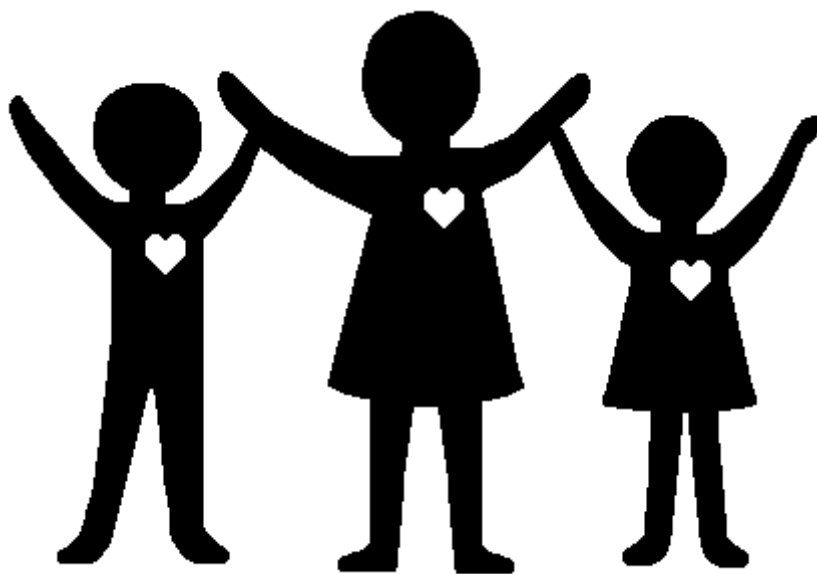


# Trial Attorney Protocol for Effective and Zealous Representation of Parents in Termination of Parental Rights Cases in Wisconsin.



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## **Introduction**

The United States Supreme Court has recognized a parent's fundamental right to the care and custody of his or her child, and concluded that a state may not terminate this right without an individualized determination that the parent is unfit. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). Absent a finding of unfitness, it is presumed that children are best served by remaining with their natural parents. *Santosky v. Kramer*, 455 U.S. 745 (1982). The Wisconsin Supreme Court has similarly recognized that “[a] parent's desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’ ” *Sheboygan County D.H.H.S. v. Julie A.B.*, 2002 WI 95, ¶ 22, 255 Wis.2d 170, 648 N.W.2d 402 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 1 (1981)).

