

# **NEW ROLES FOR OLD ADVERSARIES:**

## **The Challenge of Using Litigation to Achieve System Reform**

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**January 1998**

The Center gratefully acknowledges the work of Ellen Borgersen who was the primary author of this report.

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Child protection is one of the most urgent issues on the public policy agenda. The stakes are enormous. Agreement on the goal of child safety is broad enough, at least at the rhetorical level, to unite people all across the political spectrum. But what that means and how to get there involves issues so sensitive they are difficult to acknowledge, much less treat, in a “public” forum. Deciding what is best for any one child often poses a question no less ultimate than the purposes and values of life itself. Deciding what constitutes sound child welfare policy involves a complexity of competing interests and intersecting institutions that challenges a community’s capacity for public conflict resolution to the utmost. The roles of families, extended families, faith, racial, ethnic and tribal communities in defining “child welfare” are hotly contested. The notion that it is a *public* concern at all is a relatively recent development. (Borgersen & Shapiro 1997a; Mnookin)

Today’s public child welfare agencies confront larger caseloads and far more difficult problems than did the private, largely voluntary system that served in quieter times. Drugs, gangs, family violence and cultural conflict intensify the problems. Growing numbers of very troubled children need intensive services that do not exist in some places and consume resources at an alarming rate when they do. And public agencies carry the extra burden of antipathy to government intervention, which is especially heavy in the intimate setting of family conflict. Deep ambivalence about this extraordinarily difficult work leaves many agencies starved for the resources they need to cope with the kinds of crises that force children into their care.

This disconnect between the public’s demand for child safety and its willingness to pay for it — in terms of both dollars and state intrusion

—often has tragic consequences. The principal victims are children abused by the very system that is supposed to protect them, and families who don't get the services they need to stay intact. Caseworkers powerless to help are also victimized, but at least they can quit. Many of them do, of course. Child protection workers are the "shock troops who are expected to solve one of the nation's most intractable social problems: the decomposition of families in the inner cities and the resulting epidemic of child abuse and neglect." (Gross) Inner cities are hardest hit and most visible, but some rural systems are just as troubled, particularly when it comes to finding and retaining workers qualified to do this demanding work. "What they do is not rocket science," said the deputy director of the Child Welfare League of America, "it's way harder than rocket science." (Id.) Low pay and high stress push turnover rates past 40 percent a year in some places, making investment in training all but impossible.

The good news is that knowledge of what it takes to build a sound child welfare system is growing. There is no formula; solutions are intensely local in their details. Building an effective community partnership for child safety takes a long time, measured in years at least. It requires trust among diverse partners to take risks and to fail. It can be thwarted by entrenched bureaucracy or a change in political climate. Even in privileged communities, barriers from the practical to the profound can undermine the best efforts of well-intentioned people. But patterns of success are emerging. Management consultants and technology companies are beginning to see child welfare services as a growth market. Optimistically,

the goal of child safety might seed the renewal of a civic infrastructure capable of articulating and achieving a community's collective aspirations for the care of its most vulnerable citizens. (APIP; Farrow; Clark)

But many of the most troubled systems are still failing, and falling further behind. In abandoned inner cities and rural counties, a failing child welfare system may be only the most visible part of a larger civic collapse. Devastated by corporate and middle class flight, these communities lack the basic public and private institutions needed to support an adequate child protection system. The public agencies that serve them lack the resources, political will and administrative capacity to mount and sustain the kind of strategic planning effort needed for systemic reform. Here the pattern is of failed reform efforts, each one sapping strength and morale from a system already stretched beyond capacity.

At least 20 of these systems are in litigation, and more will surely follow. Class action litigation is typically a last resort of advocates who have seen too many children abused while voluntary reform efforts foundered. Because protective custody must be ordered by a court, a system's most obvious failures are visible to the judges and lawyers responsible for placing children in its care. In some states the judicial branch has explicit oversight responsibility for the child welfare system. Even where that is not so, Federal and state laws afford ample basis for holding agencies accountable for the welfare of children in their care.

