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Ellen Borgersen

Stephen Shapiro

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*Ellen Borgersen and Stephen Shapiro**

This paper is the product of an unusual collaboration, in terms of both people and process. Data for this study was gathered through interviews conducted during the Fall of 1994 and Spring of 1995.[1] It was conceived by the Center for the Study of Social Policy ("CSSP"), whose expertise in human services management and financing has often been called upon in class action lawsuits against child welfare agencies across the country. CSSP has served as a plaintiff's expert, court-appointed neutral expert, court-appointed monitor, and neutral settlement facilitator in seven cases, and its experiences differed considerably in each case and role. One observation, however, held constant across all of them: the later in the litigation's life cycle that substantive expertise of the sort CSSP provided was called in, the greater the likelihood that protracted adversarial combat had already done substantial damage to the very agency that the lawsuit had set out to reform.

The Kansas City case that is the subject of this study is a case in point. It took about 16 years of increasingly hostile litigation to bring the defendant agency to the point where it was forced to acknowledge its own serious deficiencies and begin working in good faith toward enduring solutions. *G.L. v. Stangler*[2] was filed in 1977, and by the Spring of 1993 it had become one of the longest-running child welfare lawsuits in the country without much progress toward its goal of a better child welfare system and without an end in sight. Only then, and only by a considerable stroke of luck, was the necessary energy and expertise brought to bear, and the arduous process of diagnosing the roots of the agency's pervasive

* Ellen Borgersen was Associate Dean for Academic Affairs at Stanford Law School. Stephen Shapiro is Professor of Law at the University of Baltimore School of Law. They were retained as consultants to the Center for the Study of Social Policy to provide an independent, objective assessment of the G.L. v. Stangler settlement process.

1. A list of the participants and those interviewed for the case study appears as Appendix A. Documents relative to the litigation and settlement process were also reviewed. Unless otherwise noted, quotations are from these interviews and documents.

2. G.L. v. Stangler, 873 F.Supp. 252 (W.D. Mo. 1994).

performance problems within a complex system of interlocking public and private bureaucracies even begun. That process, which combined the substantive expertise of nationally and locally respected child welfare professionals with political muscle at the state, local, and community levels, has made substantial progress. But it continues to this day, still fragile in the wake of lingering mistrust, with the goal of measurably improved agency performance still far from being achieved.

All of which led CSSP to conclude that there had to be a better way of fixing dysfunctional child welfare agencies than litigating them into a state of Bosnian exhaustion and forcing technical assistance down their throats at gunpoint. Moreover, finding that better way is a matter of considerable urgency. The years of stalemate that are so typical of child welfare litigation translate into hundreds of childhoods thwarted by inadequate services, punctuated by the occasional violent death that puts the scandal of failed child welfare systems on the front pages for a while.[3]

CSSP therefore commissioned this study of the Kansas City litigation in an attempt to learn how litigation against child welfare agencies, when it is necessary, can be made less destructive and more productive of lasting, positive change. We conclude, as previous studies have also shown,[4] that class action litigation is often an essential part of a multi-faceted strategy to achieve effective reform of child welfare agencies. It can spotlight ignored problems, put a halt to the most grievous harms, and often results, at least initially, in more money for services, more staff with lower caseloads, and closer scrutiny of agency process and procedure. In order to achieve lasting change, however, child welfare 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.[5] The chances of achieving systemic reform in the context of litigation are greatly enhanced if the following factors are addressed:

- The dearth of substantive expertise in child welfare administration, financing, and service delivery must be remedied. It was the opinion of some lawyers interviewed for this study that the expertise provided by CSSP was virtually unique, and essential to putting the Kansas City child welfare system on a trajectory toward real reform. A breadth of expertise must be readily available and affordable to all advocates for

3. *See, e.g.*, Nina Bernstein & Frank Bruni, *She Suffered In Plain Sight But Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at 1.

4. ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985); SHERYL DICKER, STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN (1990).

5. Paul Brest and Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 538 (1994).

child welfare reform, and deployed as early as possible in the process – certainly well before any litigation is filed.

- 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 work together to achieve reform. Litigators must learn the strategic benefits and effective practice of more conciliatory methods, particularly when working with the political actors who are essential to a long-term reform strategy.

- Finally, the failure of political will or bureaucratic capacity for reform that is at the root of the system's problems must be identified and addressed. Even when under the scrutiny of a court, a failed system will not reform itself if the parties responsible for implementation lack the political capital or administrative wherewithal to complete the task. Persistent performance problems of the sort that have been well-documented in Kansasare ultimately rooted in a collapse of the civic infrastructure needed to support an adequate system of family-based child welfare services. That structure has two foundational requirements. First, it needs active and sustained citizen involvement in articulating the community's needs and desired outcomes for child welfare services and in holding politicians accountable for meeting those needs. Second, it needs a ready and steady supply of the material resources and technical expertise necessary to manage the delivery of an extraordinarily complex array of services to a vulnerable and often invisible clientele. Building this capacity should be an express objective of the reform process. Advocates must therefore work not only to empower parents and children in their interactions with child welfare agencies, but also to mobilize potential allies in a broader movement to articulate, achieve, and sustain the community's desired outcomes for children and families.

It is no mystery why child welfare services are in such a state of disarray nationwide, notwithstanding the high level of rhetorical support they enjoy all across the political spectrum. Children do not vote and do not have the power to hold politicians or bureaucrats accountable for mandated child welfare services. That is why litigation is often the only realistic route to child welfare reform in some jurisdictions. But, it is a volatile weapon which must be used with great care. The common analogy of litigation to armed civil conflict has real bite here: ultimately the war must be won on the ground, through a peace process that can rebuild the civic infrastructure essential to sustainable reform. In order to achieve this elusive goal the child welfare advocate must be able to engage a wide variety of people, with skills and interests ranging from the technical and professional to the personal and political, in a long

and difficult process leading to an uncertain outcome. This is not an easy task, even in the best circumstances. An important objective of this study is to identify the skills and commitments that might make it more often an achievable one.

I. THE KANSAS CITY LITIGATION

G.L. v. Stangler was filed under the name *G.L. v. Zumwalt* in 1977 as a class action suit to reform child welfare services in Jackson County, Missouri, which serves Kansas City. The case vividly illustrates both the strengths and limitations of traditional institutional reform litigation and the possibilities of a new approach that uses the legal clout generated by the lawsuit to instigate a substantive and more cooperative reform planning process. Several themes recur in their observations that underscore the tensions inherent in court-ordered institutional reform. In a nutshell, it is not easy to do strategic planning at gunpoint: that is, under an ever-present threat of legal sanctions. But it is sometimes necessary to do so, especially when an agency has broken the law.

The suit was filed by lawyers with Legal Aid of Western Missouri and grew out of their own experiences representing neglected and abused foster children in family court. Those lawyers observed that too many children were being removed from their families only to become lost in a system where efforts to provide them with permanent homes were woefully inadequate, and often succeeded only after the system itself inflicted additional damage on both child and family. The complaint named as plaintiffs five foster children in the custody of the Jackson County Office of the Missouri Division of Family Services (JCDFS) and alleged violations of their constitutional right not to be harmed while in state custody. The principal defendants were the County Director and Social Service Supervisor for Jackson County and the State Director of the Division of Family Services.[6]

After suit was filed, lawyers from the ACLU Children's Rights Project in New York became co-counsel in the case, and a team of experts was hired to study JCDFS case records. That study confirmed that the kinds of problems the plaintiffs' lawyers had observed were indeed occurring throughout the system, and that almost sixty percent of the children in the custody of the Jackson County child welfare system were at risk of abuse or neglect. Based on this study and other evidence, the court made several important legal rulings in the plaintiffs' favor, including class certification, which prompted the state defendants to initiate settlement discussions.