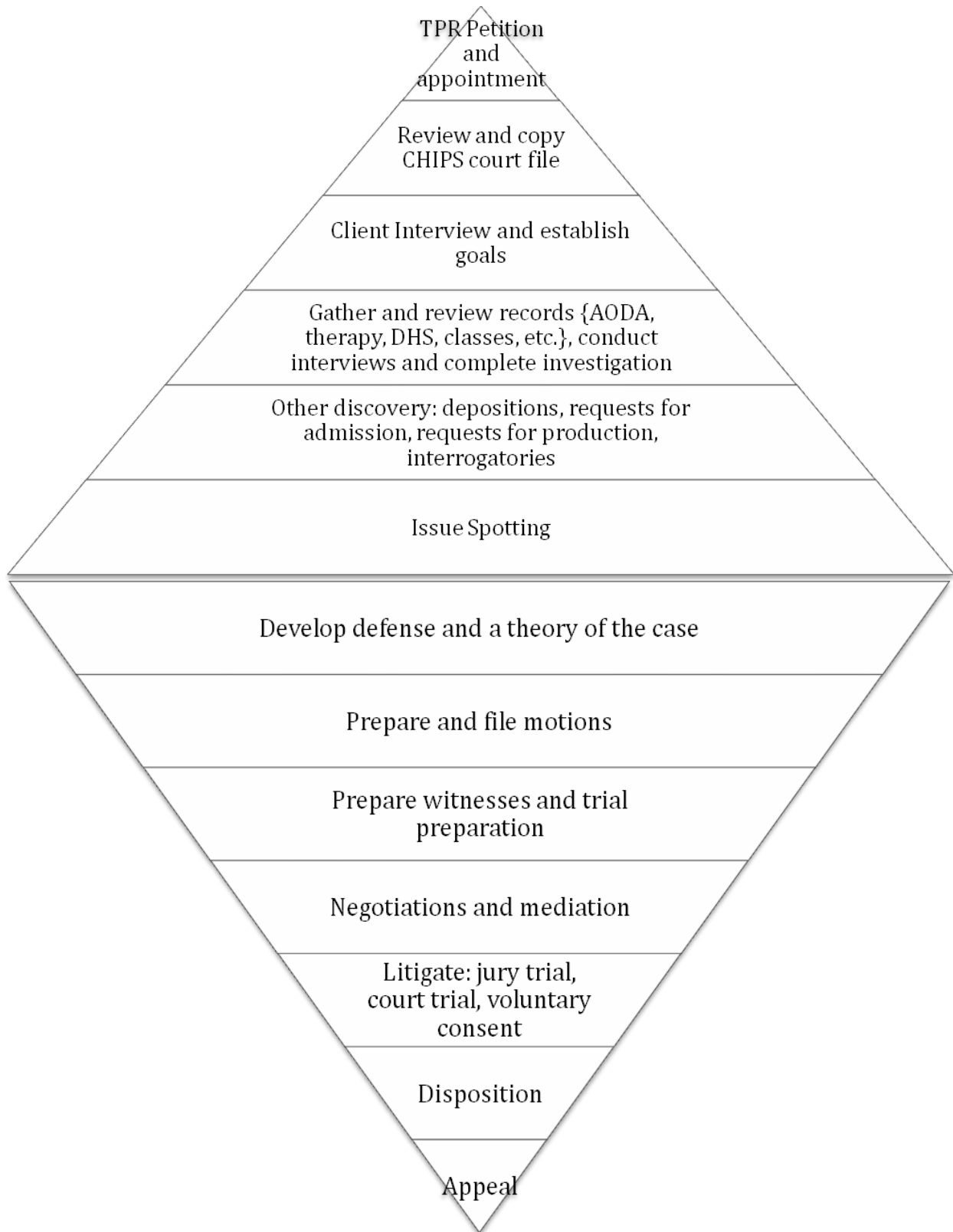
Due to the fundamental liberty interest involved in parenting, when anyone seeks to permanently sever that tie, parents must be afforded protections, including zealous, knowledgeable, and competent representation. It is the parent attorneys who play a critical role in safeguarding this liberty interest.

This protocol is intended to promote quality representation among attorneys representing parents in Termination of Parental Rights (TPR) proceedings. This protocol is not a comprehensive check list of every issue or consideration that may come up while litigating a TPR case, but is meant to be a starting point in representation. It should not be a substitute for seeking further education, conducting legal research, reading the statutes, or consulting with colleagues. This protocol is also focused on representation at the trial court level and does not address the specific obligations of appellate attorneys in TPR cases.

The following TPR diamond was developed to help organize this protocol. It gives a step by step description of what is necessary in preparation for trial in a TPR case. The case will start out with an attorney gathering as much information as is available, and then, as the attorney begins to prepare for trial she must funnel down the information to determine what will assist in presenting a parent's best defense at trial.



# TPR DIAMOND



To help guide attorneys, this protocol breaks down suggestions, case law and statutory references following the general outline of the TPR diamond. There are, of course, areas that overlap. Furthermore, there are ongoing obligations that attorneys should address throughout the TPR process.

Wisconsin is not the first state to establish a protocol, standards of practice or guidelines. The following standards are adopted from those developed by the American Bar Association; the Children's Justice Project, a project of the Wyoming Supreme Court; and the Parents' Attorney Protocol from the Child Welfare Services division of the Michigan State Courts.



The following is an outline of expectations each attorney must meet in each TPR case.

## 1. Ongoing expectations

### a. Relationship with client

- i. Advocate for the client's goals and empower the client to direct the representation and make informed decisions based on thorough counsel. *See also* SCR 20:1.4
  1. *Commentary:* Parents in TPR cases often distrust the child welfare system. This may include prior attorneys, judges, social workers. Counsel should ensure that she communicates her role to the client and explains the advantages and disadvantages of various courses of action. It is important to be aware of the client's goals and work towards furthering those goals.
- ii. Act in accordance with the duty of loyalty owed to the client.
  1. *Commentary:* Counsel must show respect and professionalism toward the client. Counsel may be the client's only advocate. Take the role seriously.
- iii. Meet and communicate regularly with the client well before all court proceedings. Counsel the client about all legal matters related to the case. This includes specific allegations against the client, the service plan, the client's rights in the pending proceedings, all court orders and the consequences of failing to obey court orders or cooperate with the service plan. *See also* SCR 20:1.4.
  1. *Commentary:* Counsel has a unique perspective and information on how the legal and child welfare systems work. Even for clients who have been involved in the system previously, it is often confusing. It is the counsel's job to help demystify the system for the parent. Counsel must be available to answer questions, strategize, and educate the client on the status of the case. TPR is a complicated legal proceeding which requires communication both in and outside the courtroom.
- iv. Adhere to all laws and ethical obligations concerning confidentiality. *See also* SCR 20:1.6.
  1. *Commentary:* Counsel should be familiar with the legal and ethical rules of confidentiality specifically that which pertains to treatment records, psychological records, and all other records. Counsel should ensure that the parent understands confidentiality and any release is done knowingly.

