Representing Parents in Child Welfare Cases

Vivek Sankaran
University of Michigan Law School, vss@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/374

Follow this and additional works at: https://repository.law.umich.edu/book_chapters

Part of the Family Law Commons, and the Legal Profession Commons

Publication Information & Recommended Citation

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases

3rd Edition

Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran
General Editors

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN
Aurora, Colorado
Chapter 30

REPRESENTING PARENTS IN CHILD WELFARE CASES

Vivek S. Sankaran

SYNOPSIS

§ 30.1 INTRODUCTION

§ 30.2 THE ROLE OF PARENT’S COUNSEL

§ 30.2.1—Trust
§ 30.2.2—Defining The Client’s Goals
§ 30.2.3—Defining The Scope Of Representation
§ 30.2.4—Institutional Pressures
§ 30.2.5—Representing Non-Offending Parents

§ 30.3 THE PRELIMINARY HEARING

§ 30.3.1—Eliciting Information
§ 30.3.2—Client Counseling
§ 30.3.3—Negotiating
§ 30.3.4—Courtroom Advocacy

§ 30.4 PRE-ADJUDICATION PROCEEDINGS

§ 30.4.1—Pre-Adjudication Counseling
§ 30.4.2—Maximizing The Parent’s Opportunity To Receive Agency Services

1. Vivek S. Sankaran, J.D., CWLS, is a clinical assistant professor of law in the Child Advocacy Law Clinic and Director of the Detroit Center for Family Advocacy. Professor Sankaran’s research and policy interests center on improving outcomes for children in child abuse and neglect cases by empowering parents and strengthening due process protections in the child welfare system. Professor Sankaran sits on the Steering Committee of the ABA National Project to Improve Representation for Parents Involved in the Child Welfare System and chairs the Michigan Court Improvement Project subcommittee on parent representation.
§ 30.1 INTRODUCTION

A parent's constitutional right to raise his or her child is one of the most venerated liberty interests safeguarded by the Constitution. The law presumes

2. See, e.g., Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Michael H. v. Gerald D., 491 U.S. 110, 123-24 (1989) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); Prince v.
parents to be fit, and it establishes that they do not need to be model parents to retain custody of their children.\(^3\) If the state seeks to interfere with the parent-child relationship, the Constitution mandates: (1) that the state prove parental unfitness, a standard defined by state laws, and (2) that the state follow certain procedures protecting the due process rights of parents. The constitutional framework for child welfare cases is premised upon the belief that the interests of children are best served when children are in their parents’ custody. For that reason, the state’s evidence of parental unfitness must satisfy a high burden before the state may interfere with or permanently sever the parent-child relationship.

Attorneys who represent parents in child protective proceedings play a crucial role in safeguarding these liberty interests. This role manifests itself in many ways. Similar to criminal defense attorneys, parents’ attorneys protect their clients from unjust accusations, ensure that their clients receive due process protections, and ensure that the system gives their clients the chance to take advantage of its protections. In situations where temporary removal occurs, advocacy by parents’ counsel can expedite the safe reunification of the family by ensuring the prompt delivery of appropriate services to the family and by counseling parents about the ramifications of the choices they must make. If the parent is unable to care for the child, a parent’s lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship or an adoption, which will advance the parent’s interests. In these and other situations, strong advocacy on behalf of parents furthers the best interests of children and improves outcomes for both children and their families.\(^4\)

---


3. See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

§ 30.1 Child Welfare Law and Practice

The challenges confronting parents’ attorneys are daunting. Parents involved in child welfare cases often face a host of seemingly insurmountable issues, which transcend child welfare, including poverty, substance abuse, mental illness, and domestic violence. Those problems can make it difficult for an attorney to earn the client’s trust and develop a successful litigation strategy. The attorney must master complex federal and state child welfare laws and become familiar with related laws in areas such as adoption, guardianship, and special education. The attorney must also engage in cooperative problem-solving with a number of stakeholders, which can include the child protection authorities, the child’s attorney or guardian ad litem (GAL), tribal representatives, CASA, and the court. But the attorney must always hold the client’s interests paramount, which may necessitate formal and assertive courtroom advocacy. Too often, parents’ attorneys must do all of this while receiving low compensation, handling high caseloads, and enduring criticism that their advocacy somehow harms their clients’ children. These and other challenges make representing parents among the most difficult and important areas in which to practice law.

§ 30.2 • THE ROLE OF PARENT’S COUNSEL

In many ways, the role of the parent’s attorney is no different than that of any attorney representing a client. Rules of professional conduct adopted in each state establish the basic parameters of the attorney-client relationship. An attorney must zealously advocate on behalf of his or her client and maintain an undivided loyalty to the client’s interests, regardless of the attorney’s personal beliefs. The attorney must act with “reasonable diligence and promptness in representing a client” and must not knowingly reveal a confidence or secret of a


7. See Model Rules of Prof’l Conduct R. 1.7 cmt. (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).

client except in narrowly defined circumstances. Most rules of professional conduct require joint decision-making by the attorney and the client. While the client has the ultimate authority to determine the goals of the representation, the attorney typically decides how best to accomplish those goals after consulting with the client. Since a clear distinction between the client’s objectives and the tactical means to accomplish them frequently cannot be drawn, in many cases the client-lawyer relationship partakes of a joint undertaking.

These and other requirements define the relationship between a parent’s attorney and the parent. The requirements remain the same regardless of whether the attorney is appointed by the court or retained, and regardless of how much the attorney is paid. The interests and wishes of the client always remain paramount. Any attorney engaging in this work must read and understand the applicable rules of professional conduct adopted in his or her jurisdiction.