With the benefit of 20/20 hindsight, it is painfully clear that this was a critical juncture, and one that illustrates the chronic inability of American law and most litigators to deal effectively with institutional issues. The negotiations were conducted entirely by lawyers, representing the Plaintiffs and State DFS officials, with little input from anyone with real programmatic expertise. Moreover, it seems

6. Missouri's child welfare system is state funded and operated, but day-to-day administrative responsibility rests with officials in the DFS county offices. Lack of communication between officials in Jefferson City, the state capital, and their subordinates in Jackson County proved to be a persistent problem in the case.

that the main concern of the State negotiators was to avoid a formal judgment against them, and less thought was given to the difficulties that would be encountered when implementing the decree. Indeed, the officials in Jackson County who would be responsible for implementation had little or no input into the terms of the agreement against which their future performance would be measured. The 1983 consent decree that this process produced was heavily process-oriented.[7] It addressed fourteen issues from licensing of foster parents to caseload size and case record requirements. The decree also established elaborate reporting and monitoring requirements for each of the issues it addressed. However, it was not accompanied by any *operational* plan for implementing its requirements.

Not surprisingly, disputes over implementation of the decree arose almost immediately and consumed considerable energy from over-burdened workers. State officials were unwilling to give Jackson County the additional resources necessary to comply with the decree for fear that this would prompt calls for equity from other counties and possibly more litigation. A state DFS official testifying before a legislative committee in Jefferson City referred to *G.L.* as "the consent decree from hell."

In 1985, plaintiffs' counsel filed a motion to hold the agency in contempt, asserting widespread violations of the decree. The Division of Family Services responded by filing a motion to modify the consent decree. Because there was so much disagreement about the basic facts concerning implementation, the supplemental decree that resolved this dispute established a monitoring committee responsible for developing a monitoring methodology acceptable to both sides, collecting information, and reporting on compliance to the judge.

The monitoring committee's role was to provide reliable, objective information about compliance to the judge. This put the committee in the unfortunate position of documenting persistent non-compliance, which engendered unsurprising hostility from increasingly embattled front-line workers. By 1989, the committee had submitted several reports to the court documenting Jackson County's non-compliance with the supplemental decree, and plaintiffs' attorneys were actively considering further action to enforce the Decree. A new Director of the Missouri Department of Social Services was appointed and expressed a desire to solve the problems in Jackson County. The ACLU attorneys were impressed with Gary Stangler's sincerity, believed he had the authority to make changes, and agreed to his request for more time before filing a formal contempt motion.

It was during this period that Gary Stangler first met people from CSSP, both through his involvement in national child welfare initiatives and their involvement in another matter for the State of Missouri. CSSP urged him to improve communication with the plaintiffs' lawyers on compliance issues in *G.L.*, but he did not pursue the suggestion, apparently because he believed his staff's assessment of the gravity of the situation in Jackson County and not plaintiffs' counsel.

Deputy Director of Children's Services Richard Matt, a child welfare professional and 20-year veteran of DFS, felt the ten-year old consent decree was out of date and no longer represented "state of the art child welfare practice." Matt felt

7. The consent decree is published in the ruling approving it, G.L. v. Zumwalt, 564 F.Supp. 1030 (W.D. Mo. 1983).

that it was "too cookie cutter," and created blanket requirements that were often "not in sync" with what professional judgment would call for in particular circumstances. For example, the Decree mandated specified numbers of home visits by case workers. Such visits were not needed in some cases, wasted workers' time, and were often not a good measure of progress toward the desired outcome for the child. At one point he contacted the plaintiffs' lawyers directly in an attempt to substitute outcome measures, such as numbers of children reunited with their parents, for the practice-based mandates of the decree. But the State's attorneys "went crazy" when they learned of this initiative and prohibited him from speaking directly to plaintiffs' counsel.

State officials also described a reluctance on the part of the plaintiffs' attorneys to allow flexibility in implementing the decree. They felt that the lawyers were "more interested in the letter of the consent decree rather than trying to work out differences." They also believed that the monitoring committee's methodology (to which their lawyers had previously agreed) did not accurately reflect the condition of children in foster care.

The view of the plaintiffs' attorneys was, of course, different. They felt that the original decree was completely reasonable, and the agency's compliance problems reflected the inadequacies of a series of administrators, some hostile, some incompetent, and none genuinely committed to achieving compliance. There was both a chronic lack of communication between state and county officials and continued resistance by state officials to providing Jackson County with adequate staff and funding to meet the performance requirements of the decree. In their view, while Gary Stangler appeared to be interested in reform, he did not understand the nature or the magnitude of the problems. Furthermore, with the exception of funds for five additional social workers, he did come through with results after his request for more time to work on the problems in Jackson County. Nevertheless, the lawyers assert they were willing to listen to reasonable requests for modification of the decree, but were given no concrete, practice-based rationales for the defendants' requests. Plaintiffs' attorneys concluded that the agency lacked the necessary motivation and/or the substantive child welfare expertise to achieve reform since conditions in Jackson County showed so little improvement.

Both the plaintiffs' and the defendants' views seem to have some truth to them, mixed with at least equal parts of almost instinctual distrust. A certain level of distrust is a natural by-product of protracted litigation. Parties to litigation and their attorneys usually view each other as adversaries. Each move by the other side is viewed as a gambit calculated to gain an advantage in the litigation rather than a genuine attempt to resolve the underlying problem.[8] Some observers thought that because the Deputy Director of the Division of Family Services prior to 1989 was an attorney rather than a child welfare professional, a confrontational approach was taken by both sides which contributed to the considerable personal animosity that developed between them. State officials expressed frustration that none of the lawyers were capable of talking programmatically, as child welfare professionals,

8. *Cf.* Stewart L. Levine, *Silver Foxes: Practicing the Art of Resolution*, 4 L. PRAC. MGMT. 28 (1995).

and that time was wasted filtering all communication between the lawyers. Plaintiffs' attorneys countered that they "were capable of talking programmatically as a result of considerable expertise in similar cases," and that there were occasional periods of productive communication during this time.[9] Whatever the cause, all observers agree that the hostile, intensely adversarial climate that pervaded the litigation by the early 1990s was a serious obstacle to cooperative work on the real goal of achieving systemic reform and improved outcomes for children and families.

By 1990, the monitoring committee had issued several additional reports documenting continuing non-compliance, and the plaintiffs' attorneys filed another motion to hold the defendants in contempt of court. The motion documented a wide range of compliance failures, such as exceeding specified caseload limits, inadequate foster parent training, and failure to move children toward adoption. The State contested the claims and countered with another motion to modify the terms of the decree. The defendants contended that many provisions of the decree were arbitrary and unworkable, but that they had nevertheless made "reasonable" efforts and achieved "substantial compliance" with its requirements.

