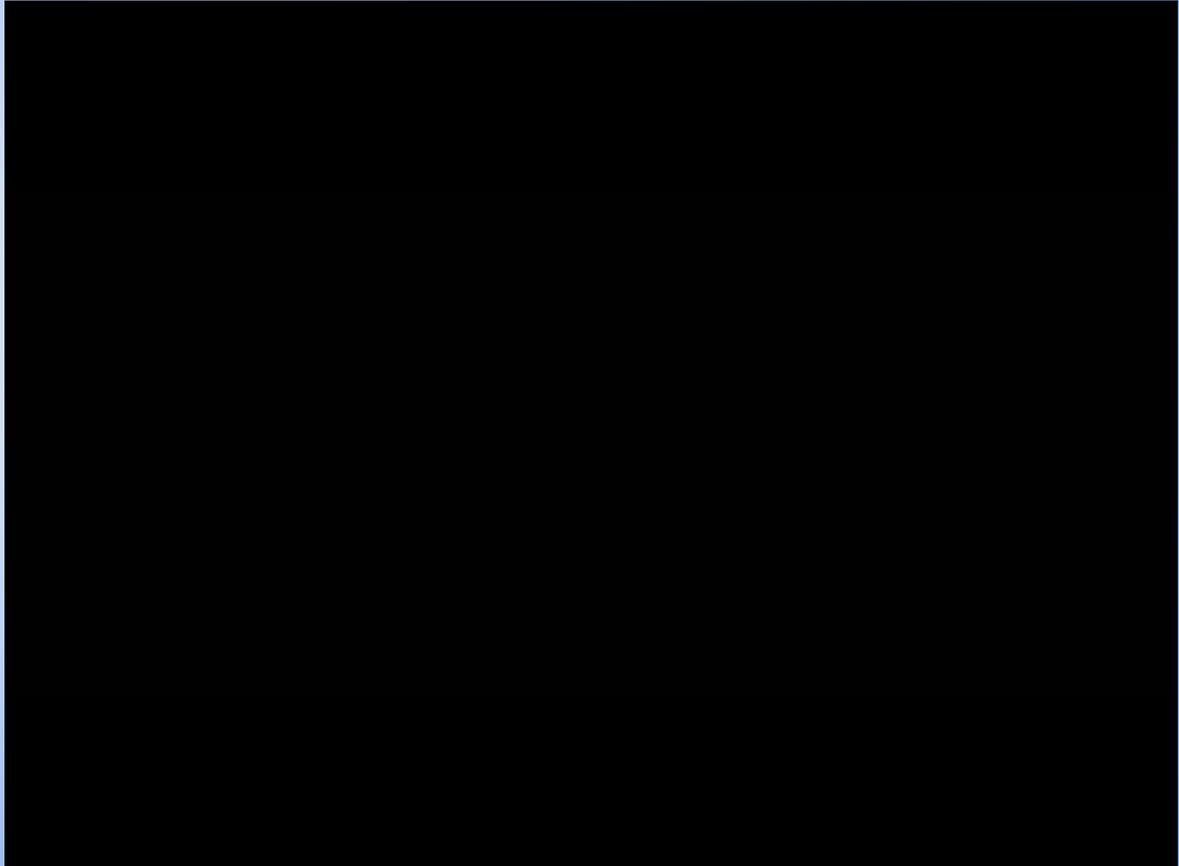


# Preparing and Litigating Motions/Motions in Limine

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# Set the stage right away as a Guardian of the Constitution

<https://drive.google.com/open?id=0B0xNvI12V51LWFhISXlaQTNESEE>



# Boilerplate Motions in Limine

[www.wisspd.org](http://www.wisspd.org)

The screenshot shows a web browser window with the URL [wisspd.org/index.php/legal-resources/specialty-practices/termination-of-parental-rights-tpr/prepare-and-file-motions/initial-motions-to-file](http://wisspd.org/index.php/legal-resources/specialty-practices/termination-of-parental-rights-tpr/prepare-and-file-motions/initial-motions-to-file). The browser's address bar and tabs are visible at the top. The website's navigation menu includes 'HOME', 'FOR CLIENTS', 'ABOUT THE SPD', 'SPD DIVISIONS', 'LEGAL RESOURCES', and 'CONTACT'. A red arrow points to the 'LEGAL RESOURCES' menu item. Below the navigation menu, a list of legal resources is displayed, including 'Authorization to Appear', 'Consolidation of CHIPS cases with TPR Cases', 'Demand for Discovery', 'Demand for Production', 'Demand for Witness List', 'Discovery Demand TPR', 'Discovery Demand TPR - GAL', 'Intake File Request', 'Intake Form', 'Interrogatories to Petitioner', 'Production of Documents', 'Request for Inspection of Records', and 'Respondent's Request for Production of Documents'. The 'Initial Motions & Forms to File' category is highlighted in the left column of the list.