While having the same ethical obligations as all other lawyers, parents’ attorneys confront unique challenges when representing their clients. These challenges are discussed in the next several sections.

§ 30.2.1—Trust

Establishing mutual trust is crucial in forming any good attorney-client relationship. Trust allows clients to honestly discuss the facts of their cases, and it enables attorneys to render candid advice. Yet parents’ attorneys often find it difficult to develop a trusting relationship with their clients. Forming such a relationship takes time and can rarely be achieved in the initial meeting.

Most of the parents come from traditionally disadvantaged populations. Additionally, parents accused of child maltreatment may be frightened and may

11. See Model Rules of Prof’l Conduct R. 1.2 cmt.
13. Statistics reveal that most families affected by the child welfare system are poor. According to the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4), poor children were over three times more likely to be abused and over seven times more likely to be neglected. Andrea J. Sedlak et al., United States Department of Health and Human Services, The Fourth National Incidence Study of Child Abuse and Neglect: Executive Summary 12 (2010). Additionally, African-American children are disproportionately affected by the foster care system even though no evidence exists that African-American parents are any more likely to abuse or neglect their children. Despite only comprising 12 percent of the population, according to the 2000 Adoption and Foster
appear hostile and confrontational. In responding to the petition and, in many cases, the actual removal of their children by Children’s Protective Services, parents may distrust the child welfare system’s authority figures, including their own attorneys.

Parents typically meet their attorneys for the first time in the courthouse immediately prior to or just following their initial removal hearing. In all likelihood, the attorney who represents them was appointed (and will be paid) by the same court that authorized the children’s removal. In the parent’s mind, the attorney may appear as just another member of the establishment responsible for the child’s removal from the home. The parent’s attorney must recognize the barriers created by this.

To remove those barriers, the attorney must, immediately upon appointment, clearly explain to the parent that the attorney’s job is to represent the parent’s interests, and that the attorney’s loyalty lies completely with the parent, not with the court or the agency. But words alone will not engender trust. The attorney must be mindful of how the client perceives the attorney’s actions. Taking some visible action on behalf of the client very early in the representation — for example, making positive statements about the parent to the caseworker or the court — may help to establish a trusting relationship. In court, the attorney must never make any disparaging comments about the client; in addition to being unethical, it will undermine the client’s still-tentative confidence in counsel. Even counsel’s casual conversations outside the courtroom with caseworkers, opposing counsel, or court staff may be interpreted by parents as signs that the attorney is working against their interests, even if those conversations are unrelated to their case. Acknowledging that these relationships exist and can be beneficial to the parent can often help mitigate these fears. In the early stages of the relationship, even the appearance of divided loyalties may irreparably impair the client’s trust.

allegations. Instead, the attorney should empathize with the client and, if appropriate, validate the client’s emotional reaction to the situation. This will help to establish rapport with the client, which is a primary goal of the initial interview. Counsel should then use broad, open-ended questions to elicit information from the parent, reserving more specific questions about the case until after the client has had a full opportunity to tell his or her story.

Counsel must seek information about the parent’s family and should consider constructing a chart or genogram 14 to obtain a clear understanding of the extended family. Even though a parent may not be willing to disclose names of relatives or extended family, early engagement of this support network can be the most effective tool a parent’s attorney can employ to support the parent through this process and ensure a continued connection to the child should reunification fail.

The attorney should close the first interview by demonstrating an understanding of the client’s goals and priorities, reviewing the next steps to be taken by both the client and counsel, and ensuring that the client knows how to reach the attorney. Throughout this process, counsel must reassure the client that, subject only to a few very limited disclosure exceptions, all conversations with the attorney are confidential. 15

Meeting with the client on multiple occasions, especially at locations away from the courthouse, can be crucial to the trust-building process. In addition to meeting in the attorney’s office, attorneys should meet with clients in places that are comfortable to the client, such as the client’s home, or public buildings with private rooms, such as a library. Letting the client choose the meeting location will help empower the client and reduce tension early in the relationship.

Once earned, the parent’s trust must be maintained. The attorney must stay in close contact with the client, which requires making and returning phone calls, scheduling regular meetings outside of court, and sending the client letters and copies of court orders. During each conversation, the attorney must carefully

14. A genogram is a graphic representation of the family tree with space for additional information related to a family. A program called GenoPro permits a lawyer to diagram the family tree, keep track of different individuals in the family, and update it as relationships change. Genealogy Software: GenoPro, www.genopro.com.

15. Model Rules of Prof’l Conduct R. 1.6. For example, under the Model Rules, an attorney may disclose information to “prevent reasonably certain death or substantial bodily harm.”
§ 30.2.1

Child Welfare Law and Practice

listen to the client’s concerns before recommending the course of action that will best serve the client’s interests. Providing information will also help to build and maintain trust. Sharing documents such as petitions, agency reports, motions, and court orders not only provides the client information he or she should have, but takes away some of the mystery of the court process and demonstrates that the attorney is working for the client. Explaining as fully as possible what the client should expect at each stage of the proceeding may make the situation less intimidating and avoid surprises. Letting the client know the attorney’s strategy at various points also encourages the client to see the work as a collaborative effort and to see that his or her position is being represented vigorously.

By taking these steps, the attorney will show that the parent’s wishes and needs are paramount, and that open and honest communication will enhance the quality of the attorney’s representation.

§ 30.2.2—Defining The Client’s Goals

Soon after the case begins, parents’ attorneys must help their clients define their goals. The typical overarching goal — reunifying the family — may be obvious, but the attorney must also identify the client’s numerous short and long-term goals on issues such as placement, visitation, and services. Even if the client denies the allegations in the petition, will the client participate in services such as a parenting class? If the children cannot be returned home immediately, where should they live while the case proceeds? What type of visitation should occur? Is anyone else available to supervise those initial visits? What frequency of sibling visits does the parent prefer?

