

# OFFICE OF THE DEFENDER GENERAL

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Matthew F. Valerio, Defender General

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To: Legislative Child Protection Committee

From: Matthew F. Valerio, Defender General

Date: September 11, 2014

Re: Testimony and responses to the committee's questions.

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1. **What is working well with the current system, and therefore should not be changed?**
  - In general, the retention of well-trained long term juvenile counsel.
  - The Family Support Program.
  - Long standing structure of the system.
  - Solid institutional history and memory.
  - Training for attorneys, judges, and GALs.
  - Evaluation of attorneys.
  - Budget management – within the available resources my ability to allocate resources consistent with the budgeted amount and the statutory requirement (13 V.S.A. § 5233).
  
2. **What does not work well and therefore should be changed? How?**
  - A general lack of new, or other, attorneys who are interested or willing to do juvenile work – particularly in the most rural counties, and specific “difficult” Courts.
  - A lack of accommodation of the contract structure, county to county, due to the lack of attorneys willing to do this work.
  - Federal requirements and State statutes that impose unrealistic expectations on families based upon the real treatment needs of the families.
  - Time delays for parents and children to access treatment and support services. There should be greater availability of providers and no waiting lists.
  - There have also been a lot of changes in the structure of case assignment and supervision at DCF offices. There was some mandate that all offices adopt a “team model” of casework, but it was left to each office to determine what that means. So now, there’s a lot of inconsistency between offices that employ different models in addition to inconsistency within offices as each office tinkers with the model for assigning and supervising caseworkers.
  - There has been significant turnover in social workers and personnel at DCF in the local offices resulting in uneven services and unpredictable spikes in caseload.
    - This has also resulted in a lot of delay in individual cases as new caseworkers are assigned to cases that they are not familiar with and cases assigned to departing caseworkers “fall through the cracks.”

- Also, there's a lot of discretion afforded to the caseworkers and with such high turnover, there is a lot of inconsistency in how cases are handled – cases that seemed to be headed in one direction suddenly change course, positive relationships between workers and parents sour, etc.
- Insufficient number of social workers to handle the caseload or lack of training as to how to adequately handle a normal or average caseload.
- More than enough administrative staff and management staff who do not interact with children or families at all, and who have overlapping job titles and responsibilities, which causes situations where no one is willing to take responsibility for certain issues.
- Insufficient pay for social workers to attract people to the profession.
- Failure to sufficiently pay contract counsel. Contract counsel went 10 fiscal years without a line item raise by the various administrations until FY 2015.
  - The increase for FY15 was 10%, however the hole that was created over a decade of level funding has yet to be made up, probably will never be, and required reductions in attorney staff so that I could allocate more funding to the contractors.
  - Our goal is to pay assigned counsel contractors at a rate of \$75K per LEC
- Guardians Ad Litem, while well meaning, often do not understand the law, what their role is in the process, or how to effectively influence the process.
  - SUGGESTION: In a perfect world, GAL's should be attorneys with the statutory ability to access facts necessary to make recommendation in the best interests of the child. They should be able to report their recommendations to the Court and the parties. They should be available to testify, and subject to cross examination. They should also be able to question witnesses upon motion to the Court. This is a model followed in the Commonwealth of Massachusetts.
- Funding should be increased to the Family Support Project.
  - While this project to some degree mirrors what I believe a DCF social worker could be doing, it has proven very successful in the short time that we have implemented it at the ODG. **See attachment:** describing the Family Support Project.
    - It provides clients with a true advocate to get them the services they need, in a very cost-effective manner, without fear that a misstep would cause them to lose their child.
    - In other states, the state provides a "reunification" caseworker who is separate from the investigating caseworker and sees the parent, rather than the child, as his client. Our FSWs really serve that role, which doesn't exist in DCF's system.
    - We currently provide this service on a triaged basis
    - **See attachment:** Defender General's Family Support Project FY 2013 Report, prepared by Deputy Defender General, Anna Saxman.