WISCONSIN  
STATE PUBLIC DEFENDERS

HOME FOR CLIENTS ABOUT THE SPD SPD DIVISIONS **LEGAL RESOURCES** CONTACT

Acts/Laws/DHS Standards  
Articles/Websites  
Case Outline  
Past Training Materials  
Prepare and File Motions  
Constitutional Challenges  
Deposition Information  
Initial Motions & Forms to File

Authorization to Appear  
Consolidation of CHIPS cases with TPR Cases  
Demand for Discovery  
Demand for Production  
Demand for Witness List  
Discovery Demand TPR  
Discovery Demand TPR - GAL  
Intake File Request  
Intake Form  
Interrogatories to Petitioner  
Production of Documents  
Request for Inspection of Records  
Respondent's Request for Production of Documents

# At or Before Hearing on Petition

- Motion to View/Copy the CHIPS file
  - Talk to petitioner and GAL first; assume no objection
  - Some counties/judges want these to be filed in the TPR case; some want them filed in the CHIPS case. Since you are appointed in TPR case, argue/assert for the former
  - Need to do this as soon as possible so that you can start gathering information right away, especially in Continuing-CHIPS cases
  - Releases of information are insufficient to get all the information you need

## At or Before Hearing on Petition

- Motion to Dismiss the Petition
  - Does the petition allege all of the necessary facts that, if true, would meet the burden to prove grounds for TPR?
  - Especially important in privately-filed TPR cases
  - Even if the petitioner may just amend or re-file, still may be worth filing this motion

# At or Before Hearing on Petition

- Motion to Vacate Default Judgment
  - Wis. Stat. § 806.01 (relief from judgment)
  - *Johnson v. Allis Chambers Corp.*, 162 Wis. 2d 261, 470 N.W.2d 859 (1992) (describes relief from default for non-appearance)
    - Court should grant relief from default judgment if non-appearance was not in *bad faith* or *egregious*

# At or Before Hearing on Petition

- Visitation Motion
  - Reinstate/Increase
  - Provide Transportation
  - Family Visits (Siblings, Family, Relative)
- Substitution
- Motion to Interview Child
- Motion to Order Client's Appearance at Hearings

## Early On/Information Gathering

- Think creative ways to get information via discovery:
  - Getting info from the GAL?
    - Interrogatories on the GAL? (What is the GAL's position on every element?)
    - Production of GAL's documents? (Does a privilege exist? Can the GAL keep stuff via attorney-work product?)

## Early On/Information Gathering

- Good discovery requests:
  - Witness lists (don't be caught surprised by an expert later on; ask for witness list in discovery + experts so that you have the opportunity to depose)
  - All documents not otherwise contained in CHIPS file (emails, notes, communication between foster parents and Dept., communication within/between Dept.)

# Dispositive

- Summary Judgment:
  - Wis. Stat. § 802.08
    - Is there anything you find in discovery that you could show is, per se, not “reasonable” under Wis. Stat. § 48.415(2)? Might be worth a shot...
  - What is the role of the permanence and concurrent goals in relation to “reasonable efforts”? Could this be a basis for summary judgment?

# Dispositive

- Motion to Dismiss: Due Process Violations
  - *Jodie W.*
    - Does this motion belong in the CHIPS case?
    - Is *Jodie W.* even worthwhile case law anymore?
      - Unpublished, but good example: *State of Wisconsin v. Abigail W.*, 2011 WI App 244, 332 Wis. 2d 318, slip op.
        - Everyone conceded that conditions of return were impossible for the parent to meet, yet TPR was upheld

# Dispositive

- Motion to Dismiss: Due Process Violations
  - Clean Hands Doctrine?
    - *State v. Kaczmariski*, 2009 WI App 117, 320 Wis. 2d 811, 722 N.W.2d 702
      - “[S]ubstantial misconduct” occurs when a party “has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction.”
    - What did the Department and/or Petitioner do to help their own case?