What the laws don't tell you, of course, is how to build a better system, and the best public

interest litigators understand that securing a decree is the relatively easy part, the start of a long and difficult process of institutional rehabilitation. A judicial decree can spotlight the worst abuses and galvanize public attention, producing short-term gains in funding for more services, more staff with lower caseloads, and closer scrutiny of agency process and procedure. But fundamental system change cannot be imposed from the outside. It must grow out of a process that engenders "ownership" of the reform plan by those charged with implementing and sustaining it. In litigation, that requires parties who have been cast as adversaries to build enough trust to embark on a long and difficult reform process: a transition, in short, from litigation to effective strategic planning, which is incredibly difficult. Too often opportunities for strategic cooperation are missed, and litigation disintegrates instead into Bosnian stalemate. The image is not invoked lightly. The common analogy of litigation to armed civil conflict has real bite here.

Traditional litigation is tantamount to war, and carries considerable costs and risks. It consumes valuable time, resources, and the energy of agency administrators. It may demoralize front-line staff, conveying the impression that they have failed. It can produce ill-conceived decrees that impose additional burdens on administrators and staff without improving outcomes for children and families. Animosity surrounding a lawsuit can become so entrenched that it hinders the agency's willingness to implement necessary reforms. In the worst case it affords an excuse for continued failure, fueling a culture of victimhood among embattled personnel.

In the best case, however, class action litigation can serve to spark and sustain real institutional change in deeply troubled jurisdictions. Litigation can force agency and elected officials to acknowledge the magnitude of the problem and pay attention to resolving it. It can create a space within which former adversaries can commit to and work toward the common goal of child safety, and begin building the high quality system of care they all want. It can sustain that commitment over the years necessary to realize it, outlasting bureaucratic intransigence and political vicissitudes. With an infusion of multidisciplinary technical assistance, a focus on sound social work practice, and a process designed to engage affected constituencies in the planning process, several jurisdictions have made substantial progress toward sustainable child welfare reform within the litigation context.

At a recent conference convened by the Center for the Study of Social Policy (CSSP) in Washington, D.C., participants in cases in Alabama, Arkansas, Kansas, and Kansas City, Missouri, reported on their experiences with a "new" approach to settling child welfare litigation by engaging the former adversaries and other stakeholders in a partnership in pursuit of broad systemic reform. All were cautiously optimistic about their prospects for success, and fearful of losing hard won gains that are still fragile. All were heartened to hear that their experiences were not unique and eager to learn more about what was working in other places. All reported difficulty raising the relatively modest resources needed to keep their hybrid processes moving forward.

By any measure these are the jurisdictions most in need of help in rebuilding their child welfare systems, and yet they are shunned by potential supporters who are fearful of litigation. In a twist of irony and logic litigation becomes the problem, rather than a symptom of a desperate need for help. Discussion at the conference included child welfare professionals and lawyers familiar with both voluntary and court-assisted reform efforts in over a dozen jurisdictions. Their consensus was that litigation is sometimes necessary to spark and sustain the impetus for reform. But turning the corner from war to peace—from litigation to strategic planning—and maintaining that commitment over the long course of institutional reform is very difficult. One of the most consistent themes in the cases was the significance of neutral, trusted outsiders who can bring former adversaries together and help marshal the technical assistance and other resources essential to sustainable reform. But there is at present no reliable source of such expertise, or of funds to pay for it.

Litigation is not anyone's first choice for how to resolve a problem as complex as child welfare reform, but it is already the reality in over 20 jurisdictions and will be unavoidable in many more. More fundamentally, class action litigation is often the last best hope for disempowered constituencies with no other means of access to institutions that profoundly shape their lives. The challenge is to make litigation a vehicle for genuine empowerment, a means of institutionalizing a voice for these constituencies that will be capable of holding the agency accountable over time without court support. A number of case studies in

child welfare and other fields, such as bilingual and special education, disability rights, health and mental health care, show how class action litigation can energize disempowered constituencies and seed institutions that will give them continuing control of public agencies nominally accountable to them. (See, e.g., Dicker; Garth; Mnookin) And yet these quiet successes are a well kept secret. The lessons must be discovered over and over again, and always seem new.

In fact, class action litigation has often been highly effective in opening public institutions to excluded voices. Try to imagine the American workplace today without class actions that forced reluctant employers not just to hire women, racial minorities, and the disabled, but actually afford them equal opportunities for success. The results have been revolutionary. Class actions holding child welfare agencies accountable to their clienteles could have an equally transformative effect on these institutions, or indeed on any social service agency afflicted with disabling remoteness from the constituencies it serves. Ironically the people most convinced of this seem to be on the conservative right, which has attacked class action litigation with revealing vigor and distressing success. Their campaign has been aided by press accounts that document vivid failure better than quiet success, and a demoralized left that oddly condemns class actions for failing to achieve more sweeping change. (Rosenberg) In this environment, legislative changes and restrictions on legal services funding have made class actions much more difficult to pursue.