- v. If the parent falls out of contact with counsel, counsel should take diligent steps to locate and communicate with the missing parent and decide representation strategies based on that communication.
  - 1. *Commentary:* Counsel should make every effort to communicate with her client in a way that is effective for that client. It requires securing affirmative means of contact. For example, if a client's phone is not working, counsel should attempt to contact family members or others in an attempt to track the client down. Counsel has an ongoing obligation to continue to represent her client's expressed interests in court.
  - 2. *Note:* The law in Wisconsin on an attorney's ongoing obligation and the court's response is changing. Counsel must familiarize herself with the recent amendments to Wis. Stat. § 48.23(2), and corresponding case law. Counsel should object to being removed from a case and set an appropriate appellate record. Even if a court indicates that a parent may no longer appear by counsel, counsel's obligation to the client continues, including but not limited to a motion to vacate the default finding.
- b. If the case involves the Indian Child Welfare Act or Wisconsin Indian Child Welfare Act (ICWA or WICWA) consider the impact throughout the proceedings.
  - i. *Commentary:* Counsel needs to familiarize herself with ICWA/WICWA and the impact on the case—including the requirement of active efforts, the burden of proof and the requirement of additional witnesses.
- c. If family members or alternative placements are identified, communicate these to the caseworker. There is an ongoing obligation to consider family placements for children in care.
  - i. *Commentary:* State and federal law includes an ongoing obligation to investigate relative placements for children in foster care. If a parent offers a suggested placement, ensure that the worker fully investigates the proposal.
- d. Continually encourage the parent to remain actively engaged in services. The filing of the TPR petition does not end the obligation of the Department of Human Services (DHS) to provide services nor does it end your client's obligation to remain involved in court-ordered services.
  - i. *Commentary:* For several of the commonly pled grounds in TPR cases, a fact-finder can and should consider the parent's compliance with the CHIPS court order, even after the filing of a TPR petition. DHS also has an obligation to continue to provide services during the pendency of a

- TPR. To the extent possible, a parent should continue to make efforts to reunify with her children throughout the entire case.
- e. Be alert to and aware of potential conflicts of interest that would interfere with the competent representation of the client. This is an ongoing obligation throughout the case as conflicts arise at any point, especially as discovery is conducted and proceedings continue. *See also*: SCR 20:1.7.
    - i. *Commentary*: If a conflict arises, take the necessary steps as quickly as possible to either resolve the conflict, obtain the necessary waiver from interested parties, or secure new counsel for the parent.
  - f. Conduct a thorough and independent investigation at every stage of the proceedings.
    - i. *Commentary*: Counsel should conduct a thorough investigation. Counsel should not rely solely on DHS or the caseworker to secure reports, records, and documents. If necessary, counsel should take the necessary steps to request funding for those records, and secure an investigator to assist with the case.
  - g. Notify the client of all upcoming court dates and important meetings.
    - i. *Commentary*: It is not always easy to get in touch with a TPR client. Ensure that your client is notified of all court dates; a parent's attendance at these hearings and meetings is crucial.

## **2. TPR Petition and Appointment**

- a. Prior to being appointed on a TPR case, ensure that you have completed the requirements to be certified by the State Public Defender (SPD).
  - i. To be certified to take TPR cases, in the five years prior to application for certification a lawyer must have been trial counsel, alone or with other trial counsel; and has litigated a significant portion of one completed jury trial, two trials to a court of record, or four testimonial hearings before a court of record, but not including a proceeding to revoke probation, parole or extended supervision. Additionally, the lawyer must have at least four hours of SPD approved Continuing Legal Education (CLE) pertaining to Chapter 48 and four hours of SPD approved CLE pertaining specifically to TPR cases. Wis. Admin. Code § PD 1.04(10).
  - ii. If counsel has not been certified or recently taken a TPR case, she should consider attending another TPR training session.
  - iii. The SPD has minimum performance standards expected in all cases. See [www.wisspd.org](http://www.wisspd.org).
- b. Ensure that you are knowledgeable and up-to-date on state and federal statutes and case law, as well as civil procedure.

