



*Making the Legal System Work for Children and Parents*

## Implementing FJI System Attributes

### *Attribute 1: Caseloads and Compensation*

This guide is one in a series providing guidance on implementing the six system attributes in the [FJI Attributes of High-Quality Legal Representation](#). View the other [implementation guides](#).

#### Attribute 1: Caseloads and Compensation

- Ensure attorneys have a reasonable caseload of no more than 60 clients at a time for a full-time attorney, assuming a caseload includes clients at various stages of the case. Generally, caseloads with over 60 clients will not be manageable for attorneys who do not have supports that may come with an interdisciplinary/multidisciplinary practice model, which includes access to social workers, investigators, and/or paralegals.
- Ensure parents' and children's attorneys' compensation rates are adequate for the attorneys' practice, taking into account the overhead and other costs borne by private professionals. At a minimum, parents' attorneys' and children's attorneys' compensation should be equal to county or child welfare agency attorneys' compensation, and consistent with other publicly-funded attorneys' compensation, including criminal defense attorneys.

#### Meeting This Attribute

Throughout much of the country, caseloads for parents' and children's attorneys vary significantly. In many jurisdictions, parents' and children's attorneys have caseloads that exceed 100 or even 150 open cases, making it practically impossible for attorneys to meet their individual obligations to clients.

Additionally, children's and parents' attorney pay is often low, with many attorneys being paid per case.<sup>1</sup> Such a pay structure can disincentivize attorneys from fulfilling their individual obligations to clients and has the effect of reducing the hourly rate for attorneys who meet their duties to their clients.<sup>2</sup>

To ensure attorneys can meet their obligations to clients, the FJI recommends attorneys have no more than 60 clients at one time. This is based on research showing parents' and children's attorneys often cannot meet their statutory or recommended duties to clients when they have more than 60 clients at a given time.

Parents' and children's attorney program managers from several jurisdictions throughout the country also see this trend in practice.<sup>3</sup>

To ensure attorneys are fairly compensated for their work, parents' and children's attorney pay should be structured as follows:

- Salaried, with benefits, as part of an independent law office specializing in representation of children and/or parents;
- Hourly pay, at a competitive rate, with the same hourly rate for both in-court and out-of-court work;
- Caps on pay per case or flat fees on a per case basis are not recommended as they can act as a disincentive for attorneys from meeting the individual attorney attributes.<sup>4</sup>

As stated in the attribute, parents' and children's attorney pay should at a minimum be consistent with agency attorney pay, taking into consideration that attorneys who are paid hourly or under a contract have to also cover their overhead costs, as well as benefits.<sup>5</sup>

## Examples of Good Practice

### Washington State Office of Public Defense

Washington State Office of Public Defense's Parent Representation Program (PRP) contracts with solo practitioners, law firms, and public defenders to represent parents in child dependency and termination of parental rights proceedings throughout Washington. The PRP contracts with social workers and provides funding for independent experts. PRP also provides: (1) oversight to assure program standards of representation are met; (2) specialized trainings for parent attorneys and social workers; and (3) technical assistance on cases, as needed.

*Caseloads.* The PRP sets a fulltime caseload cap at 80 cases. A "case" means one parent client, except a parent with an open termination of parental rights case or guardianship petition count twice. Program attorneys cannot take on more than a fulltime caseload, including private cases outside their contract.

*Compensation.* Attorneys receive a monthly compensation rate based on their contracted caseload percentage. The program is funded by the Washington State Legislature and the Office of Public Defense advocates for program contractors to receive an appropriate livable rate. Recent federal policy change allowing states to seek federal reimbursement for a portion of the cost of legal representation for children and parents has enabled the PRP to provide a raise to parents' attorneys, with attorneys earning between \$140,000 to \$156,000, annually for the 2020 fiscal year.<sup>6</sup> PRP attorneys can also request additional compensation under the PRP's Extraordinary Compensation Policy for unusually time-consuming cases. The program increases safe reunification rates and reduces days to permanency for court-involved children.

### Colorado Office of Respondent Parents' Counsel

The Colorado Office of Respondent Parents' Counsel (ORPC) oversees the provision of respondent parent representation across Colorado. ORPC has four primary legislative mandates: (1) ensure the provision

and availability of high-quality legal representation for parents in dependency and neglect proceedings; (2) make recommendations for minimum practice standards; (3) establish fair and realistic state rates for compensating respondent parents' counsel; and (4) work cooperatively with the judicial districts to establish pilot programs.

*Compensation.* When the ORPC assumed oversight of parents' attorneys, it inherited a mixed payment system in which some parents' attorneys were paid a flat-fee for their cases while others enjoyed the benefit of hourly billing. In the flat-fee districts, consisting primarily of urban counties, attorneys were given a single payment of \$1,125 when first appointed to a case and another payment of \$1,262 upon the filing of a motion for termination. For the 2017-2018 fiscal year, ORPC requested and was ultimately approved for funding to convert parent attorneys' payment structures from a mixed-payment system to an all hourly system that reimburses attorneys for actual services rendered to indigent parent clients.