The cross-motions were heard by a new judge, Judge Dean Whipple who had experience as a juvenile court judge enforcing the state's Adoption Assistance and Child Welfare Act. He held an evidentiary hearing in January 1992, and in December 1992, issued a 45-page ruling detailing many areas in which he found the Department seriously out of compliance with the Decree. The opinion stated that the Department had made "no serious efforts" at compliance and ordered 11 specific actions to purge the State's contempt.

Judge Whipple found that Jackson County's failure to meet the caseload limits specified in the supplemental decree was the single greatest obstacle to achieving compliance in other areas. He specifically ordered that the defendants meet the caseload limits and "request and lobby for a budget line item" in the next budget submitted to the State Legislature "for sufficient funds to hire the number of social workers necessary" to comply with the caseload requirement. He said that if the State didn't provide Jackson County with additional front-line workers, he would order workers transferred from other counties to ensure implementation of the decree. He also granted plaintiffs' motion to add Gary Stangler (whose predecessor had not been named) as a defendant, "to ensure that the orders of the Court are acted on by the officials who are responsible for the operation of the Missouri Division of Family Services." It was clear from the tone of his opinion that he might well order a special master or some type of limited receivership to remedy specific areas of non-compliance if the agency was unable to improve these areas itself.

By the Spring of 1993, the case had been dragging on for sixteen years. Four different judges had presided over the case. The state administration had changed three times and none of the original named Plaintiffs were still in the child welfare system. Communication regarding the case was conducted entirely through the attorneys and was hampered by mistrust and personal animosity among some of them. Indeed, the sharply adversarial climate that developed during the contempt hearings, despite prior periods of cooperation and negotiation between the parties,

9. *See supra* note 1.

prevented productive communication about how to solve the serious performance problems pointedly revealed by the lawsuit. Precious energy was wasted on assigning and denying blame rather than being put to good use addressing the structural deficiencies that prevented the agency from achieving the level of service it had been ordered, and said it wanted, to provide.

Judge Whipple's contempt order, however, served as a real wake-up call to the defendants. Virtually everyone interviewed agreed that movement toward a new strategy would not have happened absent the contempt finding and the implicit threat that parts of the Jackson County agency might be taken over by outsiders appointed by the court. The fact that the defendants were completely surprised by Judge Whipple's findings resolving the factual dispute squarely in plaintiffs' favor is a good indication of how attentive they had been to the case before that time.

II. OTHER CONDITIONS ESSENTIAL TO SUCCESSFUL REFORM

A credible threat of judicial force was, then, a necessary condition of change in this case. Nevertheless, it was by no means sufficient to set the parties on the road to sustained institutional reform. At least three other elements were essential to the development of a new strategy for achieving reform.

First, there was a significant change in the state's political climate. In January 1993, a new governor was inaugurated, Democrat Mel Carnahan, who had a particular interest in children's issues. Moreover, Gary Stangler was the only cabinet secretary who had been held over from the prior Republican administration. Although several key persons had advised the new governor not to hold Stangler responsible for the contempt citation, he knew that he would be held responsible if the situation in Jackson County did not begin to improve. Stangler had, after all, just been added as a named defendant in the case after Judge Whipple specifically noted on the record that he was the responsible state official. The combination of the contempt order and a new boss who would hold him personally accountable for expunging that order gave Stangler a strong incentive to try an innovative approach to the problem.

Second, two men with an innovative approach to try appeared on the scene: Frank Farrow and Tom Joe who, along with other CSSP personnel, had worked with Gary Stangler previously on several national child-welfare reform initiatives. They had also worked closely with plaintiffs' attorneys in a case against the District of Columbia foster care system. Based on what they knew about the parties from these other contexts, Joe and Farrow recognized that Gary Stangler and the plaintiffs' attorneys shared similar goals but were not communicating constructively due to the long history of negligible progress, disappointed expectations, and the sharply adversarial nature of the contempt hearings.

In March 1993, Joe and Farrow proposed an informal, off-the-record meeting between Stangler and plaintiffs' ACLU attorneys at CSSP's offices in Washington, D.C. Stangler informed his attorneys about this meeting. The attorneys were unenthusiastic about the initiative because they would have little or no control over

the agenda. They advised Stangler not to attend.[10] However, under pressure from both the court and his new boss, Stangler was more open to innovative solutions and the idea of systemic change than his attorneys. He was willing to take the risk of proceeding with the initiative against his attorneys' advice and largely without their involvement. This was the third essential element in breaking the adversarial logjam in Jackson County: the front-line litigators for both sides finally got out of the way and let the parties and others with programmatic expertise focus on substantive change.

The participants in the first meeting in March 1993 were Gary Stangler, CSSP staff, and two ACLU attorneys – Children's Rights Director Marcia Lowry and staff attorney Chris Hansen – who had worked with CSSP in the D.C. foster care litigation. Their experiences in that litigation had convinced both CSSP and the ACLU attorneys that narrow court orders mandating reduced caseloads and better services were not effective without an infusion of programmatic expertise and a focus on a clearly articulated implementation strategy. What was needed was system-wide, programmatic reform planned in a coherent, long-range fashion and backed up by the clout of a lawsuit. They proposed a cooperative strategy which would lead to a systematic reform of the Jackson County child welfare system and eventually lead to a termination of the long, contentious lawsuit.

CSSP challenged the parties on both sides of the litigation to rise above their focus on narrow legal remedies and search for common ground. The root of the problems the litigation had identified would have to be found in the complex interlocking system of public and private bureaucracies at the federal, state and local levels that affect the delivery of child welfare services. Diagnosing the problem would require commitment from all parties to a new strategy founded on a set of common principles. *The parties would have to agree:*

- *First, on the need for broad systematic reform of the entire Jackson County child welfare system, in order to reach the shared goal of providing improved services to children in the system.* It was further agreed that this would require a large investment of effort and additional funding and that the potential benefits more than justified this investment.[11]

- *Second, that sixteen years of adversarial combat had not produced results satisfactory to any of the parties, and that a less confrontational approach was necessary. In order to move beyond impasse, they needed to set aside personal animosities and begin developing a level*

10. Throughout the litigation, communications were complicated by the fact that the State was represented by two sets of attorneys, one employed directly by the Department of Social Services (DSS) and the second representing the Missouri Attorney General's office, who viewed themselves as representing the interests of the citizens of Missouri.

11. Although State DSS officials initially resisted giving Jackson County the additional resources it needed to comply with the decree, pressure from plaintiffs' lawyers and the court eventually did bring a substantial infusion of new funding into JCDFS. By the time that CSSP became involved in the case, a lot of money had been spent, but, in the absence of a coherent strategic plan for reform, it had not yielded any measurable improvement in performance.

of trust in each other and in the process they were shaping. They needed to focus on substantive and programmatic issues, putting further legal action on hold while the new approach was given a chance to succeed. For a start, this would mean that the State would drop its appeal of the contempt order and the plaintiffs' attorneys would not take further legal action related to enforcement.