- i. Counsel should know the local rules and customs for TPR/ Child in in Need of Protection and Services (CHIPS) proceedings. Examples of specific laws counsel should be familiar with include:
  1. Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 and the ASFA Regulations, 45 C.F.R. Parts 1355, 1356, 1357; and the Fostering Connections to Success and Increasing Adoptions Act, 42 U.S.C. § 622.
  2. Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36
  3. Indian Child Welfare Act (ICWA) 25 U.S. C. §§ 1901-1963, the ICWA regulations, 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67, 584 (Nov. 26, 1979).
  4. Wisconsin Indian Child Welfare Act (WICWA), Wis. Stat. §§ 48.028 and 938.028. Additional information on WICWA's implementation can be viewed at <http://dcf.wisconsin.gov/Children/ICW/INDEX.htm>.
  5. Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP) 42 U.S.C. § 622(b)(9) (1998), 42 U.S.C. § 671(a)(18) (1998), 42 U.S.C. § 1996b (1998).
  6. Interstate Compact of the Placement of Children (ICPC), codified in Wisconsin in Wis. Stat. § 48.988.
  7. Foster Care Independence Act of 1999 (FCIA), P.L. 106-169.
  8. Individuals with Disabilities Education Act (IDEA), P.L. 91-230.
  9. Family Education Privacy Act (FERPA), 20 U.S.C. § 1232g.
  10. Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L., 104-192 §264, 42 U.S.C. § 1320d-2 (in relevant part).
  11. Public Health Act, 42 U.S.C. Sec 290dd and 42 C.F.R. Part 2.
  12. Wisconsin Rules of Evidence.
  13. Wisconsin Rules of Civil Procedure.
  14. Supreme Court Rules Chapter 20: Rules of Professional Conduct for Attorneys.
  15. Wisconsin laws related to domestic violence.
  16. Wisconsin laws related to domestic relations, *See* Chapter Wis. Stat. Chapter 767.
- c. Counsel should review the petition, summons and return of service and, unless there are sound tactical reasons for not doing so, move to dismiss the

petition if there are defects or it does not conform with the requirements of Wis. Stat. § 48.42(1) such as:

- i. The TPR petition does not state:
  1. The legal name, sex, date of birth, and the jurisdictional facts;
  2. The name and residence of the petitioner and the relationship to the child;
  3. The name, address and date of birth of the parent, if known; and the name of the person having legal custody or guardianship of the child;
  4. The grounds for seeking TPR;
  5. The name and address of the person or authorized agency requesting the TPR;
  6. Whether the Indian Child Welfare Act applies;
  7. The Uniform Child Custody Jurisdiction and Enforcement Act Affidavit required by Wis. Stat. § 822.29. Wis. Stat. § 48.027.
- d. Prior to taking the TPR case, evaluate your current caseload to ensure that you have sufficient time and resources to take on a TPR case. *See also* SCR 20:6.2.

### **3. Review and Copy CHIPS or family court file**

- a. It is essential to acquire and review all relevant documentation. Depending on the county's protocol, this may require filing a motion requesting permission to review the file and associated records.
  - i. Refer to Wis. Stat. §§ 48.293 and 48.295 for the Children's Code specific discovery.
- b. Review any existing court orders that pertain to your client and her family.
  - i. Check that the orders were all legally entered.
  - ii. Check if TPR warnings are attached to required documents.
  - iii. Check if there are any transcripts of hearings that may provide helpful information.
  - iv. If visitation was suspended or denied during the CHIPS or family court proceedings, you may want to request a transcript to ensure that appropriate findings were made.
  - v. Ensure that notice requirements were satisfied.
  - vi. Counsel should become familiar with the CHIPS dispositional order. Remember that the parent has an ongoing obligation to participate in services and DHS has an ongoing obligation to provide services.  
*Commentary:* Counsel should ask for and review the agency case file as early as possible. While it is important to conduct an independent investigation, it is also crucial to determine what DHS is relying on to

further its case. The file may contain information the client did not share. Unless counsel is familiar with the DHS file, she is at a disadvantage.