**3. What is the role of Defender General and Juvenile Defender in child abuse and neglect cases and in CHINS proceedings?**

- In some ways we handle “all roles.” The ODG through staff attorneys, contract counsel, and, on limited occasion, ad hoc counsel represents almost all clients, other than the state, involved in child abuse and neglect cases and in CHINS proceedings, i.e., the parents, and the child.
- Typically, the children are represented by the staff office attorneys, unless there are multiple children with differing interests, or the staff office is representing a parent on criminal charges. In the later instance, the staff office will represent one parent, and contract counsel will represent the other parent(s), and the child or children.
- The ODG manages the budget for the entire system. State employee staffing and contract allocation and management are performed by the Defender General, allowing us to come within budget for 15 consecutive budgets.
- The Juvenile Defender, Bob Sheil, is hired and supervised by the Defender General.
  - The juvenile defender handles policy matters consistent with direction from the Defender General routinely testifying at the Legislature and in various committees and groups relative to issues of juvenile law.
  - The juvenile office also covers administrative case reviews over much of the state representing the interests of the juvenile.
  - The juvenile office also represents minor clients who have been committed to Woodside.
  - The Juvenile Defender, together with the ODG Training Director, develops and implements training for the juvenile attorneys across the state.
  - The Juvenile Defender also provides representation to juvenile clients in:
    1. Matters that are related to ongoing juvenile representation, but are not provided by contractors or (often) by DG staff attorneys. That’s included substantiation appeals and representation in educational hearings.
    2. Miscellaneous administrative hearings.
    3. Appeals to the Human Services Boards.
    4. Occasionally, in habeas corpus proceedings.
  - Training is occasionally also provided to DCF staff and GALs.
  - Overall, the Juvenile Defender acts as a resource concerning juvenile law for staff and contract attorneys.

**4. The Committee has heard testimony that the “conflict counsel” and attorneys who contract with the Defender General’s Office to handle CHINS cases sometimes cover a large geographic area and therefore are difficult to schedule, are sometime not prepared when they appear in court, and sometimes delay proceedings or fail to represent their clients adequately. What is your opinion on this testimony?**

- I would agree that some attorneys cover multiple counties which sometimes make it difficult to schedule particular attorneys at particular times. This is a direct result of the lack of attorneys who are available, particularly in rural counties, who are willing and able to do juvenile work.

In addition, while it would be nice to have local counsel – if they existed – available to every court so that they could be called upon at a moment's notice for an emergency juvenile hearing, it is likely not fiscally viable, even if the attorneys were available. The caseloads in the rural counties are often very small - mere fractions of an ABA approved Lawyer Equivalent Caseload (LEC) - and as such do not warrant payment sufficient to sustain a law practice. As a result, a few lawyers gather multiple contracts from smaller counties to build sufficient payments so that they can survive in practice. This causes inconvenience to the Court, but it is a fiscal necessity for the system and the practitioner.

- **NOTE:** Many fractional contract services used to be provided by more ad hoc counsel however there is no training requirement for ad hoc counsel, no guarantee of availability, no evaluation process or quality control, and THEY COST 5X AS MUCH AS CONTRACTORS.
- I would agree that on occasion a particular attorney is sometimes not prepared when they appear in Court. But I would strongly disagree that this is rampant or pervasive problem across the system. And in the rare instance where, after investigation, we can determine that an attorney is not performing, I have terminated their contract.
  - **CONTRACT ATTORNEY'S NOTE:** A lot of what is perceived by some as a lack of preparation might be attributable to DCF's common failure to meet the discovery deadlines in statute and DCF policy. We very often see permanency case plans and disposition reports that are not disclosed until a couple days or even a couple hours before a hearing.
- Do attorneys delay proceedings? Of course. On occasion they do. Sometimes this is purposeful, because their client needs more time to access services or work through a rehab program, or reestablish a residence, or job or the like. Often times the attorney is covering for a client who is homeless, addicted, without a cell phone or means of contact. But the attorney, in the interest of representing the client, is not going to advise the Court of such things, and will likely ask for more time, so the client has a reasonable opportunity to right him or herself.
- Most likely, however it is the Court system itself that causes the delay. (**See attachment: Feb. 2013 Charts on Factors Causing Delay in Court Process; and Factors Most Negatively Impact Timely Permanency. NOTE:** "Full Court Calendar" is the primary reason for delay, and compare number of "Often" and "Sometimes," between FCC and Attorney Scheduling Conflicts – THE VAST MAJORITY OF DELAY IS FULL COURT CALENDAR. See also raw survey attached.)
  - **FROM JUVENILE APPELLATE:** There is also a lot of delay caused by DCF and the state not being prepared for hearings – in the cases we see on appeal, we definitely see more examples of DCF and the State requesting continuances because they are not prepared to proceed than of parents' counsel.