The consensus at the conference was that class actions have a substantial chance of achieving real reform in some very troubled jurisdictions, which is more than can be said of other strategies. But it is a volatile tool, with the potential for doing more harm than good in unskilled hands. Discussion at the conference yielded some insights on why litigation is sometimes necessary to achieve child welfare reform, why it also creates barriers to reform, and how to overcome those barriers. The conclusion is that institutionalized support for class actions could make a real difference in the child welfare wars: could, in fact, make the difference between success and failure in places that are being left behind on the road to reform.

## Why is Litigation Sometimes Necessary?

Institutional reform litigation is usually made necessary by some failure of the political process and child welfare litigation fits that pattern. (Ely 1980, Fiss 1982, Mnookin 1985) It is not hard to understand why vulnerable children are unable to hold politicians accountable for failing to carry through on their solemn statutory commitments to protect them from harm while in state custody: children don't vote. The families and foster parents most affected by the system are also underrepresented politically. This, in a nutshell, is why child welfare services are in such a widespread state of disarray: a classic case of official nonaccountability to a disempowered clientele. Experiences reported by litigating child welfare jurisdictions make the theory concrete.

In Kansas, for example, veterans of 25 years of legislative and administrative lobbying turned to litigation after a promising reform effort failed with the defeat of the state legislator who had championed it. Litigation opened the system to scrutiny and revealed an entrenched and inefficient bureaucracy that was highly resistant to change. It focused legislative and executive attention on the problem until a new cabinet officer was hired and given a mandate to fix the system. It led to a Task Force appointed by the judge that brought agency officials and child advocates together with outside experts to help settle the litigation. The agency ultimately concluded that the only way to fix the system was to dismantle it, and undertook a massive initiative to privatize over 90 percent of its functions. The Task Force is giving stakeholders and knowledgeable experts a strong voice in the privatization process. The defendants in the litigation have been open to their input, and are using it to help build a stronger and more accountable system.

In Alabama a class action litigator seized the opportunity presented by a reform-minded state director to enter into an innovative, flexible and very ambitious settlement agreement. It aimed to achieve state-wide reform at the level of *practice*—that is, at the point of interaction with children and families—using the enforcement power of the court to make it happen county by county. Under the guidance of an active and knowledgeable court monitor substantial progress has been made in most of the state. Implementation is still not complete, and a new administration hostile to the settlement is actively trying to undermine it. But the parties are hopeful that gains won at the level of practice will become entrenched,

not out of bureaucratic inertia but because children and families are being better served, and people won't want to go back to the old ways. Moreover strong political support was built by involving stakeholders in the reform process, and institutionalized in community based Quality Assurance Councils that give county agencies continuing feedback on their performance. The former state director and nominal defendant in the suit emphasized that litigation was essential to bring them this far: "we had to acknowledge that we were incompetent, and that was hard!"

As the Alabama example suggests, achieving real reform requires a strong internal champion within the agency. Indeed real reform *means* having internal champions within the agency, and what litigation can do is maintain pressure for reform until those people arrive and then help them carry it forward. That is what happened in Kansas City, Missouri, which is the most extensively documented of the cases thus far. (Borgersen & Shapiro 1997a, 1997b)

Litigation had been pending in Kansas City for almost 15 years when a new, reform-minded state director first promised to focus attention and fix the serious problems there. When nothing had changed a year later, the plaintiffs sought and obtained an order holding the agency in contempt, and naming the new state director as a defendant in the litigation. Within months of the court's ruling he and the plaintiffs entered into a cooperative settlement process designed to build and implement a high quality system of care for Kansas City. The needs assessment and strategic planning took almost a year, and implementation continued to encounter resistance from middle

management for another two years. Only then, after another monitoring report in the litigation documented continuing non-compliance, did the state agency send one of its senior executives to Kansas City for a year, and finally come to grasp the depth of the problem. After another year of hard work the parties believe that the next compliance report will show marked improvement. For over 20 years, the litigation provided the continuity and the enforcement power to keep the issue alive in the political branches until they were forced to deal with it. Moreover when the internal champions finally did decide to get serious about compliance, the monitoring reports and threat of further court action gave them powerful tools in implementing reform down through the ranks of the agency. "You'll end up being glad you were sued," one state official said.