#### **4. Client Interview & Establish Goals**

- a. Counsel should take reasonable steps to maintain adequate and appropriate contact with the client throughout the proceedings. *See also* SCR 20:1.3 and 20:1.4.
  - i. This includes having contact information for the client and others that may assist in getting in touch with the client.
  - ii. Find out and use your client's preferred method of communication. Sometimes clients may not have a reliable phone number, but may have access to email or text messages.
- b. Meet with your client as soon as possible after accepting representation. If at all possible, try to have this meeting be in person well before your initial court appearance.
  - i. *Commentary:* Counsel should strive to make the client as comfortable as possible during the interview. The interview may involve disclosure of sensitive, painful, or incriminating information, the attorney should make sure to explain attorney-client privilege/confidentiality to the parent. Counsel will need to work to gain the parent's trust, but gaining trust is essential in providing the most effective representation.
- c. While meeting with your client, determine any of the client's unique characteristics. This includes diminished capacity, incarceration, mental health challenges, addictions or drug use, socioeconomic status, domestic violence history, and any other unique cultural considerations.
  - i. It is essential that counsel provide culturally competent, individualized representation.
    1. *Commentary:* Counsel must understand how cultural and socioeconomic differences impact interaction with the client, and must interpret a client's words and actions accordingly. Remember that racial, ethnic, gender and socioeconomic factors also may impact how an individual parents. Counsel has an obligation to explain these differences to others involved in the court proceeding.
  - ii. Be aware of the client's mental health status and be prepared to assess whether the client can assist counsel with the case. *See also* SCR 20:1.14.

1. *Commentary:* Many parents involved in TPR cases have long-standing mental health challenges. It is important to remember that this does not mean that a parent cannot assist in his/her own defense or requires a *Guardian ad Litem* (GAL). Counsel should become familiar with the parent's mental health diagnosis and how it manifests in the parent. Counsel should ensure that the services being provided to the family properly take the parent's mental health into account. Consider consulting with an expert who may be able to help counsel and the trier of fact understand the impact of the parent's mental health challenges.
  - a. If the parent is assigned a *GAL*, but can still communicate her wishes to the advocacy counsel, the parent's attorney must zealously advocate for that position. *In the Interest of T.I.*, 151 Wis. 2d 725, 445 N.W.2d 729 (Ct. App. 1989).
- iii. Incarcerated parents involved in TPR proceedings require special considerations.
  1. Wisconsin has several cases to consider when representing an incarcerated parent or a parent with a criminal record. *See: Kenosha County Dep't of Human Services v. Jodie W. (In re the Termination of Parental Rights to Max G.W.)*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845; *State of Wisconsin v. Quinsanna D. (In re Termination of Parental Rights to Teyon D.)*, 2002 WI App 318, 259 Wis. 2d 429, 655 N.W.2d 752; and *LaCrosse County Dep't of Human Services v. Tara P. (In re Deantye P.-B.)*, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194.
  2. Services: Incarcerated parents may have difficulty obtaining treatment services and visitation while in custody. Counsel should advocate for reasonable efforts to be made for a client in custody. Prisons and some jails in Wisconsin allow visits, even by children. Counsel should advocate for visits whenever possible.
  3. Communication: Even after a TPR is filed, it remains crucial that a parent remains in regular communication with her child while incarcerated. Counsel should stress that those communications must be age and developmentally appropriate for the child. A parent should also communicate with the child's caregiver and the case manager on a regular basis.

Counsel must keep in regular contact with the parent and keep her updated on any progress in the case.