- *Third, that a systematic needs assessment of the child welfare system in Jackson County should be conducted to provide a basis for a detailed, comprehensive plan for broad systemic reform.* The assessment and reform plan would be done by a national panel of neutral child welfare experts who had the confidence of all parties and expertise in both substantive child welfare policy and the difficult process of effecting change in large state bureaucracies. The plan would be based on substantive social welfare policy, not on the technical requirements of the law. It would serve the dual purposes of ending the lawsuit -- based on compliance with its underlying goals -- and improving the level of services to children in need.

- *Fourth, that the people who would be most affected by the implementation of the proposed plan should be involved to the greatest extent possible in its development.* This meant including all levels of staff, including administrators, supervisors and front-line workers; foster parents; local child welfare advocates; and community leaders in the needs assessment and reform planning. Their input was necessary to develop a realistic, workable plan. Moreover, their long-term involvement in implementing the plan would be crucial to its ultimate success. The greater their involvement in developing the plan, the harder they would work to implement it later.

In essence, the parties committed to an integrated strategic planning process with goals to be established through a process of cooperative consultation among all affected constituencies, including agency personnel, children and families in direct contact with the child welfare system, and the broader Kansas City community. Everyone recognized that they were trying to do considerably more than settle the lawsuit. If they had fully appreciated the magnitude of the undertaking, however, it might have stopped them in their tracks.

The ACLU attorneys were fairly enthusiastic about the new strategy, based on their recent experience with a similar approach in the District of Columbia. The local Legal Aid attorneys who had initiated the litigation were, however, uneasy with the idea of an "exit plan" from the litigation, and favored vigorous enforcement action to "hold the State's feet to the fire," up to and including a receivership. Gary Stangler was also nervous about the relationship between the reform plan and the lawsuit, but in a different way. His concern was that the comprehensive reform initiative might expand the scope of the litigation beyond foster care. The State's attorneys, possibly influenced by the Kansas City school desegregation lawsuit which cost the State hundreds of millions of dollars, expressed similar reservations. It is indicative of the level of frustration that everyone was feeling that these

reservations were put aside, and the national panel initiative went forward without resolving exactly how the panel's report would affect the litigation. This may, in retrospect, have been a wise but unconscious strategic retreat, avoiding conflict over an issue down the road that might well have derailed the process before it began. It is also not surprising, however, that these concerns resurfaced and led to complications when the parties eventually had to translate the panel's report into a new consent decree.

A. Convening the Panel

Once the participants agreed to the idea of the national panel, they had to find experts who could produce the needs assessment and reform plan. The members of the panel had to have the necessary substantive expertise. They needed to be neutral, to have the trust of all the parties, and to possess the skills to work with diverse groups of people in the child welfare field. The parties easily agreed to the membership of the panel: Alinda Dennis of the United Way's Metropolitan Child Abuse Network for the Greater Kansas City Area; Elizabeth Cole, an attorney, social worker and nationally known expert on child welfare policy and practice; and Frank Farrow, Director of Children's Services Policy for CSSP. Two other members of CSSP's staff, Judy Meltzer and Carol Williams, functioned as *ex officio* members of the panel.

As a group, the national panel had expertise in the full range of child welfare services. The panel was knowledgable in emergency protective services, foster care, permanency planning, and adoption, and had a deep sense of the purpose, history, and quality standards of good child welfare practice. They also had experience in the reform of human service systems, including personnel issues, organizational structures, and public finance. One panel member, Alinda Dennis, was an important source of local knowledge about the Jackson County system, as well as a contact readily accessible to local workers. Many people emphasized the importance of having a respected local professional on the panel to eliminate perception of the panel as a group of outsiders coming in to tell the people in Kansas City how to function. (Even so, there were complaints the national panel was "too East Coast," and should have included a national expert from Missouri or at least the Midwest). In addition to expertise and credentials, the panel members communicated a sense of having "been there" in public child welfare agencies, which won them credibility with front-line workers. They were also credited with having personal styles and communications skills that kept the process going through difficult times.

B. Casting a Wide Net of Participation

In May of 1993, the panel members traveled to Kansas City for two days of meetings with attorneys, supervisors, staff members, and foster parents. The overwhelming sentiment at these meetings was to "get this over with." People thought there was no point in investing more energy in litigation sixteen years old. This underscores a key point: energy had been going into the *litigation*, and not into the system it was trying to fix.

The staff complained that they needed concrete support that would ease their day-to-day work: car seats, post-it-notes, photocopiers. They also acknowledged larger impediments such as a lack of respect for staff and lack of communication within the department. The panel tried to establish credibility with supervisors and front line staff by immediately providing some of the requested supplies. They also seized on this as an opportunity to involve the Kansas City business community in the reform effort. The supplies were provided by the Jackson County Local Investment Network Commission ("LINC"), a public/private venture initiated by Gary Stangler and Bert Berkley, a Missouri businessman, in 1991 to involve members of the Kansas City business community in social services issues. [12] Within a month, over sixty car seats had been delivered to the agency.

The panel next set out to design a process that would encourage broad participation in the reform planning. With the help of JCDFS officials and LINC, nine committees were formed. Each had a JCDFS administrator, two JCDFS supervisors, and JCDFS line workers as well as community advocates and family court staff. Several committees included foster or adoptive parents. Between forty and fifty of the 200 agency workers signed on to participate in the process. LINC also provided support and technical assistance as the panel went on to tackle the task of building a high quality system of care.[13]

C. Getting in the Trenches

Throughout the Spring and Summer of 1993, panel members and CSSP staff met several times with each committee. Several people mentioned that the panel's willingness to "get in the trenches" and meet with so many workers was helpful and appreciated. It also provided a constant reality check and demonstrated to doubters that the process was addressing the delivery of child welfare services on a day-to-day basis and not just looking for an easy exit from the lawsuit.

Equally important, according to people interviewed, was the "helpful" attitude that panel members and staff consistently displayed to the workers and supervisors. They were viewed as facilitators, which was in marked contrast to prior consultants, whom the workers felt were interested only in documenting their failures. Panel members were viewed as committed problem-solvers, who kept the lines of communication open and helped to maintain enthusiasm for this work over the many months it took to complete.

It was at this point that the shift from a litigation perspective to a strategic planning perspective began to take hold. It was probably also when some unreasonable expectations, particularly as to timeline, were created. CSSP's initial estimate that the panel's work could be finished in three months was far too short. Three months was at best an ambitious schedule for a first draft of the needs

12. The LINC Board is comprised of twenty-three Kansas City citizens, including business people and civic and neighborhood leaders. A staff of seven is paid by the State while facilities and discretionary funds are supplied by private foundations.

13. LINC provided a staff person, Phyllis Becker, to help coordinate the panel's on-site work. As the process progressed, LINC also provided private sector funds to finance the start-up costs of some new activities, such as foster and adoptive parent recruitment.

assessment, which in fact took six. The national panel issued a draft reform plan in January 1994. The final report required another round of small group meetings attended by almost all members of JCDFS staff, whose comments were then included in a revised report. Revisions, further review, and a line-by-line negotiation of timelines and workplans with the new Director of JCDFS and the State Deputy Director of Social Services added another six months before the report was final. Many people were critical of the amount of time the process took, and it seems in retrospect that future disappointments might have been avoided if a more realistic timeline had been projected from the start.