Critics contend that litigation is itself a cause of delay in these long-running cases, and can present almost insurmountable barriers to reform. There is some truth to that. In unskilled hands and without the expertise and other supports essential to sustainable reform, litigation can poison the atmosphere and block progress instead of mobilizing it. But understanding why and how that happens suggests how those barriers can be avoided.

## How Does Litigation Create Barriers to Reform?

Twenty years after public law litigation got its name (Chayes 1976) some judges and lawyers understand that it has a very different character from the traditional, adversarial model, and



that participants must step outside their usual roles in order to be effective in this process. But very few are well educated about these issues. And even among those who know the theory adversarial habits run deep. The traditional model still casts a long shadow over public institutional reform litigation.

The archetype of litigation, your basic “P v. D” lawsuit, is bipolar, retrospective, reductive, and adversarial by design. It aspires to a level of clarity and certainty that is impossible to achieve in the messy, dynamic present, let alone the indeterminate future. It assumes that the dispute will be cashed out rather than resolved, that the parties will never see each other again, that they will take their money or swallow their losses and get on with their lives. The key elements of an effective strategic planning process—the multilateral structure, focus on the future, incorporation of expertise from many disciplines, and cooperative, dialogic, iterative approach—are precisely the ways in which traditional litigation is said to be ill-suited to the task of effective institutional reform. The lesson of Kansas City is that it is possible but not easy to do strategic planning at gun-point—that is, under the ever present threat of legal sanctions. It is sometimes necessary to do so when an agency has persistently broken the law. But it is extremely difficult to break out of the litigation box and begin establishing the trust on which a non-adversarial, and potentially transformative, public conflict resolution process depends.

Traditional adjudication begins with assumptions of mistrust, non-cooperation, and finality. If the parties could have resolved

their differences amicably they would not have invoked the coercive power of the state. Just as institutional reform litigation represents a failure of the political process, traditional private law litigation is a failure of negotiation. These premises inform the rules on the information and participation—evidence and party joinder, in legal parlance. Evidence is sifted and participation limited in the interests of reducing the dispute to terms on which hostile parties will accept the court’s judgment as binding. The same assumptions cast the legal actors in sharply defined roles: the lawyers must be zealous advocates for their clients’ interests (which are assumed to be irreconcilable—why else would we be here?); and the judge must be an unswervingly neutral and highly rational decision maker (the better to command the respect of mutually mistrustful litigants).

In Kansas and Missouri a trusted, neutral outsider played a crucial role in assembling the elements of the reform process, and mediating tensions between that process and the litigation out of which it arose. Other cases have managed to turn this trick without external intervention but the odds are against it. All of the usual suspects in an institutional reform case—the judge, the lawyers, and the litigants—have to transcend their traditional roles in order to be effective in the institutional reform process.

***The Judge.*** The judge is the ruler of the adversary system, and has primary responsibility for adapting litigation to the demands of institutional reform. (Chayes; Mnookin) Federal and most state courts have been given expanded powers and a variety of

tools for managing complex institutional reform cases, including the power to appoint their own experts, for example. But the judge is a passive ruler in the traditional model, an umpire calling balls and strikes. The more active role contemplated for judges in public law litigation runs counter to that deep-rooted tradition. It is revealing that the judge who convened the Kansas Task Force later had to recuse himself from the case. He had simply become too involved to maintain the appearance of impartiality required of a sitting judge.

A court could in principle appoint its own experts in the wide variety of disciplines essential to effective institutional reform: social work practice, public finance, government contracting, systems management, human resources, and others. But this is a limited role, which must operate within the constraints of the adversary system. Even neutral experts often find that the pressure to take sides interferes with their effectiveness. Certainly the highly structured format of communications before a judge, even off the record, tends to inhibit creative problem-solving. One former Federal judge experienced in such cases said she began conducting meetings with the experts on remedy in which the lawyers were allowed to attend, but not speak. The experts greeted this move with relief: "For the first time I feel like I can really *think* about the problem!," one of them said.