# Dispositive

- Motion to Dismiss: Due Process Violations
  - *Shannon R.* (Matt's favorite TPR case)
    - “The due process protections of the 14th Amendment apply in termination of parental rights cases.”

# Dispositive

- Motion to Dismiss: Due Process Violations
  - *Shannon R.*, ¶ 62 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)):

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the fact-finding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis of the termination.

# Dispositive

- Motion to Dismiss: Due Process Violations
  - *Stacey P.* in Continuing CHIPS cases:
    - 2012 WI App 88, slip op at ¶ ¶ 8-9 (Matt's second favorite TPR case); *see also 2015 Wisconsin Jury Instructions-Children 324, Involuntary Termination of Parental Rights: Continuing Need of Protection or Services*
      - “Post-Petition Efforts of County Agency”

# Dispositive

- Is it fair if the prosecutor claims an attorney client relationship with the social worker?
  - Denial of access of relevant information? *Stacey P.* and *Shannon R.*
  - Prosecutor as witness? *Stacey P.*, *Shannon R.*, and ethics rules
  - Corporation Counsel's Duties: Ch. 59 vs. Ch. 48
  - Clean hands? Interfering with the facts of the case (especially in continuing-CHIPS cases)

# Dispositive

- Is it fair if the prosecutor claims an attorney client relationship with the social worker?
  - Is it okay for the prosecutor to claim privilege when it fits his/her purposes?
    - Milwaukee Co. and Dane Co. examples

# Dispositive

- Special Prosecutor
- Immigration/Deportation
- Equal Protection

# Motion to Sever

- Your parent has a bad case and wants other parent to at least have a shot.
- Mom has restraining order against dad.
- Your client is victim of other parent.
- Other parent has multiple children being TPR'd, but that aren't all your client's children also.
- Any ideas???

# Motions in Limine

- Some basics:
  - Jury strikes: GAL and Petitioner to share; should parents share?  
*In the Interest of: C.E.W.*, 124 Wis. 2d 47, 368 N.W.2d 47 (1985)
  - No reference to counsel as “appointed counsel” or “public defender”
  - *Daubert* hearing prior to any witness testifying as an expert
  - Call certain witnesses adversely

# Motions in Limine

- Some basics:
  - Social workers are not experts. *Daubert*.
    - *In re: J. B.-A.*, 2017 WI App 21, slip op.
      - Even though it was harmless error, a social worker should be able to give lay opinion, not expert opinion on 9-mo. projection question. Wis. Stat. § 907.01.
    - *In the Interest of: D.S.P.*, 166 Wis. 2d 464
      - Social workers able to be qualified as expert

# Motions in Limine

- Some basics:
  - Existence and admissibility of criminal convictions
  - Recording all of the proceedings
  - Sequestration of witnesses
  - Exclude references to the best interests of the child. *In the Interest of: C.E.W.*, 124 Wis. 2d 47, 368 N.W.2d 47 (1985)
  - Limiting the scope of possible evidence by dates (date of removal/petition in continuing-CHIPS)

# Motions in Limine

- Getting creative?
  - Where should the social worker sit?
  - Where should the GAL sit?
  - Exclude litigation in the underlying CHIPS case. See Wis. Stat. § 48.415(4) (only statute requiring the respondent go to court to try to get more visits)
  - Ensure that *each* condition of return can be litigated, not just the “conditions of return” as a whole
  - Things that happened before TPC
  - Criminal Record

# Jury Instructions

- Write special instructions
  - Mitigate no contact
  - Mitigate failure to assume
  - Telephone/Video Testimony
  - Custody

# Applying to the Fact Pattern:

What are some motions in limine that you could file:

- At or before the hearing on the petition?
- Early on; to gather information?
- As dispositive motions?
- As motions in limine before trial?

# In Conclusion...

Motions in limine are super important because...

- They shape the evidence that comes in at trial;
- They can tease out legal issues that may help win a case or limit the prosecutorial options of the case; and
- They protect issues for appeal.