As one Legal Aid lawyer who has been involved in *G.L.* from the beginning observed, a year "may not seem like a long time to you policy folks, but it's one third of the life of a three-year old languishing in foster care."[14] 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 moving reform forward. 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. Staring that reality in the face at the outset might have killed enthusiasm for the project, but it seems clear that unrealistic expectations of a speedy recovery also left some bad feelings about the process that might have been avoided. One lesson that CSSP has drawn from this experience is the importance of more clearly and realistically phased implementation. That is, it would have been better if the reform plan had more explicitly set some short-term goals that could be achieved quickly, which would build confidence for the long haul.

It is also important to understand the goal of broad participation in a strategic planning process in determining whether too much time went into producing the panel's final report. When the panel issued its first revised report in December 1993, it had been edited based on comments received from partial drafts given to the staff workgroups, which offered few substantive changes. Even so, some staff expressed unhappiness at their lack of more formal input into the revised report, and a series of eight meetings with groups of approximately twenty-five staff members was held early in 1994. Once again there was not a great deal of substantive criticism at these meetings. Some critics of the delay may have felt that all of this time was wasted because it did not lead to significant changes in the report. The panel's view was that this step was important to the integrity of the process since the report had aimed at representing staff priorities whenever possible.

Sound strategic planning must be based not only on accurate information, but also on a common set of goals shared by everyone who plays a role in implementing them. Participation is thus a source of both information and, equally important, legitimacy to sustain hard decisions that entail many close judgment calls. No matter how excellent the final product is, no matter how impressive the credentials of the experts who wrote it, there will always be room for disagreement as well as mistrust and resentment on the part of anyone excluded from the process of creating it. A plan imposed from above, like the original consent decree in *G.L.*, is likely to set goals that are unattainable and to be deeply resented by the front-line workers who

14. *See supra* note 1.

bear the burden of trying. The objective here was to create not another "Consent Decree from Hell," but a plan developed in close partnership with local and state child welfare workers that they would view as *their* plan, with ownership of it at all levels of the system. That is why it was important to take the time to give everyone with responsibility for implementing the plan, especially front-line workers, ample opportunity for input and comment. Moreover, the delay did not affect negotiations toward the revised consent decree, which were proceeding in parallel time, based on the panel's draft report.

D. The Panel Report

The final panel report was issued in June 1994 and titled "Building for the Future: A High Quality System of Care for Child Welfare Services in Jackson County, Missouri."[15] The introduction made clear that it envisioned "major change, not small scale, incremental improvements to current Jackson County services." Although the panel intended that the report would be the basis for an "exit plan" from the lawsuit, it also recognized that the plan went well beyond the requirements of the existing consent decree, which was directed only at the foster care system.

"Since this lawsuit was filed," the panel wrote, "we have learned that it is impossible to fix one part of a child welfare system (for example, foster care) in isolation from the rest of the system." The plan, therefore, addressed the continuum of child welfare services and recommended programmatic improvements ranging from in-home and community supports for intact families to out-of-home care and adoption.

The report reflected the wide range of inputs the panel had solicited, from experts in public finance to front-line workers to the concerned citizens of LINC. It articulated principles and underlying theories of practice as well as specific programmatic examples and addressed fiscal, personnel, and management support issues that are fundamental to a well-functioning system. It also stressed the importance of building capacity to sustain change into the future.

In the interviews for this case study, the report was almost universally praised as a fair, accurate, comprehensive needs assessment for Jackson County. It is clear that the input of staff whom the panel interviewed was taken seriously. There was, as noted above, general criticism that the process took too long and a sense that the panel should have been able to issue the report in six months. Also, confirming the principle that process begets expectations of still more process, there were criticisms from people who felt they had not had adequate input into the report. Predictably, the people who felt they did not have input into the report were also the most critical of its substance.

One critic was Kate Dodd, the new Jackson County Director of the Division of Family Services. Despite pleas from the panel that the vacancy be filled quickly, she was not installed in office until January 1994, after the first revision of the draft

15. Elizabeth S. Cole, Alinda Dennis, Frank Farrow and Judith Meltzer, *Building for the Future: A High Quality System of Care for Child Welfare Services in Jackson County, Missouri* CSSP MONOGRAPH, 1994.

report was issued. She felt that the report was a "very negative document" that only pointed out what was wrong with the agency and ignored some of the strengths. She viewed it as a good needs assessment and as one less task she would have to do to improve the agency. However, she was concerned that its tone was commanding rather than suggesting and that it would deprive the agency of the flexibility it needed to achieve its goals over time in a professionally appropriate way.

This reaction conveys a skepticism that is entirely natural for a non-participant and not necessarily inappropriate in a voluntary strategic planning context. However, the panel report was not a pro-bono management consulting project commissioned by the former Division of Family Services Director, that she and her staff were free to "take or leave." The report was a document in which every line had been agreed to by the plaintiffs and defendants, and which she herself, along with the State's Deputy Director of Social Services, specifically had gone over in a final review and editing of the report with CSSP staff. In that sense, it was a product of sixteen years of litigation in which the agency had been found to be violating the law and over which her bosses had been held in contempt of court. The fact that the person most directly responsible for implementation found the panel's report "too commanding" and resisted the notion that it might be authoritative or binding presaged long and difficult negotiations over translating the report into the language of the law, in the form of a revised consent decree.

E. The 1994 Consent Decree

The negotiations on a new consent decree began in January 1994, as soon as the panel's draft report was available and under review. It was clear almost from the outset that while the parties agreed that the class of protected children would not be expanded beyond those in foster care, they agreed on very little else.

The defendants' understanding was that the report was to be used only as guidance and technical assistance to help the Department exit the consent decree. They were concerned about their ability to achieve 100% compliance with the goals and timetables in the report, and feared that the level of detail it prescribed would deprive the Division of needed flexibility if the recommendations were mandated in a consent decree. The plaintiffs' attorneys, however, expected that the items in the panel's report relating to children in the class would actually be incorporated into the new consent decree. They viewed the defendants' protestations about administrative flexibility and unduly aggressive timetables with a skepticism well-grounded in sixteen years of non-compliance.

It seems clear that the different expectations about how the panel's report would be used reflected a genuine misunderstanding and not a negotiating ploy, caused in part by the fact that defendants' attorneys were not present at the discussions leading up to the appointment of the panel. In the end, however, ambiguity was very likely a good thing. Trying to resolve this difficult issue at the outset might well have derailed the process before it ever began. By 1994, however, many people had invested a lot of time in this process and enough good will had been restored to permit resolution of the discrepancies.

Negotiations continued from January through October 1994. They were often acrimonious, and came very close to completely breaking down several times. Many

of the old animosities between plaintiffs' and defendants' attorneys resurfaced and were exacerbated by disagreements between State attorneys representing the Department and the Attorney General's office. Two of the key players, the Director of JCDFS and the Department's attorney, were both new to their jobs as the negotiations began and did not have a personal investment in the panel's work.

At one point, as the result of a series of misunderstandings, Gary Stangler wrote a letter to the monitoring committee chiding the plaintiffs' attorneys for making unreasonable demands and threatening to cease joint efforts to modify the decree and proceed with a unilateral implementation effort that would satisfy the court and so deprive the plaintiffs of any further input into the process. This threat, which is a common defense negotiating tactic in institutional reform cases, highlights two interesting points. First, the parties were negotiating against the backdrop of what the court would be likely to order in the absence of an agreement. Judge Whipple's findings supporting the 1993 contempt order signaled impatience with defense procrastination, but both sides recognized that they were considering interests and remedies in these negotiations that were well beyond the court's power.