Moreover the case studies teach that expertise alone is not enough: it is just as important to involve all stakeholders in the reform process,

and to build the institutions that will reconnect the child welfare system with its community. Iconic Justice notwithstanding, judges are not blind to the political implications of institutional reform. When the civil rights revolution imperiled the legitimacy of judicial decrees, creative readings of the formal rules on party joinder allowed courts to recognize stakeholders in the remedial process who had no legal right to a remedy as those terms were understood in the context of private law. (Yeazell 1977) And in the elastic rules on class actions, contemporary courts have virtually unconstrained discretion to convene a "town meeting" on the problem presented by the litigation. (Yeazell 1987) But they remain limited in the extent to which they can solicit, rather than merely permit, intervention. And they get no help whatever from the rules or the cases on how to conceptualize "the problem presented by the litigation" in institutional, rather than individual, terms.

Finally, even if a court were to use the full range of its powers to bring before it all of the experts and all of the stakeholders essential to sustainable institutional reform, the question of what to do with these inputs would remain. There is an oft-told tale in the annals of institutional reform litigation about the hearing at which "every time someone sneezed, the *gezhundheits* took ten pages of transcript." (Mnookin, Rhode) The point being that it is impossible to do consultative process on the record. More fundamentally, if the inputs are to a decision *by the court*, the output will be limited to what a court can order.

In traditional legal process terms, judicial power is constrained by the qualities that

distinguish it from political decision making: neutrality, and articulated rationality within a legal framework. (Eisenberg, Fuller) Court orders must be supported by findings of fact and conclusions of law; remedies should be "narrowly tailored" to specific legal violations, and not intrude unduly on the discretion of agency officials. Even advocates of an expansive judicial role concede that broad remedial powers are exercised at some expense to a court's institutional capital, which is why the discretion inherent in reforming a complex bureaucracy is so problematic for them. (Fletcher) Most judges prefer the role played by the judge in the Kansas City case: he supplied the legal clout, in the form of a contempt order, which provided a powerful incentive for the relevant players to negotiate a solution to the underlying problem. When it comes to managing reform of a complex bureaucracy, it is preferable, if possible, to leave the Wizard behind the curtain.

***The Lawyers.*** Judges may be more or less active in the remedial process, but the adversary system recognizes only one posture for the lawyers: zealous representation of their clients' interests. Moreover the culture of "adversarial legalism" tends to define those interests narrowly, in terms of winning the litigation rather than the resolving the underlying conflict: "[M]ost attorneys are oriented to their process," and counsel their clients accordingly. "Parties—themselves or with the help of willing gladiators—posture, threaten, incite, delay and escalate from an adversarial position. They take delaying actions, and often detach themselves from the conflict." (Levine.)

In class action litigation the picture is complicated by the fact that the clients are not natural but legal persons—not the individual, autonomous, human beings who populate traditional litigation but figments of the legal imagination, constructed out of the rules on class certification on the one side and bureaucratic organizations on the other. The fact that there are no real clients in public interest litigation, but only constructed clients whose "interests" are profoundly indeterminate, gives the lawyers essentially unconstrained control of litigation strategy.

The phenomenon of the clientless lawsuit has been extensively studied on the plaintiffs' side of class action litigation. (Coffee, Grundfest and Perino, Mnookin) The child welfare cases suggests that an analogous dynamic may be at work on the defendants' side as well. The indeterminate quality of "the public interest" and diffuse responsibility for promoting it within a sprawling state bureaucracy can conspire to empower lawyers at the expense of their nominal clients. The clients are responsible adults rather than children, of course. But they are as dependent as any client on their lawyers' advice and—particularly in middle management—may not have the authority or the confidence to act against it. If the issue raised by the litigation is one on which there are policy conflicts within government—as is true of virtually any issue of child welfare policy—control of litigation strategy may fall to the lawyers either by default or through explicit pressure to suppress conflict and present a united front. This sets up a clash between two sets of highly motivated ideological partisans, which may account for the "needlessly confrontational"

character of many child welfare class actions. (Dicker)

Effective litigators tend to be highly partisan, impatient, skeptical, yes, confrontational, and above all, firmly in control of the case. Litigators are accustomed to working with experts from a variety of disciplines, for example, but traditional training is to *control* “your” experts, and indeed all information within the artificial confines of “the case.” This drive to control information and outcomes to the extent possible is part skill and part attitude, and is probably essential to “successful litigation” if that means winning before a court. But it is counterproductive in the fluid atmosphere of remedial negotiations.