4. Court appearances: Discuss with the parent whether they want to appear in person. Keep in mind that if an inmate is away from the institution for several days she may lose her place in programming. If the parent is appearing by phone or video, counsel and the parent should arrange in advance how they are going to communicate while in the courtroom.
- d. Provide the client with contact information in writing and establish a message system that allows regular attorney-client contact. *See also* SCR 20:1.4.
  - i. *Commentary*: It is important that the parent knows how to get in touch with her attorney. Counsel should respond to the parent's inquiries and requests promptly. Counsel should be cognizant of any barriers to communication such as education, language and mental health.
- e. Provide the client with copies of all petitions, court orders, service plans, and other relevant court documents, including reports regarding the child.
  - i. *Commentary*: Ensure that this information is delivered to the parent in a manner that she can understand.
- f. Thoroughly explain the TPR process to your client. Review the initial decisions, like substitution of judge and right to a jury trial, with the client prior to the first hearing.
  - i. *Commentary*: Inform the client about legal matters related to the case, including specific allegations against the client, the service plan, the client's rights in the pending proceedings, any orders entered against the client and the potential consequences of failing to obey court orders or cooperate with the service plan.
- g. Discuss with client her goals and objectives for representation and the future of the family. It is important to inform the parent of the consequences of an unfitness finding. *See*: Wis. Stat. § 48.415(10) and SCR 20:1.2, 1.3 and 1.4
  - i. Consult with client on case strategy.
  - ii. Advocate for the client's goals.
  - iii. Empower the client to direct your representation and make informed decisions based on thorough counsel.
- h. Early on in the representation, counsel should explain the role of advocacy counsel, attorney client relationship, confidentiality, and duty to zealously advocate.
  - i. *Commentary*: Keep in mind a parent involved in a TPR, may have distrust for anyone she perceives as a part of "the system." It is



important for counsel to develop rapport and establish trust. This can happen by counsel listening to the client's full story, having patience, asking open-ended questions and setting realistic goals for the client and the case. *See also*, SCR 20:1.2, 1.4, 1.6 and 2.1

## **5. Gather and Review Records**

- a. Cooperate and communicate regularly with other professionals in the case.
  - i. Some prosecutors (DA's or corporation counsel) consider the caseworkers as clients. Learn the policy in your county. *See also*: SCR 20:4.2 and 4.3.
  - ii. Engage in case planning and advocate for appropriate services using a multidisciplinary approach when available.
    1. *Commentary*: Counsel should advocate for the parent in and out of the courtroom. Get to know service providers and case workers. When working on case planning, ensure that the services being provided to your client are appropriate and meet the needs of the family. While participating in meetings or case planning do not forget the restrictions of confidentiality.
- b. Take all necessary steps to obtain information from third parties, such as DHS, law enforcement, and the *GAL* that may benefit the client or help inform the client's decisions and help in the client's defense at trial.
  - i. *Commentary*: Counsel should gather all relevant documents that may provide information and insight into the entire family. These records include criminal records, social service records, medical records, school records, and all evaluations.
- c. Conduct a thorough and independent investigation at every stage of the proceeding.
  - i. *Commentary*: Do not rely on social services to provide the only information about the parent and the services she has participated in or completed. The attorney should contact the providers, request and review the documents independently.
- d. Get appropriate releases signed to obtain necessary records regarding client and children.

## **6. Conduct other discovery**

- a. When needed, use formal discovery methods to obtain information. These methods include depositions, interrogatories, requests for production of documents, and requests for admissions. Remember that other parties in the

case also have these mechanisms at their disposal. Be prepared to respond in a timely manner.

- b. Familiarize yourself with the rules of civil procedure and mechanisms for civil discovery to ensure correct and effective use of discovery tools.
- c. Timely file all requests and responses. Thoroughly prepare client for deposition testimony.

## **7. Issue Spotting**

- a. Counsel shall evaluate DHS efforts to reunify the client and the child, and request DHS to provide appropriate services for the client. Counsel should address any missing or inappropriate services with the caseworker and, if necessary, the court.
- b. Evaluate the case and defenses keeping in mind the unique characteristics identified during your interactions with your client.

## **8. Develop defenses and a theory of the case**

- a. Counsel should develop an overall strategy and theory of the case that adapts the client's story to the legal issues in the case. In deciding on strategy, counsel should consider whether client's interests are best served by not presenting evidence on behalf of the client and instead relying on the evidence and inferences, or lack thereof, from opposing parties. Keep the strategy and theory in mind during all hearings, negotiations and at trial.

## **9. Motions**

- a. Timely file all pleadings, motions, and briefs. Research applicable legal issues and advance legal arguments. When filing motions, keep in mind that they may also be appropriate issues for appeal. Ensure that the issues are thoroughly researched and argued.
- b. Aggressively advocate for regular and increasing visitation in a family-friendly setting. Visitation is a crucial component in advocating for a parent and is critical to mounting a persuasive defense at trial. Factors to consider when analyzing and advocating for visitation include: frequency, length, location, supervision, restrictions and support/coaching provided to parents.
- c. Counsel should consider seeking an advance ruling on issues likely to arise during the fact-finding hearing through the filing of motions in limine.
- d. Prepare proposed findings of fact, conclusions of law, and orders when they will be used in the court's decision or otherwise benefit the client.