Second, one of the most important things the parties were negotiating about was discretion. Call it administrative flexibility, bureaucratic slack, or bounded rationality, the reality of managing a complex bureaucracy is that one simply cannot anticipate every detail or bend in the road toward improved performance.[16] Discretion, of course, is a huge problem for courts, which is why they struggle so mightily with the scope of their remedial powers in the face of corporate or bureaucratic intransigence and tend to defer to defendants even when their own findings suggest that the defendant is incorrigible.[17] This tension creates considerable uncertainty in the bargaining process.

Ultimately, the misunderstandings that led to Stangler's threat were resolved and the parties went back to work with a reduced team of players. Several factors contributed to the parties' commitment to these negotiations in the face of repeated near-breakdowns. First, the panel's report itself, whose quality everyone had confidence in, served as a basis for the discussions, which allowed the parties to focus on implementation and feasibility. Second, supervisors and case workers were invited to the negotiations, which gave front-line credibility to the State's objection that certain recommendations would be difficult to implement. Third, when formal negotiating sessions deteriorated into irreconcilable positional bargaining, for example on staffing and supervisory levels, CSSP staff worked informally behind the scenes with both sides to reach some compromises. Fourth, Gary Stangler put a great deal of pressure on his own attorneys to get the new decree signed, overriding their concerns that a decree which was too detailed or demanding would produce continuing compliance disputes and no foreseeable end to the litigation. Stangler was apparently willing to take that risk. He asserted his rights as the client and demanded that the lawyers pursue his agenda, not their own.

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16. *Cf., e.g.*, W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL AND OPEN SYSTEMS 104-105 (3d ed. 1992).

17. *See, e.g.*, William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 649-657, 692-697 (1982); JOHN BRAITHWAITE ET AL., CORRIGIBLE CORPORATIONS & UNRULY LAW (Brent Fisse & Peter A. French eds., 1985).

Negotiations on small details continued right up until the day before the signing. Agreement on a new consent decree was finally reached on October 18, 1994 – which, of course, was not the end of anything, but yet another beginning.

Although the defendants always insisted on a consent decree limited to the scope of the initial suit, they did not narrow the focus in the same way when discussing implementation. This was probably because most people agreed that the agency-wide changes recommended by the panel's plan were the best and surest route to achieving the narrower compliance demanded by the decree. Opinions on whether the Division could actually achieve compliance with the decree ranged from cautious optimism through mild skepticism to a view that it was virtually impossible. What did not vary, though, was a sincere determination to "try like hell," as one skeptic put it, not only to comply with the decree, but also to implement as much of the panel's report as was feasible.

Some of the plaintiffs' attorneys questioned whether the new decree was substantively better than what they could have gotten by pursuing the litigation through the assignment of special masters. Even they were convinced, though, that the process through which the decree had been reached was far superior to the imposition of special masters or a receivership, specifically because it gave the defendants a sense of ownership of this decree.

The panel process created an improved environment for implementation in other ways, as well. There is now closer communication between state and local officials, which may have begun when state officials brought county workers into the consent decree negotiations. The chances of successful implementation should be considerably improved by the fact that Gary Stangler secured approximately $4 million dollars in additional funding for Jackson County through private negotiations with the chair of the legislature's Appropriations Committee. Stangler emphasizes that these funds were secured independently of the panel initiative, which is understandable given his interest in discouraging litigation as a way of gaining an edge in the appropriations process. Regardless, there is no question that the process of obtaining the funding was part of an overall effort to solve the problems in Jackson County, of which the national panel initiative was also a part.

There were conflicting views about LINC's role in implementing the decree. Most people felt that LINC could be helpful in marshaling community support and keeping the pressure on the Division to comply with the decree. However, several people were wary of LINC becoming too involved in the day-to-day operations of the Division. There were some reservations about the burgeoning size of the LINC bureaucracy, the complexity of its process, and its slowness to act. One major area that apparently still needs to be resolved is what LINC's official role will be, if any, in overseeing compliance with the decree.

Notwithstanding a genuine commitment to implementation by all concerned and an infusion of expertise, funding, and community support, the course of reform in Jackson County has not been smooth. There is continuing resistance to implementation from middle management. It seems that higher level political appointees respond to political pressure and front-line workers to the compelling needs of the children and families in their care, but that middle managers remain oddly unaccountable, even in the face of a court order. A realistic threat of some

sanction that directly affects the people in critical positions is also an essential tool of effective institutional reform.

The good news is that when the monitoring committee's report documented continuing non-compliance in 1995, state officials did not resist or deny the Committee's fact-finding, but instead adopted a "get tough" policy with recalcitrant middle managers about the consequences of *not* successfully implementing the new consent decree. The officials instituted an internal receivership, placed some supervisors on unpaid administrative leave for a day, detailed state workers from Jefferson City to work on compliance in Jackson County, and ultimately fired the new Director of JCDFS, who had been so resistant to the panel's report.

There are also continuing compliance disputes, and adversarial tensions threaten to undermine the cooperative governance structure the panel and others have worked hard to establish. In April 1995, CSSP convened another meeting at its Washington offices "to take stock of the 'partnership'" and determine whether "disagreements, even disputes, can be handled so as to be less damaging to on-going work together." As a result, the parties have asked panel member Alinda Dennis to convene a regular problem-solving forum in Kansas City with all the principals present, not to resolve compliance disputes, but to establish communication on implementation issues before they grow into disputes. Considerable grief might have been avoided if the need for such a structure had been anticipated at the point of agreeing to the new consent decree.

The need to "course correct" and create this new forum should not be viewed as a harbinger of failure but as an entirely normal part of the process.[18] The course of massive institutional change cannot be charted with precision. It is to be expected that the process itself will change as each wave of reform is assimilated and that surrounding circumstances will also change in unanticipated ways over any realistic time frame for reform. How one manages the uncertainty and disputes that will inevitably arise over the course of the reform process is a central question in any implementation plan. It is what the long fight over the language of the decree was about. The fact that skirmishes over implementation continue to this day suggests that even the 1994 decree did not entirely resolve the management questions. The fact that the parties were able to agree in 1995 to keep trying, however, suggests that the panel process succeeded in articulating goals that the parties agree are worth striving for, and established a reservoir of hope and good will sufficient to support cautious optimism that the goals will ultimately be realized.

III. LESSONS LEARNED

It is far too soon to declare success in Jackson County. The reform process continues to evolve. It is on a promising trajectory, and the participants show a continuing commitment to the process they embarked on in 1993. While it is still too early to judge the success of the new approach in Jackson County in terms of its effect on the child welfare system and improved outcomes for children and families,

18. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 56-59 (1985).

it is clear that the participants on all sides of the dispute believe the process was a marked improvement over the way the litigation had been proceeding. What made the process work, to the extent it has, after such a long time? Are there lessons to be learned here that might avoid at least some of the rancor and speed the way toward effective reform in other institutional class action cases?