*Caseloads.* Beginning July 1, 2017, all parents' attorneys were paid \$75 per hour for all new case filings. Colorado's hourly rate increased to \$80 effective July 1, 2019. In the first seven months of hourly pay, the percentage of attorneys with caseloads over 60 dropped by 25%. While partially due to lawyers no longer relying on a volume practice to make a living, other factors could be contributing to caseload drops such as increasing the number of lawyers available for appointment and the department providing services through "voluntary" cases opposed to filing petitions in court.

### Massachusetts Committee for Public Counsel Services

The Committee for Public Counsel Services (CPCS), Massachusetts' public defender agency, represents children and indigent parents in dependency/termination of parental rights (care and protection) cases through its Children and Family Law Division (CAFL).<sup>7</sup> CAFL uses private and staff attorneys to provide trial and appellate representation. Private attorneys trained and certified by CAFL handle about 85% of trial court assignments; staff attorneys handle the other 15%.

*Responsibilities.* CAFL attorneys, both staff and private, must follow performance standards when

representing parents and children. The performance standards require counsel to advocate zealously for the client's position at the temporary custody hearing, help the client obtain services and advocate for reasonable efforts by the Department of Children and Families (including through the filing of motions), investigate, obtain discovery, and otherwise prepare for hearings, and represent the client at trial, permanency hearings, administrative case reviews (referred to in Massachusetts as "foster care reviews"). CAFL attorneys handling care and protection cases are expected to accept both child and parent assignments.

*Compensation.* State appropriations provide CPCS nearly all of its funding, including funding for payments to private attorneys for their work on CPCS cases. State statutes set the rate at which attorneys are paid for their work on care and protection cases by the hour and prohibit CPCS from paying private attorneys for more than 1,800 hours per year.<sup>8</sup> There are no

## Endnotes

1. See Ellis, Krista et al. CHILD WELFARE ATTORNEYS NATIONAL COMPENSATION AND SUPPORT SURVEY (2017), at <https://15ucklg5c-821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2019/12/2017-Survey-of-Parents.pdf>.
2. See, e.g., Jacqueline McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39(4) UNIV. OF MICH. JRN. OF LAW REFORM (Summer 2016); see also *State v. A.N.J.*, 168 Wash.2d 91, 113 (2010) (finding that public defender contracts that require the attorney to pay for his investigators, experts, or conflict counsel is ineffective assistance of counsel and violates rules of professional conduct.)
3. See, e.g., 2015 PENNSYLVANIA STATE ROUNDTABLE REPORT, LEGAL REPRESENTATION: A CALL TO ACTION (2015), at [http://www.ocf-cpacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3\(1\).pdf](http://www.ocf-cpacourts.us/assets/upload/Resources/Documents/2015%20Legal%20Representation%20Report3(1).pdf); see also ABA STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (American Bar Association, 2006); ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (American Bar Association, 1996); NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES (National Association of Counsel for Children, 2001.)
4. At least one state supreme court has found flat fee/per case compensation unconstitutional in the context of indigent defense. *Simmons v. State Public Defender*, 791 N.W.2d 69, 87 (Iowa 2010); see also, *State v. Smith*, 140 Ariz. 355 (1984).
5. For more information about drawing down Title IV-E federal funds to support high-quality legal representation for parents and children, please visit the Family Justice Initiative website [Federal Funding](#) page
6. Although OPD pay for parent attorneys is among the most competitive in the country, it is still not equal to agency attorney compensation. OPD continues to advocate for increased compensation for parent attorneys as a key component to retaining highly-qualified counsel.
7. CAFL also provides trial and appellate representation to parties in other matters, such as status offense, contested guardianship-of-a-minor, and contested private adoption cases.
8. The normal annual cap for CPCS attorneys is 1,650 hours. Over the last several years, however, in an effort to address a shortage of dependency attorneys, the legislature has authorized CPCS to pay those attorneys for up to 1,800 hours of work each year.

## Technical Assistance

FJI team members are available to help implement the FJI attributes.

Visit the [Family Justice Initiative website](#) for more information.

formal limits on the number of hours an attorney can work on an individual case, though attorneys' bills are subject to review to ensure they are billing reasonably.

*Caseloads.* Private attorneys who work full-time on care and protection cases typically have 40 to 50 open cases. A caseload cap established by CPCS in 1994 prohibits them from having more than 75 open cases. Experienced, nonsupervisory CAFL staff attorneys usually have about 35 to 40 care and protection cases.



The FJI unites professionals from around the country to ensure every child and every parent has high-quality legal representation when child welfare courts make life-changing decisions about their families. Through the FJI's work, child welfare lawyers, researchers, judges, social workers, policymakers, families impacted by abuse and neglect, and others are reenvisioning how to best protect children, strengthen families and support communities.