The parent’s attorney must help the client establish realistic goals for the representation. To that end, the attorney should provide objective feedback about the client’s stated goals, and guide the client toward goals that can be achieved. For example, where the evidence clearly shows that the parent seriously abused the child, the parent should not expect immediate reunification. Most parents want their attorney to analyze the likelihood of achieving their short- and long-term goals. Therefore, parents’ attorneys must provide objective, carefully considered advice.

The attorney must also ascertain the extent to which the client wants the case to focus on the past or the future. This decision will significantly affect how the attorney handles the case. If the case is about the past — that is, about the veracity of the agency’s allegations against the parent — then the pre-jurisdictional stage of the child protective case may resemble a criminal
proceeding. The parent’s attorney will act like defense counsel, trying to exonerate the client with the hope of obtaining a dismissal. In that situation, an attorney may take a more adversarial approach to the case, focusing on the traditional aspects of civil litigation such as formal discovery, depositions, and the trial.

On the other hand, many clients will decide that they do not want to focus on the past, preferring instead that the case be about the future. If so, then the parent’s improvement becomes the goal and the attorney will try at every opportunity to demonstrate to the court and the agency that the parent has made progress and now can care for the child. Rather than pursuing the more adversarial techniques discussed above, this litigation strategy may acknowledge the court’s jurisdiction and shift immediately to cooperative problem-solving and the parent’s participation in services.

In other words, exonerating a parent may entail a different legal strategy than addressing the deficits identified by the court and the agency. For both, the goal is to reunify the family, but the attorney’s strategy and tactics will differ markedly. In the abstract, one cannot determine which approach will be best for a client. A parent will likely elect to incorporate elements of both. But the one indispensable step is for the attorney to meet with the client to establish the parent’s individualized goals and priorities.

Regardless of the client’s specific litigation strategy, the parent’s attorney should try to foster a healthy relationship between the client and the caseworker. That will benefit even those parents who disagree with the agency’s actions and decide to challenge the factual and legal bases for the court taking jurisdiction over the child. A strong, working relationship with the caseworker will make it easier to negotiate disputes regarding placement, visitation, and services to the family, which the courts often cannot resolve quickly unless the parties have already agreed on how to resolve them. The attorney must explain that it is often in the parent’s interests to cooperate with the caseworker despite their disagreements on some specific issues. The attorney should express understanding of the challenges of working with the caseworker, but help the parent consider whether to risk the consequences of having a confrontational dynamic with a person who may greatly influence the direction of the case. The attorney should offer to intervene if the parent is having trouble working with the caseworker and encourage the parent to voice concerns to the attorney first if it is difficult to do so constructively with the caseworker.
§ 30.2.3—Defining The Scope Of Representation

Defining the scope of the legal representation presents another challenge for parents' attorneys. Typically, parents' attorneys become involved in the case after receiving an appointment from the court. The appointment order will likely authorize legal advocacy both inside and outside the courtroom provided that the advocacy relates directly to the child welfare case. Yet, attorneys who do this work recognize that resolving collateral legal disputes and related issues can significantly affect the child welfare case. For example, a parent may need an attorney to file for custody or establish paternity, to provide criminal defense consultation, to expunge the parent's name from the central registry of child abuse and neglect, or to advocate for both the child and the parent in special education hearings. Without legal assistance on these collateral issues, the parent may not be able to take the necessary steps to move the child welfare case forward. Unfortunately, in many jurisdictions, court-appointed parents' attorneys do not get paid for assisting clients in these separate-but-related matters. Consequently, court-appointed parents' attorneys often confront the question, "How much more should I do for my client?"

Beyond representing the parent in the child welfare proceeding, which the appointment order typically mandates, each attorney must determine the scope of the representation and explain to the client exactly which other activities the attorney can and will undertake. This determination should be reflected in writing. Sometimes just a little work by counsel can make a huge difference in the child welfare case. Some examples include helping the client fill out standard court forms or merely advising a client on how to proceed in a related matter. If the attorney cannot directly assist the parent in the collateral matter, then the attorney should attempt to locate another lawyer, perhaps at a legal aid organization, to help the client. At a minimum, the attorney must try to provide the client with sufficient direction to enable the client to address the collateral legal issue without an attorney's assistance. Parents' attorneys must think broadly about their client's goals and act creatively to achieve those goals, even if that entails advising the client to pursue other legal avenues such as custody, adoption, or guardianship. These small counseling steps, taken when the attorney cannot do more, may help resolve the child welfare case.

§ 30.2.4—Institutional Pressures

Parents' attorneys often face enormous institutional pressures to undermine their own clients' interests. For example, low compensation and high caseloads discourage active advocacy. Parents' attorneys may also face pressures to convince their clients to enter a plea giving the court jurisdiction rather than
take a case to trial. This pressure may be compounded by a perceived need to please the judge, who may control the attorney’s appointments in future cases. Even worse, parents’ attorneys who press their clients’ arguments aggressively may be chastised by other parties or outside observers who believe that the parent’s goals conflict with what they deem is the child’s best interests.

Regardless of these pressures, parents’ attorneys must remember that their paramount obligation, under the rules of professional conduct, is to zealously advocate on behalf of their client. This responsibility remains despite external constraints such as low fees or pressure from third parties. If an attorney feels unable to fulfill his or her ethical responsibilities to the client, the attorney must immediately request permission to withdraw from the case. Under no circumstances do the rules of professional conduct permit an attorney to deviate from the basic requirements set forth in those rules.