## **10. Witness interviews, witness list and exhibits.**

- a. Counsel shall identify and interview all potential witnesses. If witnesses are represented by counsel, obtain permission from that counsel before speaking with the witness. In some counties, corporation counsel considers DHS social workers their clients. Know the position in the jurisdiction where you practice. *See also:* SCR 20:4.2, 4.3 and 4.4.
- b. Identify, secure, prepare and qualify expert witnesses. Make sure to follow SPD protocol (See the Assigned Counsel Division page of [www.wispd.org](http://www.wispd.org)). When permissible, interview or depose opposing counsel's experts.

## **11. Negotiations and Mediation**

- a. With the client's permission, and when appropriate, engage in settlement negotiations and mediation to resolve the case.
  - i. *Commentary:* When authorized to do so, counsel should present information about the client's progress and completed services.
- b. Counsel shall keep client fully informed of all offers made by opposing counsel. Counsel should discuss the advantages, disadvantages and consequences of accepting any offers. Counsel should fully inform the client of the consequences that his or her failure to fulfill conditions of any agreement. *See also:* SCR 20:1.2.
- c. Notwithstanding the existence of ongoing negotiations, counsel should continue to prepare and investigate the case to the extent necessary to protect the client's rights and interests in the event that negotiations fail.
- d. Follow the developed case theory and strategy during negotiations.

## **12. Litigate**

- a. Attend and prepare for all hearings.
- b. Discuss the differences between a jury trial and court trial. Discuss the potential for a voluntary consent to TPR with the parent and in extremely rare instances, discuss the option to stipulate to grounds.
- c. Counsel should be familiar with the rules of evidence and law relating to all stages of the TPR process, as well as legal and evidentiary issues that can be anticipated based on the pleadings, investigation, and discovery. Counsel should be prepared to make all appropriate objections.
- d. Thoroughly prepare the client to testify at the trial. Because TPR is a civil proceeding, the prosecution can call your client as a witness during the case in chief. Preparations should include the likelihood of impeachment and the possibility that the client might incriminate herself when testifying. The client may invoke her Fifth Amendment privilege against self-incrimination

when responding to questions about potential criminal activity, however the fact-finder may make an adverse inference if the privilege is invoked.

- e. Prepare for hearings and/or trial and make all appropriate motions and evidentiary objections. When appropriate, counsel should:
  - i. Develop a plan for direct examination potential witnesses;
  - ii. Determine the implications that the order of witnesses may have on the case;
  - iii. Consider the possible use of character witnesses and any negative consequences that may flow from such testimony;
  - iv. Consider the use of demonstrative evidence and other exhibits;
  - v. In the case of expert witnesses, ensure that proper notification and *Daubert* qualifications are met. If opposing parties are calling an expert witness, consider requesting a *Daubert* hearing challenging that witness' qualifications. Wis. Stat. § 907.02. If a DHS worker will testify, ensure that the testimony is challenged to establish whether the worker is an expert, if she is going to be offering expert-like testimony;
  - vi. Be familiar with Wisconsin statutory and case law on objections, motions to strike, offers of proof and preserving the record for appeal; and
  - vii. Be familiar with Wisconsin statutory and case law on the admissibility of documentary evidence, the foundation necessary to secure introduction of evidence and any hearsay exceptions that might permit introduction of evidence without authentication.
- f. Present and cross-examine witnesses, prepare and present exhibits.
- g. Actively participate in jury selection and drafting jury instructions.
- h. Counsel should have materials available at the time of the litigation that will be helpful to presenting the case. This may include:
  - i. Copies of all relevant documents filed in the case, including the petition;
  - ii. A copy of applicable statutes and cases related to anticipated or common issues;
  - iii. DHS reports and attachments;
  - iv. Expert reports;
  - v. Copies of subpoenas;
  - vi. A list of all exhibits to be offered and the witnesses through whom they will be introduced;
  - vii. Reports, certificates, and notes from assessments, programs, and counseling;
  - viii. Documentation concerning client's employment and housing;