So is the advocate’s natural mistrust of his adversary. Litigation depends on adversarial presentation to sharpen the issues. From this premise, the very concept of a consent decree is puzzling, if not downright offensive to separation of powers: by what authority does a court give its special blessing to an arrangement between the executive branch and the special pleaders who happen to be before it in this case? From the same premise, a lawyer representing governmental defendants might define her role as protecting “the people” from an adverse judgment, or the political branches from judicial interference, regardless of the preferences of individual incumbents.

If litigators control defense strategy for an organizational defendant they will shut it down, retreat within the shell of formal structure and official policies, and resist efforts

to get inside and tinker with the machinery. That’s their job, or at least one view of what it means to be a good lawyer in the corporate defense role. To understand how hard it is for either a defendant or defense counsel to pursue a different strategy—to embrace litigation as an opportunity to improve the delivery of public services—it is instructive that such a lawsuit would be considered “collusive,” and highly problematic, within the traditional litigation model. (Yeazell 1987) Indeed at least one state legislature has barred governmental defendants from entering into class action consent decrees on this basis.

Even without legislative constraint most defense lawyers assume their clients want to win the case, and zealously pursue this goal. A different vision of the defense lawyer’s role—counseling the client to confront the roots of conflict, search out areas of vulnerability, and seek deep resolution rather than shallow victory—has a long and noble tradition with the profession, but has been largely eclipsed by the dominant culture of adversarial legalism. (Levine.) It is, moreover, fraught with peril if the client is a sprawling bureaucracy, and authority for resolving policy conflicts is unclear. Consider the experience of a lawyer defending a corporate client in a class action who negotiated a consent decree on terms the general counsel and product managers enthusiastically approved, only to be called on the carpet by senior management to explain what she was doing letting “those people”—meaning plaintiffs’ counsel—dictate how the business would be run.

This exposes a few more layers of complexity for defense strategy in the corporate context. One is the repeat player problem: what other lawsuits am I inviting if I give these people what they want? Which leads to the constituency problem: who are “these people,” and what are the consequences of recognizing their right to a voice in how I do business? And not just any voice: a voice with a mouthpiece, a lawyer, and under the jurisdiction of a court? The standard advice of government attorneys, and indeed the strongly held view of many government defendants, is to resist submission to judicial supervision at almost any cost. Entering into a consent decree aimed at system wide reform, often against the advice of state attorneys, is a very risky proposition.

On the plaintiffs’ side, entering into a decree that contemplates slow, painstaking progress toward reform is equally problematic. A lawyer with no real client is in an extraordinarily difficult position, particularly when it comes to deciding what counts as successful resolution of the conflict. One of the most consistent themes in successful institutional reform cases, for example, whether or not litigation is involved, is the importance of realistic time frames, phased implementation, and experimentation. But if the plaintiffs’ lawyers think of their clients as individual children, as the traditional model demands they should, by what authority can they agree to a process that postpones relief for some of them? As one of the lawyers in Kansas City put it, a year may not seem like a long time to “policy folks,” but it is one third the lifetime of a three year old trapped in inadequate foster care. This sense of urgency

is entirely appropriate given the gravity of the situation, and it is an important image to keep in mind to bring pressure for reform at “all deliberate speed.” Attention to the personal, human dimension of a case is one of the great strengths of the legal process (Noonan), and litigators rightly play to this strength in making their case come alive to the court. A litigator who has documented bureaucratic failure and its human consequences for over 16 years is likely to be skeptical of promises to do better with just a little more time. But the truth is that one cannot hope to turn the performance of a large, complex bureaucracy around in one year, or even three or four.

*The Litigants.* Which brings us, finally, to the litigants, whose priority in the process reflects how most people feel about litigation. It is an 800-pound gorilla which has a tendency to dominate the landscape in all events, and especially when client control is weak. Just as it’s best to keep the Wizard behind the curtain, litigation works best when the litigator is on a leash. There is no disrespect for the litigator’s role in this view. To the contrary it rests on a real appreciation for its power and the pressures it puts on practitioners, and an honest recognition of human weaknesses as well as strengths.