First and foremost, litigators who undertake the arduous task of institutional reform must know when to lead, when to follow, and when to get out of the way.[19] Part of the problem with institutional reform litigation is that it often puts the reform process solely in the hands of lawyers rather than program people and places formal legal requirements too much at the center of attention. The new approach in *G.L. v. Stangler* shows that translating law into reality in a complex, dysfunctional public bureaucracy requires a wide array of expertise of which law is only one. Expertise in public finance, government contracting, systems management, human resources, and other related disciplines is required as well. Moreover, this broad array of expertise must be readily available, affordable and deployed as early as possible to help establish the scope of the litigation and the reform effort, and to increase the chances for success, measured not in terms of legal victories, but improved outcomes for children and families.

The decision to file a class action lawsuit in 1977 was undoubtedly sound. The Legal Aid lawyers had ample evidence of a serious systemic problem in the Jackson County child welfare system, and their judgment that litigation was necessary to force DFS to confront its own institutional failure was fully confirmed by the conduct of agency personnel for many years. While it is clear that skillful litigation is what brought the problems in Jackson County's child welfare system to the forefront, the lawsuit alone was unable to resolve the problems it had identified. The techniques and strategies that win lawsuits are not necessarily the most effective methods for achieving systemic reform, and none of the attorneys on either side of this case had the expertise to structure a lasting solution to it. To the contrary, the adversarial positions bred by the lawsuit ended up becoming a part of the problem in Kansas City. In fairness, the conditions the lawyers were confronting in 1977 were hardly conducive to an attempted reform effort. DFS was dysfunctional, the political climate was not receptive, and the interdisciplinary expertise in public management that finally started turning things around was not widely available. According to ACLU attorneys, the lack of readily available and affordable substantive expertise remains a barrier to implementing systemic reforms; few entities have the necessary expertise or resources to conduct the kind of assessment that was done by the national panel with the staff back-up of the Center for the Study of Social Policy.

This case study clearly teaches that the sustained participation of substantive area experts, both in the analysis of problems and the development of solutions, is crucial to the success of institutional reform cases. Attorneys must make every effort to reach out for this expertise early in the process, even before filing suit, and they must be prepared to defer to it on appropriate issues. An attorney who believes that prior experience litigating child welfare cases gives him expertise comparable to that of a child welfare professional on programmatic issues is guilty of hubris, at a

19. *See, e.g.*, GERALD P. LOPEZ, REBELLIOUS LAWYERING (1992).

minimum. The same is true of expertise in community organizing and political strategy. Lawyers must learn to work in concert with child welfare experts and local community leaders to devise broad strategies for achieving long-term systemic reform. The lawyers must view themselves as part of an interdisciplinary team whose objective is to achieve that reform.

Litigators are accustomed to working with experts from a variety of disciplines, 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 fullest extent possible is part skill and part attitude, and it may be essential to winning a legal victory before a court. However, it is counterproductive in the fluid atmosphere of remedial negotiations.

Marcia Lowry said she learned from working with the Center that "you don't have to control your experts if you have the right experts." She believes the substantive resources the national panel brought to Kansas City were 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 were crucial, but so was Lowry's willingness to risk trusting the Center, and ultimately the defendants as well, over a long and uncertain time. This attitude was in part a function of having the luxury of being in a "largely supervisory" role in the case.

Front-line litigators tend to burn out on cases that drag on for years, particularly cases involving the level of human tragedy that pervades child welfare. A litigator who has documented bureaucratic failure and its human consequences for over sixteen years is likely to be skeptical of promises to do better with just a little more time, as the Legal Aid lawyers were in this case. They would have preferred to "hold the defendants' feet to the fire" on compliance after the contempt ruling and were critical of the time it took to complete the national panel process. Genuine success in an institutional reform case takes time and ultimately the defendants' good faith and cooperation, which cannot be won by adversary struggle. It bears emphasis that the struggle was necessary to break through years and layers of bureaucratic resistance and denial. It took the contempt order, after all, to focus Gary Stangler's attention on the case, and it was natural for the litigators who won it to want to press forward. Just as it is impossible to prepare simultaneously for both war and peace, it is unrealistic to expect the same person both to litigate the case and rehabilitate the defendant when the opportunity finally presents itself. The lawyers at the ACLU who were at a greater distance from the fray played a crucial role in persuading their more skeptical colleagues to try the new strategy.

CSSP and the national panel played a parallel role on the defense side, giving Gary Stangler the cover he needed to override his lawyers' advice to fight the contempt ruling and then enter into a new consent decree over their objection. The Attorney General's lawyers sought to protect their client – the people of Missouri – from an adverse judgment and their political representatives from unwarranted judicial interference. From this perspective the new consent decree was very risky, exposing the Department to further litigation if it failed to comply. Stangler's insistence on signing the consent decree signaled his own commitment to the non-adversarial process that had produced it and his confidence that the plaintiffs were equally committed to it. That hard call might have been impossible without the credibility and support provided by The Center and the national panel.

The skills called for in the remedial phase of institutional reform litigation are those of the cooperative problem-solver and the community organizer. Some attorneys and some program people have those skills. However, this study confirms that it is difficult for all parties involved in litigation to resist the hardening of positions that characterizes the litigation process and to retain the openness to cooperation and flexibility that will ultimately be required in an institutional remedial process. It may be that the intervention of a credible, neutral third-party, unburdened by acrimonious history, is essential in helping the parties to clear their channels of communication and begin negotiating the turbulent passage from war to peace.

Plaintiffs' attorneys deserve credit for recognizing the opportunity that CSSP's intervention in the case presented and helping to convince the skeptics to give the panel process a try. They also understood that it would require something of a leap of faith for the process to succeed and resisted the temptation to assert excessive control even when the process faltered. The criticism that one of them voiced about Gary Stangler – that he was "only interested in taking credit and avoiding blame" – signals a fundamental misconception of the attorney's role in an institutional reform case. If one is trying to persuade political actors to take on the significant risks inherent in systemic reform, part of the job is to help them figure out how to avoid blame for past failure and take credit for future successes. Since genuine success in an institutional reform case will ultimately demand the defendants' good faith and cooperation, the plaintiffs' attorneys must not make defeat of the defendant as an institution the primary goal, or attack individual defendants so vigorously that they are unwilling or unable to cooperate in the reform process. While it may sometimes be necessary to exert pressure to remove intransigent or incompetent individual defendants, it is also important to remain open to even the faintest suggestion of a willingness to cooperate from the other side.

On the other side of the equation, government officials who become involved in such suits, whether as named defendants or parties necessary to the remedial effort, must rise above defensive nay-saying and learn to look for the many opportunities that litigation presents to improve the delivery of public services. They cannot afford to be blinded by defensive middle managers with a vested interest in the status quo and should be willing to accept well documented facts presented by plaintiff's attorneys, hopefully before a Court has to conduct extensive evidentiary hearings.

Personalities were important in this case, as they always are. The fact that both the ACLU lawyers and Gary Stangler also knew and trusted CSSP, that Alinda Dennis was a respected member of the local child welfare community, and that Elizabeth Cole was a nationally recognized expert all contributed to what was accomplished. It would be a mistake, though, to conclude that the convergence of events in Jackson County was so dependent on fortuitous personal contacts and circumstances that no useful generalizations can be drawn.