- ix. Documentation of any special achievements of the child while in the custody of the parent;
  - x. Documentation regarding result of drug screens;
  - xi. An outline of opening and closing statements;
  - xii. Plans or outlines for direct and cross-examination of witnesses.
- i. Counsel should consider whether there are tactical reasons to stipulate to damaging facts. This may include when facts are readily provable and uncontroverted, instances when the facts will have less impact on the fact-finder if they are summarized rather than the subject of lengthy testimony, and when there is the possibility that the fact-finder will view the client as accepting responsibility for the stipulated facts or circumstances.
  - j. At the close of the petitioner's case and at the conclusion of all evidence, counsel should make appropriate motions to dismiss.
  - k. In the event that the client is unsuccessful at the fact-finding stage, counsel should prepare the client for the required unfitness finding.

### **13. Disposition**

- a. Consider dispositional issues and witnesses throughout your preparation of the grounds phase of the trial.
- b. Depose or interview foster parents, caseworker, and other professionals providing services to the parent and children, or other relevant witnesses in preparation for disposition.
  - i. Consider whether it is appropriate to secure dispositional-specific experts like a bonding or attachment expert.
- c. The rules of evidence do not apply at a dispositional hearing. All material and relevant evidence helpful in determining questions may be received by the court and relied upon for probative value. Counsel should be prepared to object on the record to information, testimony, and written reports counsel deems inadmissible.
- d. Counsel should prepare the client that the best interest of the child is the standard for the dispositional hearing, Wis. Stat. §48.426(2).
- e. Counsel should be knowledgeable of the factors in Wis. Stat. §48.426(3). Counsel should gather evidence and present the client's case in light of the factors.
- f. Counsel should present an alternative dispositional plan, including alternatives outlined in Wis. Stat. §48.427.
- g. Counsel should present all mitigating and favorable information regarding the client to the court, including evidence of client's achievements and progress after the filing of the petition. This evidence should be presented through documents, photographs and testimony of the client and other

- witnesses. Potential mitigating and favorable information includes medical, psychiatric, psychological, social, employment and educational information.
- h. Following disposition, counsel should discuss the court's decision with the client.

#### **14. Appeal**

- a. Counsel should request ongoing visitation or contact orders during the appellate process.
- b. Counsel should review the court orders to ensure accuracy and clarity.
- c. Counsel should establish a proper record for appellate review throughout the fact-finding and disposition phases, including but not limited to:
  - i. Making appropriate objections to testimony or information in any reports or prior orders that are sought to be admitted into evidence;
  - ii. Making appropriate offers of proof regarding excluded evidence;
  - iii. Making appropriate motions to preserve issues for possible appeal.
- d. Counsel should discuss the possibility of appeal with the client. If the client wants to appeal, it is the obligation of the trial attorney to file a notice of intent to pursue post-dispositional relief within 30 days of the judge's order. Wis. Stat. §§ 809.30(2) and 809.40. Appellate deadlines for privately filed TPRs cannot be extended.
  - i. *Commentary:* The discussion of whether a parent wants to appeal is one that an attorney should have a general idea about the parent's position while litigation is still ongoing. If a parent is unsuccessful and incredibly emotional, immediately after the hearing may not be the best time to have this very important conversation and follow up may be required. If you think that the parent is going to not be in contact following the conclusion of the disposition, you should find out her position on appeal immediately.
- e. If a notice of intent to pursue dispositional relief is filed, counsel should serve the appropriate parties. Counsel should send a copy of the notice of intent, the appellate questionnaire, and all transcripts to the SPD Appellate intake division. Also include updated contact information for the parent.
- f. Once an appellate attorney is assigned, counsel should make available to appointed appellate counsel any documentation from the counsel's file that is necessary or requested by the appellate attorney.

## **Conclusion**

Parents need zealous, knowledgeable and passionate advocates to protect their rights and, in many cases, try to put their families back together. Always reach out to other practitioners who have knowledge of TPR litigation or consult with the Public Defender's website for additional guidance or support when litigating TPRs. Thank you for choosing to represent parents in these difficult cases.

For additional assistance, questions or comments, please contact Wisconsin State Public Defender TPR Practice Group Coordinator, Katie Holtz at (414) 266-1184 or [holtzk@opd.wi.gov](mailto:holtzk@opd.wi.gov)