- I would also note, that despite our notice to the Court's every year prior to July 1 of changes in contract counsel, some Court's either ignore or disregard the contract structure causing negative fiscal impacts to the ODG/State (ad hoc assignments) and sometimes delays in assignment or unnecessary reassignment of cases. We usually do not catch this until our first quarter statistics are in, and we can catch the anomalies.
- Does it ever occur that an attorney fails to represent his/her client adequately? Of course. However, I would submit that this is an extraordinarily rare occurrence, and the system itself is designed to ensure that an appropriate result is obtained in most cases for the child. In any given case there is a social worker from DCF, a Guardian Ad Litem, a State's Attorney, and potentially law enforcement, attorney(s) for the child or children, attorney(s) for the parent(s), and then the Court for review after the case is reviewed administratively, every 6 months. If on one occasion a particular lawyer is off his or her game or "inadequate," there are numerous other people involved with the case that ensure that that an inappropriate result does not occur.
- That having been said, inadequacy of representation in these cases is HIGHLY UNLIKELY and VERY UNCOMMON. (**See attachment: Judicial Evaluations of Counsel in Aggregate**).
- In general, my feeling about the testimony is that while in any given case there may be an issue with the quality of representation, in almost all cases the clients receive significantly better than adequate representation – and this is provable by the results of the ODG evaluation process. Individuals who seek to cast aspersions in general on the legal representation are speaking anecdotally, perhaps with an axe to grind, and without any empirical basis to make the statement.

**5. How are the attorneys who contract to handle CHINS cases selected?**

- First, we comply with the Secretary of Administration's Bulletin 3.5.
- We advertise every year on the ODG website, the Vermont Bar Association website, the ODG list serve, and on the State's website noticing available contracts. **See attachment:** Website posting seeking attorneys.
- Court Clerks and Judges are asked to forward any potential contractor names to our attention.
- Preference each year is given to existing contractors as the ODG has invested significant resources in training them, unless there is a documented problem.
- A letter of interest and resume are provided to the Defender General
- The Defender General personally reviews the resumes, interviews the prospective contractors, and checks on prior qualifications and background, if any.
- Every prospective new contract attorney is required to attend our mandatory annual 3 or 4 day training held every June.
- Every contract attorney is required to attend at least the mandatory 3-4 day training in June, together with the mandatory 1 day training in October; and other mandatory juvenile trainings, if available.

**6. What training do these attorneys receive? Is it sufficient?**

- All new juvenile attorneys, staff, contract or ad hoc are provided with an extensive orientation packet of relevant juvenile law materials which has been prepared by the Office of the Juvenile Defender. They are also provided with a juvenile practice manual that addresses all aspects of Vermont Juvenile Law.
- Every prospective new contract attorney is required to attend our mandatory annual 3 or 4 day training held in June. **See attachment: Sample Contracts for Juvenile Attorneys and Conflict Attorneys.**
- Every contract attorney is required to attend at least the mandatory 3-4 day training in June, together with the mandatory 1 day training in October; and other mandatory juvenile trainings if available.
- In addition, juvenile attorneys are routinely provided with additional specialized training opportunities in state and out of state depending primarily upon grant funding obtained by the Court through Shari Young's Court Improvement Project.
- Consultation with the Office of the Juvenile Defender's staff is always available.
- Attorneys receive a regular newsletter on relevant topics produced by the Juvenile Defender's office.
- I do not think that a lack of training, or insufficient training, is a problem in the juvenile system. Clearly more opportunities for training would be beneficial, but in general I do not see that as problem.
- The biggest problem is the lack of attorneys willing to do juvenile work.
- Secondarily, low pay is likely a deterrent to some accepting this work.