§ 30.2.5—Representing Non-Offending Parents

While the bulk of this chapter is geared towards representing parents accused of abusing or neglect their children, attorneys may find themselves representing non-offending parents, that is parents who have not been adjudicated by courts to have abused or neglected their children in any way.

When representing a non-offending parent, counsel must first determine whether their client has legal rights to the child, which is an issue when representing unmarried, non-custodial fathers.\(^\text{16}\) The Supreme Court has stated that these fathers have rights protected by the Constitution when they maintain a sufficient involvement in their children’s lives. “When a father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause.”\(^\text{17}\) For example, in *Caban v. Mohammed*, the Court struck down a New York law that denied a father the right to object to an adoption to which the biological mother had already consented.\(^\text{18}\) The Court held that since the father was as involved in the children’s upbringing as their mother, both parties had to be treated equally.\(^\text{19}\) But in *Lehr v. Robertson*, the Supreme Court upheld a New York law that did not require an unmarried, non-custodial father to be notified of his child’s impending adoption

---

16. Fathers married to the child’s mother at the time of birth are presumed to have legal rights to the child.
19. *Id.* at 389.
because the father did not take meaningful steps to establish a parental relationship with his child.\textsuperscript{20} In \textit{Lehr} and other similar cases, the Supreme Court has prevented unmarried fathers who failed to make efforts to establish a relationship with their children — commonly referred to as putative fathers — from using the Constitution to disrupt the child’s permanent placement.\textsuperscript{21}

Although the Supreme Court has never listed the specific actions a putative father must take to establish his constitutionally protected interest in his child, its rulings clarify that the rights of fathers who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness. State courts often consider a number of factors to determine if a putative father has established a relationship with the child, including whether he: paid child support or provided other assistance to the mother, visited or lived with the child, sent the child card or gifts, attended school meetings or took the child to doctor appointments, or listed his name on the birth certificate.\textsuperscript{22}

In addition to providing guidance as to when relationships between unmarried fathers and their children are constitutionally protected, the Supreme Court has said that states must give all fathers the opportunity to establish parental relationships by allowing them to claim their interest in the child soon after the child’s birth.\textsuperscript{23} States have created several ways for fathers to assert parentage. In some states, unmarried fathers have to file an affidavit of paternity jointly with the child’s mother\textsuperscript{24} or institute a paternity suit.\textsuperscript{25} Others use putative father registries to let unmarried fathers assert their interests.\textsuperscript{26} State practices vary on this issue, and attorneys representing fathers must know the options available to their clients in their state. Many courts have found that an unmarried father’s

\textsuperscript{20} \textit{Lehr}, 463 U.S. at 248.
\textsuperscript{22} See, e.g., \textit{In re A.A.T.}, 196 P.3d 1180, 1194 (Kan. 2008) (noting that “to determine if a natural father of a newborn child has taken diligent, affirmative action, courts measure the putative father’s efforts to make a financial commitment to the upbringing of the child, to legally substantiate his relationship with the child, and to provide emotional, financial, and other support to the mother during the pregnancy.”). In the decision, the Kansas Supreme Court details case law from other jurisdictions on this issue.
\textsuperscript{23} \textit{Lehr}, 463 U.S. at 262-63.
\textsuperscript{26} See, e.g., Ohio Rev. Code Ann. § 3107.062; Fla Stat. § 63.054.
failure to comply with state procedures constitutes a permanent waiver of the father's rights to his child.\textsuperscript{27} As the discussion above suggests, the extent of fathers' parental rights is often unclear, and the attorney may need to help fathers take steps to solidify and protect their rights.

Assuming that the non-offending parent has legal rights to the child, counsel must understand that their clients have a substantive due process right to direct the care, custody, and control of their children. In \textit{Stanley v. Illinois},\textsuperscript{28} the United States Supreme Court specifically found that a parent's constitutional right to direct the care of his or her children extends to non-offending parents. At issue in \textit{Stanley} was an Illinois law which permitted the State to automatically place the children of unwed fathers in foster care upon the death of their mother without having to make any finding that the fathers had harmed their children.\textsuperscript{29} The State argued that proof that an unmarried mother of a child was dead was enough to separate the children from their father. The State sought to shift the burden of proving parental fitness onto the non-offending father whom it said could prove his ability to care for the child by filing for guardianship or adoption, proceedings in which he would be treated as a legal stranger to the child.\textsuperscript{30}

The Supreme Court rejected the argument and held that the Constitution required, as a matter of due process, that the father have a "hearing on his fitness as a parent before his children were taken from him."\textsuperscript{31} The Court found that the State's interest in presuming the unfitness of all unmarried fathers and efficiently disposing of their rights did not outweigh the constitutional interests of the father. The Court stated:

\begin{quote}
Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the
\end{quote}


\textsuperscript{28} Stanley v. Illinois, 405 U.S. 645 (1971).

\textsuperscript{29} Id. at 646.

\textsuperscript{30} Id. at 647.

\textsuperscript{31} Id. at 649.
important interests of both parent and child. It therefore cannot stand.\textsuperscript{32}

The Court made clear that infringing upon a non-offending parent's right to custody of his or her children is strictly forbidden under the Constitution absent a judicial determination of parental unfitness.

Other decisions have made clear that the constitutionally required unfitness finding cannot be satisfied if a court makes an unfitness finding against the other parent. In \textit{Parham v. J.R.},\textsuperscript{33} the Supreme Court noted that "[t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."\textsuperscript{34} Federal appellate decisions have made similar findings.\textsuperscript{35} These decisions make clear that as a matter of federal constitutional law, non-offending parents have a substantive due process right to care for their children that cannot be interfered with by the State absent a finding of unfitness.