Personalities and circumstances are always important, but a helpful, facilitating attitude is a matter of commitment and training as much as personal predisposition.[20]

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20. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 153-154 (Bruce Patton ed., 1981).

A favorable political climate is essential, but creating it should be seen as a key objective of the overall reform strategy, not as an exogenous variable beyond anyone's power to control.[21] The process that began in 1993 recognized this and did a good job of exploiting nascent improvements in the political climate at the state level, the opportunities offered by LINC at the local level, and in general, dealing directly with the political dimensions of the problem.

The national panel's significant technical expertise was essential to translating good intentions into action in Jackson County, Missouri. The panel also recognized the limits of their own expertise and the extent to which the problems of Jackson County required a political solution. The panel process began with a shared commitment to building a high quality system of care that would lead to improved outcomes for children and families in the child welfare system. The Panel recognized that defining what Jackson County meant by "improved outcomes" was not a question for the experts, but for the community. What is considered appropriate and/or feasible in one community may not be so in another. This depends on such factors as demographics, the availability of non-governmental community resources, and attitudes toward the proper allocation of responsibility for children's welfare.

It is still not clear when the litigation will draw to a close, whether the system will be reformed, or whether children and families will actually experience improved outcomes. Perhaps the hardest part of institutional reform litigation is figuring out when and how to wean the defendant from judicial monitoring. This requires two separate steps: rehabilitating the defendant's internal management capacity and identifying (or creating if necessary) a constituency in the community that will continue to monitor performance after the litigation has ended. It is still not clear whether community and political organizing efforts channeled through LINC or other entities will yield a level of support sufficient to sustain the ambitious goals of the Panel plan for any significant period of time. However, the Panel rightly identified this as an integral part of their work, pointing the community toward a sustainable political resolution of the underlying problems.

Institutional reform litigation is usually made necessary by some failure of the political process[22] and *G.L. v. Stangler* fits that pattern. 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. If a defect in the political process is what justifies or at least necessitates judicial intervention in the first place, it makes sense to try to address that defect as part of the remedial process. Whether it will work in the long run, however, is not a question for the court or the experts, but for the citizens of Kansas City, Jackson County, and the State of Missouri.

Forty years experience with institutional reform litigation teaches that courts dance a delicate minuet with the executive and legislative branches when they undertake the messy, but often necessary, task of court-ordered agency reform. A

21. *See, e.g.*, LOPEZ, *supra* note 13; SHERYL DICKER ET AL., STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN 5-9 (1990).

22. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121 (1982); JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

court order, or the threat of one, can spotlight a problem by revealing, for example, the extent of abuse and neglect suffered by children in the nominal care of the Jackson County child welfare system. It can exert pressure, order some reforms, and even serve as a sort of incubator to nurture a reform effort for a number of years, but it cannot alone sustain change in the face of persistent political opposition or bureaucratic neglect.

While there is no longer any question that a court has broad power to order an appropriate remedy once it determines that an agency is systematically violating that law, formulating and implementing the remedy remain highly problematic. Fixing a dysfunctional bureaucracy requires the exercise of discretion, a range of expertise that is not easy to assemble, and persistence over a long period of time. Concerns about both the legitimacy and the competence of judicial intervention in the affairs of the other branches of government lead to admonitions that the remedy should be "narrowly tailored" to specific legal violations and not intrude unduly on the discretion of agency officials.[23] It turns out, however, that narrow remedies are hardly ever able to cure the legal violations, which are only symptoms of a deeper malady. The determination on the merits is, after all, a judgment that the defendant officials have not been able to achieve a legally acceptable level of performance up to that time. There is certainly no reason to think that a court order alone, even with some prescriptive detail, is going to change anything. The question, which the defendants do not seem to know how to answer, is, "How?"

Answering that question is an exercise in both local politics and strategic planning. This case study illustrates (as others have before) that by far the best results are achieved when the parties move beyond adversarial bickering and approach the issues with an attitude of constructive problem-solving. The remedial process cannot be limited to mandating and monitoring compliance but must also provide the technical assistance and other resources necessary to achieve it and build capacity within the system to sustain reform after judicial support is withdrawn. That is a very tall order, and judicial authority alone is not sufficient to deliver it. Technical expertise is also a necessary part of the equation, but it cannot legitimate institutional reform of the magnitude undertaken in Jackson County. Ultimately, sustained reform requires political will and local ownership, which is why it is important to build consensus for the reform plan as an integral part of the process of designing it.

What judicial authority can do is provide a forum in which the relevant players can negotiate a solution to the underlying problem, and a powerful incentive to do so. *G.L. v. Stangler* suggests that litigation can continue to play an important role in holding government officials accountable to the requirements of law, but if it is to actually achieve systemic reform and better outcomes for children, it must lead to a broader strategy which utilizes the best available technical expertise to enhance the motivation and skills of agency managers and staff. The overall strategy must be designed to achieve reform that will work for the community and survive on its own power long after the lawyers and experts have left the scene.

The question posed in this case study was whether a litigation-based strategy emphasizing collaboration, substantive expertise, and local ownership could be a

23. Fletcher, *supra* note 12, at 635, 649-657, 692-697.

catalyst for long-term systemic reform of a dysfunctional child welfare system. The answer it provides is "we hope so." By defusing adversarial tensions, infusing needed expertise, and calling for genuine grass-roots political support for sustained reform, the process begun in 1993 may have put Jackson County on the road to providing a level of child welfare service that matches its stated aspirations of caring for its most vulnerable citizens.

APPENDIX

The key persons who were involved in the Jackson County litigation are listed below. An asterisk (*) indicates persons who were interviewed for this case study.

PLAINTIFFS' ATTORNEYS

ACLU Children's Rights Project
Robin Dahlberg*
Chris Hansen*
Marcia Lowry*
Legal Aid of Western Missouri
Fred Rich*

DEFENDANTS' ATTORNEYS

Division of Legal Services,
Department of Social Services
Tim Wynes,* Director
Mary Browning,* Deputy Director
Attorney General's Office
Robert Presson,
Assistant Attorney General

FEDERAL JUDGE

Dean Whipple

NATIONAL PANEL OF EXPERTS

Members of the National Panel
Alinda Dennis*
Elizabeth Cole
Frank Farrow*
CSSP Staff who assisted the National Panel
Judy Meltzer*
Carol Williams

MONITORING COMMITTEE

Members
Harriet Lawrence*
Marilyn Shapiro
Don Tharp
Executive Director
Sheila Agniel*

STATE DEPARTMENT OF SOCIAL SERVICES

Gary Stangler,* Director
Division of Family Services,
State Office
Carmen Schulze, Director
Richard Matt,* Deputy Director
Division of Family Services,
Jackson County Office
Kathleen Dowd,* Director
Division of Family Services,
Jackson County Office
Connie Pyles,
Social Services Supervisor III
Mary McKee,*
Social Services Supervisor III
Rebecca Thomas,
Social Services Supervisor III
Rosalyn Wilson,
Social Services Supervisor III

LOCAL INVESTMENT COMMISSION (LINC)

Bert Berkley, Board Chair
Gail Hobbs, Director
Phyllis Becker,*
Committee Executive