**7. How are these attorneys supervised and is there any oversight over their case load, performance, or how they handle cases? Do you have any recommendations concerning oversight?**

- Supervision for staff attorneys is generally the responsibility of the Defender General by statute – and that is the case with staff attorneys who handle juvenile matters.
- Except for general contract and fiscal oversight, assigned counsel contract attorneys ethically and statutorily may not be supervised or directed in any given case by the Defender General. By definition, their representation is at odds with the interests of a client who is represented by a staff attorney, so to direct their specific performance would be an ethical violation.
- The DG does, however, ensure that the contractors comply with their contracts.
  - **Again, see attachment: Sample Contracts for Juvenile Attorneys and Conflict Attorneys.**
- The DG monitors case loads and allocates contracts and payments equitably based upon the reported caseloads. In cases where the attorney fails to report caseloads, the ODG can, and has withheld contract payments until reporting occurs.

- As part of their contracts attorneys must participate in the assigned counsel evaluation process, including an evaluation of their work by judges.
  - We view these evaluations in aggregate and design our trainings around any perceived weaknesses identified in the evaluation process.
  - Any remarkable evaluations are brought to my attention to address with the contractor.
  - The evaluation is an on line form filled out by the respondent for various areas of practice and compiled by our stats/HR person in central office.
  - A copy of the form is attached.
- Staff attorneys handling juvenile work are evaluated based upon our 360 degree evaluation process, including self-evaluation, peer evaluation, supervisor evaluation, and judicial evaluation, with review by the Defender General. A copy is attached.
- Staff caseload is reported through a teetering but still intact ACCESS database written in house in the 1990's. We expect to go live with a new case management system in 2015.

**8. Are there any ways in which the process of selecting and assigning attorneys can be improved?**

- The Supreme Court can, along with others, work to elevate the status of juvenile practitioners, therefore, increasing the prospective pool of interested attorneys.
- Regular pay increases consistent with the cost of living may attract and retain more attorneys thereby increasing and improving the pool of available contractors
- Court staff should pay careful attention to the ODG assignment protocol to prevent overloading particular attorneys needlessly, and to prevent unnecessary fiscal impact to the ODG
- The Court staff and judges should take special care to treat juvenile attorneys with the utmost respect and courtesy. Reports of negative treatment by court staff and judges is significantly higher in Juvenile cases than it is in any other area. This is primarily due, I think, to the pressure to move the docket, and counsel's interests in getting their clients the time they need to succeed with limited treatment resources.

**9. Are there ways that CHINS proceedings can be streamlined or improved?**

- The answer is somewhat simple from a judicial perspective. If you want cases to move through the system expeditiously, there should be a sufficient number of judges available with sufficient support staffing with court time available to handle the caseload.
- Also, perhaps, dialing back the timeframes to something closer to their pre-2007 state. It used to be a requirement that CHINS merits hearings occur within 15 days of a child coming into custody (see the old §5519(a)). The JPA changed that to 60 days or longer for good cause. We routinely see cases that are not adjudicated until several months after a petition is filed – judges are unwilling to dismiss a petition when the prosecution is not prepared for fear of being the judge that returned a child to an abusive home as a sanction for procedural error, but this means that repeated prosecution requests for more time become routine and cases take forever.