Despite this case law, across the country, states vary on whether and how they safeguard the rights of non-offending parents. In fact, many states have enacted statutes or created practices that disregard the constitutional rights of non-offending parents in some way.\textsuperscript{36} For example, several states permit courts to strip non-offending parents of legal and physical custody immediately upon a finding that the other parent has abused or neglected the child.\textsuperscript{37} In these jurisdictions, immediately upon a finding against one parent, a trial court can

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{32} Id. at 656-57.
\item \textsuperscript{33} \textit{Parham v. J.R.}, 442 U.S. 584 (1979).
\item \textsuperscript{34} Id. at 603.
\item \textsuperscript{35} See, e.g., \textit{Burke v. County of Alameda}, 586 F.3d 725, 733 (9th Cir. 2009) (holding that where the noncustodial parent was not accused of wrongdoing and the State failed to investigate the possibility of placing his daughter with him rather than the government, a reasonable jury could find his constitutional rights were violated); \textit{Wallis v. Spencer}, 202 F.3d 1126, 1142 n. 14 (9th Cir 2000) ("The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct — real or imagined — of the other parent.").
\end{itemize}
\end{footnotesize}
obtain temporary custody of the child and can issue any order it deems is in the child’s best interest. Even without a finding of unfitness against the non-offending parent, the court can place the child in foster care, can compel the non-offending parent to comply with services, and can order the termination of that parent’s rights based solely on his or her failure to comply with those services. These systems treat non-offending parents as legal strangers to the child, and place the burden on them to prove to the court that it is in their children’s best interest to be placed with them. In these jurisdictions, Supreme Court precedent has played little impact in shaping the jurisprudence involving non-offending parents.

Other jurisdictions have adopted a more nuanced approach while continuing to deprive non-offending parents of their full custodial rights.\(^{38}\) In these states, judges recognize that parents have the right to care for their children but only apply that right with regards to physical custody. Absent a finding of unfitness, non-offending parents are granted physical custody of their children, but the court still retains legal custody, \textit{that is, the authority to make decisions regarding the child, and can order the non-offending parent to comply with services. Though safeguarding the physical custody rights of non-offending parents, these systems intrude on their right to make decisions regarding their children.}

Two states, Maryland and Pennsylvania, have recognized that non-offending parents have constitutionally protected rights and have adopted a very different approach.\(^{39}\) In these states, if a non-offending parent steps forward and requests custody of his or her child, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child. The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the non-offending parent before dismissal. Once the transfer of custody is made, all court involvement or oversight must be terminated.

Finally, in Michigan and Nevada, the highest courts have held that while a court can obtain jurisdiction over a child based solely on findings against one parent, it cannot use its dispositional authority to order the non-offending parent to comply with services or place his or her child in foster care absent a finding


against that parent.\textsuperscript{40} This approach allows the juvenile court to issue orders pertaining to the abusive parent while protecting the constitutional rights of the non-offending parent.

Counsel representing a non-offending parent must first conduct a comprehensive interview of the client to identify the client's goals. Does the client want immediate placement of the child? Does he or she want the right to see the child? Or does he or she wish to release his or her parental rights? Without knowing answers to these and other related questions, counsel cannot develop a strategy to further the client's goals.

In addition to identifying the client's goals, the interview can also further the fact investigation that must occur to learn more about the client's circumstances. Was the client involved in the child's life previous to the abuse or neglect case? In what way? What are the client's strengths? Who are individuals in the community who can speak on the client's behalf? What concerns exist? How will counsel address those concerns? Counsel must investigate the facts of the case, beyond just the interview of the client, to ensure that he or she is well positioned to advance the client's goals.

If the client wishes to remain involved in his or her child's life — either by caring for the child full time or by visiting the child — then counsel should consider adopting a dual strategy. First, he or she should pursue a traditional litigation strategy to persuade the trial court to safeguard the constitutional rights of the client. Counsel should consider filing a motion for immediate placement or visitation, highlighting the fact that no findings of abuse or neglect have been made against the client. The motion should rely on constitutional case law, such as \textit{Stanley v. Illinois}, and should seek to convince the court that the Constitution mandates an immediate return of the child to the non-offending parent absent a finding of unfitness. As noted above, recent decisions in Michigan and in Nevada may be helpful to review. Counsel should also explore state law grounds to support this position. Filing such a motion is also important to preserve issues for appeal.

In addition to relying on legal arguments in the motion, counsel should also establish in the motion how placing the child with the non-offending parent is good for the child. Detailing the previous relationship between the child and the parent, highlighting the strengths of the parent, and addressing any weaknesses are crucial.

Counsel should consider attaching affidavits from respected members of the community, such as teachers, clergy, and employers, in support of the motion and any reports that reinforce the client's commitment to the child. Pure legal arguments, divorced from a factual claim that placing a child with the non-offending parent would be in the best interests of the child, are unlikely to succeed at the trial court level.

If the trial court denies the motion for immediate placement, counsel should consider appealing the adverse decision. Whether to do so will rest on a number of variables, including the likelihood that the child will be returned to the client quickly, the length of time of the appeal, and any negative consequences that may be incurred by pursuing the appeal, including a loss of momentum in the case. Ultimately, the client will have to weigh those factors and make a decision.