A central assumption of the traditional litigation model—an, active, competent client able to determine its own ends and employ litigation in a controlled way to achieve them—is obviously inapposite on the plaintiffs’ side of a class action. “The class” is by definition an amorphous, disempowered constituency, and for that very reason effectively absent as a “client” even when the named plaintiffs are

competent adults. This phenomenon has been studied extensively in the context of antitrust and securities class actions—"where the money is," as Willie Sutton might put it—and where the misalignment of lawyer incentives and client interests often produces sweetheart settlements that are inadequate from a law enforcement perspective. (Coffee) One proposed solution was for institutional investors with a substantial financial stake in securities litigation to step forward and play an active client role, monitoring lawyer performance and making strategic decisions, most importantly when and on what terms to settle. (Grundfest and Perino)

The analog to institutional investors in ideological class actions is the voluntary sector, including membership organizations and the foundation world. But children cannot support membership organizations, and foundations interested in child welfare issues tend to keep litigation at a great distance. This is in contrast to the environmental movement, for example, in which wealthy membership organizations have pursued an active litigation agenda. (Mnookin) If there has been progress toward more revolutionary methods in environmental disputes, including mediation (Dukes, Susskind), that may reflect the influence of organizations exercising something like client control, however attenuated, in defining litigation as a means to an end rather than an end in itself.

It also reflects the willingness of official decision makers to recognize representatives of environmental interests as stakeholders in the policy process, which still encounters resistance in child welfare litigation. The New

York City litigation, for example, now stands about where Kansas City was in 1989. Litigation has been pending for years, with no sign of progress. To the contrary, there have been repeated and highly visible failures, the kind with names, like Eliza Izquierdo, who are lost in the system while they live and end up on the front page of the New York Times when they die. A new Commissioner for Children's Services was appointed, a highly regarded professional who was given broad powers and a mandate to fix the system. At a conference on the role of litigation in protecting at-risk children he freely acknowledged the agency's deficiencies and promised prompt action and improved performance. But he (or his lawyers), later told the court that the agency would pursue reform without participation from the plaintiffs (or their lawyers or experts) in the long-pending litigation. Which misses one of the most compelling lessons of the Kansas City case study: participation, inclusion of the interests and resources of all stakeholders in the system, is part of the solution to the problem he says he wants to solve. And the sooner that happens, the better off everyone involved, most importantly the children, will be.

The Kansas City case study also shows that this is a very difficult role for governmental defendants to assume. Most people and institutions react defensively to a lawsuit. An agency struggling to fulfill an impossible mandate with inadequate resources will not leap to the belief that attack is justified. Even caring and competent public servants resist letting litigation set their priorities or divert resources from other equally pressing

problems. They are likely to be advised by their lawyers to proceed very cautiously when it comes to making commitments that might be enforceable by a court, advice that is extremely sensible from the perspective of the litigation box. The challenge for governmental defendants is to break out of that box and risk embracing their adversaries as constituents, and partners in the difficult work of child protection.

## **What Will Help Overcome Litigation Barriers, and Make it More Effective in Achieving Systemic Reform?**

Child welfare cases present the classic paradox of public interest litigation: advocates for poor children, who are chronically underrepresented in the political process, are forced to resort to the courts for enforcement of their legal rights, but rights-based solutions are a notoriously second-best substitute for effective political participation. (Mnookin, Rosenberg, Yeazell 1987) If it takes a village, or a system of community partnerships, to provide effective child protection (Clinton, Farrow), the trick is to use the leverage of litigation to help build those systems.

The cases presented at CSSP's conference suggests a role for the court as a sort of civic incubator, maintaining pressure for aspiration to high standards over the long time necessary for massive institutional reform, which often exceeds the political life-span of key decision-makers. "I am here and I am not going away," as one prominent plaintiffs' lawyer put it at the

same conference at which the New York Commissioner spoke. But the cases also show that litigators may be among the last to recognize when an opportunity for cooperative engagement on systemic reform finally appears. It may simply be asking too much to expect gladiators to become peacemakers on command. In the wake of prolonged hostilities, it generally takes some force external to the conflict, unburdened by history, to help the parties clear their channels of communication and begin negotiating the turbulent passage from war to peace.

The Center for the Study of Social Policy has played this role in many cases. One plaintiffs' lawyer who has worked with them on several cases believes their substantive expertise is virtually unique, and that making similar help more readily available is the key to success in other cases. There is no question that the technical and political resources are crucial. But so is the Center's role in helping the parties overcome their mutual distrust and begin working together. A neutral outsider can also give government defendants the political cover they need to risk overriding their lawyers' advice and embarking on a long and difficult process with an uncertain end.