- Also, the juvenile courts are often clogged with TPRs. The whole TPR procedure could be sped up dramatically. They should be treated like civil pleadings – DCF files the petition and alleges, in a concise manner, the facts that support the TPR. The parent responds with admission and denial, paragraph by paragraph, and alleges any additional facts. Then you could have summary judgment motions and a factual hearing on ONLY the alleged facts that are disputed. As it is, the entire case is presented through testimony and DCF often puts on an entire day's worth of uncontested evidence taking up tons of court time and lawyer time and delaying the disposition of TPR cases and slowing the whole juvenile docket.
- There need to be more lawyers available who are willing to do juvenile work.
  - There should be financial incentives to private attorneys who do this work.
  - To entice new lawyers, there should be some level of loan repayment assistance for contract attorneys just as there is for attorneys who are state employees of the ODG, Legal Aid, and State's Attorneys.
  - There should be some level of qualified immunity for juvenile contractors, as there is for state employed attorneys, for juvenile work performed under contract with the ODG.
  - Mileage, or at least a stipend, should be provided for attorneys willing to take contracts in rural counties away from their home office.
- Substantive legal and procedural changes should be made to keep the attorneys better informed about what DCF is doing with their clients, as clients often do not have the means or inclination to do so on their own.
- In light of the recent deaths of two children who at one time were in DCF custody, I personally reviewed materials and interviewed individuals involved to determine if there was a systemic response that might prevent such tragedies in the future. In general, what I found was a lack of information being provided to the legal arm of the process. The attorneys, the GAL, and the Court were not well advised factually about what was going on with the case prior to any Administrative Review or Court proceeding. That having been said, given what was known, I am unsure whether – given the DCF evaluation of the home situation whether either situation could have been prevented.
- Within 30 days of an order granting responsibility for a child to DCF, DCF must provide all counsel and the GAL with a copy of the case file which provides the factual basis for taking the child into custody, and for any placement or disposition plan contemplated by DCF.
- DCF shall provide notice of any change of placement of the juvenile to all counsel and the GAL within 48 hours of the change.
- DCF shall provide notice to all counsel and the GAL of any individual known to DCF who would be living with the child in any placement made by the Department.
- A licensed social worker should be assigned to each public defense office to assist its clients in accessing services in juvenile cases.
- DCF shall provide access to case notes to all counsel in a case. The rules already require DCF to permit any party's attorney to inspect or photocopy any part of the case file (V.R.F.P. 2(d) (6)), but it is like pulling teeth. Some caseworkers refuse to provide them, and you have to request it from their supervisor. Then the notes are printed and are always too large to be scanned and emailed, and so must be picked up from the DCF office, which can be difficult for a lawyer covering several counties. Since this stuff is all on-line, access should just be provided to attorneys.



**10. Is there anything else you believe the Committee should know?**

**DO NOT OPEN JUVENILE PROCEEDINGS TO THE PUBLIC:**

On the matter of opening juvenile proceedings to the public, it is the opinion of my office that the opening of Abuse & Neglect and other juvenile proceedings to public scrutiny would do significantly more harm than good, and our office would vigorously oppose such a change.

Opening juvenile proceedings, and particularly Abuse & Neglect proceedings, to the public would likely significantly dissuade families in need from reaching out for help – particularly in the case of addicted parents and children, and parents and children with mental health issues. Opening these proceedings might fulfill some perceived public need for accountability, but does little or nothing for the prospects of rehabilitating a family in need of working through a treatment program with the same privacy rights as a family doing the same thing without being in the Court system.

While Vermont because of our size has the ability, most times, to move quickly on matters where a specific event, or anomaly in the system, so appalls the public sensibility that it cries for something to be done. Vermont also has had the tendency react to the individual horrific case, and make changes that decades later advocates continue to call for revision – specifically the treatment of 16 and 17 year old cases in criminal court.

My office and I do not think that Vermont needs to unravel decades of generally good work in the juvenile system based upon a couple of terrible cases that likely would never have been prevented by making juvenile cases public, and where sufficient resourcing of the social work system would have had a better chance of preventing the tragedies - if there ever was chance.