While pursuing this litigation strategy, counsel should also consider a "softer" approach to demonstrate to the court that the client is committed to the child and to develop a concurrent plan in the event that the court refuses to immediately place the child with the client. This approach may involve facilitating supervised parenting time between the child and the client. It may also require the client to engage in services, such as participating in parenting classes, or submitting to drug screens. While the law may not require the non-offending parent to take such steps, voluntarily cooperating with the child welfare agency may expedite the reunification process and may be the most effective way to achieve the client's goals quickly. Ultimately, the specific approach to recommend to the client will depend on the facts of the case.

In short, counsel representing non-offending parents must recognize that 1) their clients have constitutionally protected relationships with their children; 2) that such relationships must be safeguarded using traditional litigation tactics; but 3) that concurrently adopting a "softer approach" may also be an effective way of quickly achieving the client's goals.

Although child welfare practice and terminology varies considerably pursuant to state laws, the essential stages of the case are similar across jurisdictions. The next sections aim to discuss strategic considerations for parents' attorneys at each stage.
§ 30.3 • THE PRELIMINARY HEARING

In most jurisdictions, at the preliminary or emergency removal hearing, the court decides whether to authorize the agency’s petition and whether to approve the child’s temporary removal from the family home, if the agency has requested removal. This hearing bears some similarity to the arraignment and preliminary examination stages of a criminal case, but can be the most critical determinant of the case’s ultimate outcome. If the court finds probable cause to believe the allegations of abuse or neglect in the petition, then the court will authorize the petition, which may result in a subsequent full-scale proceeding to determine whether the court has jurisdiction over the child.

In most jurisdictions, parents’ attorneys will meet their clients for the first time just before the preliminary hearing. This is hardly ideal, and if counsel is able to meet the client and prepare for the first hearing in advance, he or she should do so. Typically, however, this meeting will take place in the hallway outside the courtroom. The attorney will have very little time before the hearing to discuss the case with the new client, but many decisions of great consequence are made during the hearing. Studies reveal that a natural bias toward preserving the custodial status quo makes courts reluctant to quickly return children to their parents once the court has ordered the child’s removal. After a removal, the barriers to reunification increase and courts may be unwilling to reunify the family until every element of a service plan has been met. In many cases, due to a perceived emergency need for protection, the child will have been removed from the parent’s home even before the preliminary hearing. If so, the preliminary hearing represents the first opportunity to remedy an erroneous removal decision. Regardless of a particular case’s initiating events, what happens during the preliminary hearing may dictate where the child lives for many months. Therefore, strong, zealous advocacy by parents’ attorneys is essential from the outset.

§ 30.3.1—Eliciting Information

Knowledge about the case empowers an attorney to represent a client effectively. Therefore, a parent’s attorney must either meet the parent in advance or make the most out of the brief initial interview with a new client. Counsel

41. See Peggy Cooper Davis & Guatam Barua, “Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law,” 2 U. Chi. L. Sch. Roundtable 139, 139–55 (1995) (observing a “sequentiality effect” in child protective decisions where decision-makers tend to favor the status quo once a child is removed from his or her home).
should acquire basic factual information about the case and advise the client on the decisions that the client must make immediately. The attorney should also obtain the client’s personal information (e.g., date of birth, address, phone number, or membership or eligibility for membership in an Indian tribe or Alaskan Native Village), the client’s version of how the family became involved with protective services, any previous family involvement with the courts or the agency, whether the family currently receives services, whether the child has special needs, and the nature of outside resources available to the family, including alternative placement options if the court orders removal. To elicit this information, the attorney should use open-ended questions calling for narrative answers. More focused, clarifying questions should follow. At the end of the interview, the attorney should retell the story in the attorney’s own words to verify an understanding of the client’s version of the facts.

Also during the limited time available before the preliminary hearing, the attorney must obtain information from other people who are present for the hearing. These may include the Children’s Protective Services worker, family members, and attorneys representing other parties. At a minimum, the attorney must obtain and review a copy of the petition, which usually will have been prepared and filed by an agency worker. A thorough reading of the petition will help the parent’s attorney avoid surprises during the hearing. It also will allow the attorney to negotiate with the other parties to see if any agreements can be reached before the preliminary hearing.

§ 30.3.2—Client Counseling

In addition to gathering information, the parent’s attorney should use the initial client interview to explain the two main decisions that the court will make at the preliminary hearing. First, the court will decide whether to authorize the petition, which is a finding that the petitioner has shown cause to believe that the facts in the petition may be true such that the case may come within the court’s statutorily defined jurisdiction. Second, if the court does authorize the petition, the jurist then will decide where the child will live while the case proceeds to the adjudication phase.

The parent must decide whether to contest the petition’s authorization. To help the parent-client decide whether to contest the petition’s authorization,
the attorney must explain that the preliminary hearing is not a full-fledged trial. Even if the parent waives all objections to authorization, the parent will still have the right to contest the petition's allegations later, during a trial before a referee, judge, or jury, depending on state law. Authorizing the petition only allows the case to go forward; it does not confirm the allegations against the parent.

Challenging the authorization, however, may have negative consequences for the client. The evidentiary showing required of the petitioner at the preliminary hearing is a very low standard of proof. Further, at a preliminary hearing, the petitioner can typically use hearsay evidence to satisfy that burden of proof. Typically, the rules of evidence do not apply at an emergency removal hearing and the testimony of the Children's Protective Services worker may suffice to meet the probable cause standard. Only rarely will a parent be able to convince the court that a petition should not be authorized.

Furthermore, if a parent does contest the authorization decision, that parent may later have difficulty convincing the court or the agency to side with the parent on issues involving placement and visitation. Much of the testimony and argument at a contested preliminary hearing will be devoted to the petition's factual allegations. That will keep the court focused on the alleged abusive or neglectful acts by the parent, which the agency will recount using hearsay evidence that may not be admissible at a later trial. If the court hears that evidence during a preliminary hearing, the court may think less favorably of the parent at all subsequent stages.