Indeed one of the most heartening lessons from the litigating jurisdictions is that, once adversarial barriers are overcome, their experiences are quite similar to those not in litigation. The essential elements of successful reform include:

- parental and citizen involvement in articulating needs, values and desired outcomes for families and children, and

holding the agency accountable  
for achieving them;

- detailed knowledge of local, state, and national resources;
- a focus on training and retaining excellent front-line workers;
- building an administrative infrastructure to support the workers;
- building a political infrastructure to support the system, and hold it accountable for achieving desired outcomes for children and families.

The cases show that class action litigation can be a vehicle for starting this process even in communities that lack the wherewithal to do so on their own. Indeed it is the only realistic route to reform in the places hardest hit by the child welfare crisis. At its best it has the potential make government work for the vulnerable citizens we reluctantly entrust to its care. But class action litigation cannot realize this potential if it is relegated to pariah status. Ironically the only reliable source of funding for these initiatives is court-awarded attorneys' fees, which creates perverse incentives to litigate more rather than less.

In fact it is the lawyers themselves who are pariahs here. The strong message is that the people who purchase professional services for child welfare reform can envision no productive role for lawyers in this work. The profession should be alarmed, and probably would be if they could figure out how to make money doing it. Over ten years ago a

professor at Stanford Law School designed a curriculum to train lawyers to do much of what CSSP and other systems-reform providers do in child welfare cases: in essence, to work with disempowered communities to help them assess their needs for public services and figure out how to get them. (Lopez) Some alumni objected that what he was teaching was not law but social work, and didn't belong in a law school curriculum. A prominent corporate lawyer corrected them: the proposed curriculum would train students to do for poor people precisely what business or transactional lawyers do for corporate clients all the time. Nevertheless the proposed curriculum failed, for lack of student, faculty, and donor interest.

Meanwhile an equally radical curriculum to train transactional lawyers in the multidisciplinary skills they need to serve corporate clients has flourished. To paraphrase an old saying, the rich get rich (with the help of transactional lawyers) and the poor get litigators.

The lesson of many case studies is that class action litigation is often an essential part of a multi-faceted strategy to achieve effective reform of child welfare and other agencies that serve poor and disempowered clienteles. But in order to achieve lasting change, advocates must use litigation carefully, and in concert with an array of other strategies designed to articulate, implement, and sustain the community's stated commitment to protecting its most vulnerable citizens. Effective advocates must also form partnerships with allies inside government, work to empower parents and children in their interactions with child welfare agencies, and enlist the aid of



experts and community leaders essential to a successful and sustainable reform effort. This is an enormously complex process that requires a set of skills not commonly found among litigators, or indeed anyone else in the veritable army of experts routinely deployed in such cases. (Brest & Kreiger)

The natural tendency of litigation to polarize both issues and people must be controlled. Adversarial tactics are often necessary and effective in exposing egregious wrongdoing and identifying responsible parties, which generally occurs in the liability phase of litigation. But in the all-important remedial phase, this approach stalls progress by creating stalemates and inhibiting creative problem-solving among parties who must now work together to achieve reform. Litigators must learn the strategic benefits and effective practice of more conciliatory methods, particularly in working with the political actors who are essential to a long-term reform strategy. Equally important, non-litigators—meaning not only the defendants in the case but the entire community that must be mobilized for effective child welfare reform—must learn to work effectively within the litigation context, and gain control of this powerful tool for reform.

A successful process depends first and foremost on plaintiffs and defendants recognizing their common interests in protecting children and families, and the opportunity for mutual gain by working together and with other stakeholders toward that goal. This requires client control of the litigation in some meaningful sense, which means organizing the relevant constituencies

and helping them reach consensus on their common goals and how to achieve them. The process will not happen spontaneously, and will not always be smooth. Engineering the major political and resource decisions, as well as the smaller-scale programmatic choices, requires careful thought and expertise. Achieving a strong process on one community is difficult; achieving it in multiple cities requires an overall national strategy that builds on the lessons learned in states and localities that are using this approach. Such a strategy could take one of the most intractable problems on the national agenda and use as leverage to transform decaying communities. The alternative—continued failure—is simply not acceptable.

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