Given the possible adverse consequences and the low likelihood of success, contesting probable cause may not be worth the risk. If, however, the allegations in the petition, even if true, seemingly fail to set forth a prima facie case of abuse or neglect, it may make sense for the parent to contest the petition's authorization for that reason. The argument then will hinge on the petition's legal sufficiency, not its factual accuracy. Framing the challenge in legal terms avoids prematurely exposing the court to all the factual details. To determine whether the alleged facts, if proven, are sufficient for the court to assert jurisdiction, the parent's attorney must know the legal standards for the court taking jurisdiction over a child.43

43. If the case involves a party from a different state, counsel should determine where jurisdiction is appropriate under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). See Chapter 19 for more information about the UCCJEA.
The child's placement pending trial is the second main decision that the court makes during the preliminary hearing. The client must understand the distinction between a court's decision to authorize the petition and the separate decision about where to place the child. Even if the court finds probable cause and authorizes the petition, it may also decide that the child should remain in the parent's home. Ideally, when it comes to the placement decision, the court will be looking to assess the risk to the child and the parent's ability to control that risk. The court should be open to strategies that would "remove the danger and not the child." (See Chapter 15, "Child Safety: What Judges and Lawyers Need to Know").

Therefore, before the hearing, the attorney must ascertain whether the parent wants the child back in the home and, if so, whether the parent is willing to accept conditions on the placement. For example, to keep the child at home, will the parent agree to random drug testing or accept agency services such as in-home reunification assistance or parenting classes? If the parent is not the alleged abuser, will he or she help enforce a court order requiring the alleged abuser to leave the home? Is the parent willing to take the children to services such as counseling and medical appointments? The attorney must convey to the client that flexibility when it comes to conditions like those listed above will increase the likelihood that the court will let the child return home. The attorney must convey to the parent that accepting agency services does not indicate that the parent is admitting to the allegations in the petition. Regardless of whether the client accepts services, he or she will have a right to a full evidentiary hearing if the case proceeds as far as an adjudication trial.

The attorney and parent-client should also discuss the parent's options if the court does not immediately return the child to the parent's custody. They should explore other placement possibilities that the parent considers more acceptable than foster care. For example, federal law requires that the court and agency consider placing the child with relatives, which may allow the parent to see the child more frequently and in a more relaxed setting. The attorney and parent should identify relatives, friends, and others who could care for the child temporarily. When considering this type of placement, the court will look at factors such as the proposed caregiver's prior criminal or child protective history, the family's resources, the proposed caregiver's previous involvement in the child's life, and the proposed caregiver's willingness and ability to comply with any restrictions placed on the child's contact with the parent. The attorney and

parent should discuss those factors before the preliminary hearing in order to assess the feasibility of these alternative placement options.

In addition to possible placements, the attorney should discuss visitation issues with the client. What type of visitation would the client like? Where should the visits take place? How frequently should they occur? If visitation time must be supervised, does the client know someone who would be willing to supervise the visits that can pass the agency’s background checks and follow the agency’s rules? When evaluating all of these possibilities, the attorney should view the client as a valuable collaborator who can help develop creative solutions to the various issues.

Unfortunately, initial visitation may not occur often enough, and at first may occur only at the offices of the agency that is supervising the child’s court-ordered placement. If visitation must be supervised, the attorney should at least try to arrange more frequent parenting time in a more family-friendly setting. Several jurisdictions have statutes or standing court orders that dictate the minimum amount of visitation a parent should receive in any case. Frequent visitation is one of the strongest predictors of successful reunification.\(^{45}\) Attorneys must always advocate for as much visitation as possible.

§ 30.3.3—Negotiating

Before the preliminary hearing, in addition to information gathering and client counseling, the parent’s attorney should negotiate with the other parties and their attorneys.\(^{46}\) The Children’s Protective Services worker and the child’s attorney will, in all likelihood, attend the preliminary hearing. In some


46. In some jurisdictions, attorneys may be able to participate in mediation programs or family group conferencing before the preliminary hearing.
jurisdictions, attorneys representing the caseworker, child, and the child’s other parent may also appear. After ascertaining the client’s goals, the parent’s attorney should work with the other attorneys and the caseworker to resolve differences, identify agreements, and try to reach a consensus on how the case should proceed. Stipulations on issues such as authorization, placement, visitation, and services will give the client a greater sense of control over the process. If agreements cannot be reached, having conversations with opposing parties will at least reveal essential information about each party’s position and reasoning. This knowledge will help the parent’s attorney decide what strategy to use at the preliminary hearing.

To summarize the last several sections: the attorney’s three primary tasks before the preliminary hearing are: information gathering, client counseling, and negotiating. Although the time for these activities may be limited, even brief conversations can help the attorney achieve the client’s objectives. The next section focuses on advocacy during the preliminary hearing.

§ 30.3.4—Courtroom Advocacy

The goals articulated by the parent during the first attorney-client meeting will guide the attorney’s advocacy at the preliminary hearing. Under no circumstances should the attorney attempt to advocate on behalf of the client without first having discussed the case with the client and ascertained the client’s position on the major issues. If there has not yet been sufficient time to consult with the client, the attorney should request that the case be “passed” until later that day (to preserve the possibility of the child’s immediate return home) or until a later date (but only if a longer adjournment will allow time for proper preparation).

The preliminary hearing is the attorney’s first chance to introduce the parent and the parent’s story to the court. The court, the child’s attorney, and the agency caseworker will watch the parent’s courtroom actions closely to determine whether the parent seems inclined to respond positively to the judicial intervention and whether the parent will prioritize the children’s interests. The attorney must caution the parent that the parent’s behavior and attitude will be scrutinized closely during the hearing. Behaviors such as hostility toward the caseworker or the judge may delay reunification. The parent’s instinctively hostile or distraught reactions may be understandable or even justifiable, but they will rarely further the parent’s goal of having the children returned. Thoroughly explaining beforehand what will occur during the preliminary hearing will help to prepare and potentially calm the client. The parent’s attorney should also
model appropriate courtroom etiquette for the client by maintaining a professional demeanor while asserting the client’s rights. Additionally, the attorney can provide the client with appropriate opportunities to participate in the court hearing. For example, having a client write down objections to statements made by other parties may minimize the possibility of vocal outbursts when disagreements arise.

Generally speaking, the major issues addressed at the preliminary hearing are: (1) whether to authorize the petition, (2) the child’s placement, (3) visitation, and (4) services for the family. Despite long-standing recommendations to the contrary, due to busy dockets, the preliminary hearing may last for only a few minutes, but the decisions made will lay the foundation for the rest of the case. Parents’ attorneys must ensure that they have opportunities to address each of those major issues, and that the court considers each issue fully and separately. Having a written proposal available for the court and parties may help if the court does not allow sufficient time.

The attorney may need to slow the pace of the hearing to ensure that everyone hears the client’s full story. Judges try to use their bench time efficiently, and that may cause them to conflate the discussion of whether to authorize the petition with the separate discussion of where to place the child if they do authorize the petition. Many judges assume that if they authorize the petition, they almost certainly will place the child in foster care. As explained above, that assumption is incorrect. After authorizing the petition, in most jurisdictions the court must then make a separate determination about where the child will be placed pending trial, which can include returning the child to one or both parents. If the parent wants the child to remain at home or to live with a relative, the parent’s attorney must ensure that the court considers the placement issue fully, separately, and in its proper sequence. Evidence such as report cards, medical records, and statements from teachers, therapists, religious leaders, friends, neighbors, and family members may help the court make those decisions.

Additionally, to assuage the court’s concerns about the child returning to a parent’s home, the parent’s attorney may want to suggest reasonable terms and conditions for a home placement. For example, courts may permit a child to remain in the home if the parents are willing to accept services such as intensive

47. See National Center for Juvenile and Family Court Judges, Resource Guidelines: Improving Practice in Child Abuse and Neglect Cases 42 (1995) (recommending that preliminary hearings last at least 60 minutes to cover basic issues).
in-home reunification programs, parenting classes, and counseling. Each jurisdiction has different service programs that may assist a family in danger of being separated. Parents’ attorneys should become familiar with the local community’s various programs for in-home and preventive services. They should consider all the programs available in the county — not just those typically utilized by the agency. Knowledge of these programs will enable the attorney to expand the court’s placement options at the preliminary hearing. A written proposed safety plan addressing the concerns can be presented to the court and parties.

Parent’s attorneys should always keep in mind that the law requires the agency to make “reasonable efforts” to prevent the removal of the child from the home except in the most extreme circumstances.48 This obligation, stemming from federal law, requires the agency to access community resources that might avoid the need to place the child in foster care. The agency’s failure to make “reasonable efforts” prior to seeking court authorization for a child’s removal constitutes a valid argument against removal and can only lead to a loss of federal funds for the child welfare agency. In the right cases, parents’ attorneys should advance that argument at the preliminary hearing.

The attorney also should explore placement alternatives to the typical foster care placement. For example, the court may order a home placement if a trusted family member or friend offers to move into the parent’s home or to allow the client and the client’s children to move into that relative’s or friend’s home. If the parent was not the wrongdoer, the attorney may request that the court order the actual abuser to leave the home.

The attorney must explain to the client that accepting community services or agreeing to special living arrangements does not represent an admission of wrongdoing or waive the right to a trial. At the same time, the attorney must emphasize the importance of complying with the court’s orders because, in many situations, the only way to keep the child at home will be to identify the court’s concerns and address those concerns by making some concessions.

If the court does order an out-of-home placement, then counsel should advocate for frequent and family-friendly visitation. As with placement issues, the attorney’s role regarding visitation is to expand the court’s options. In many child welfare cases, the standard protocol is to allow parents an hour of supervised

---

visitation per week, with the visits occurring at the agency’s office. This standard practice, in all likelihood, may not suit a particular family’s needs and may even interfere with other case plan requirements, such as the parent maintaining employment. Having the agency supervise visitation may not be necessary. Attorneys should push for unsupervised visits when they can argue that such visits do not pose a danger to the child. For example, many child protective proceedings arise out of poverty-based neglect; in those cases, the issues that led to the child’s removal may be related to the condition of the home. In such situations, day visits, with restrictions on where the parent may take the child, may suffice to protect the child.

Even if visitation must be supervised, the attorney should advocate for options that are more family-friendly and less restrictive than the common arrangement under which the parent and child see each other only at the agency office during regular business hours. For example, relatives, friends, clergy, community members, or foster parents may be willing to supervise the visits. Visits can also take place at nonagency sites such as a library, church, school, or even the client’s home and may take place in the evening or on weekends, when agency supervision is not available.

The court must also determine the frequency of visitation. Studies have shown that frequent visitation significantly increases the likelihood that reunification will occur.49 Parents afforded the opportunity to see their children regularly have an added incentive to comply with the service plan. They receive reassurance that their children are doing well in foster care. Regular visitation also preserves the parent-child bond, which, especially for younger children, has important developmental consequences.50

Services for the family are the fourth major issue (after authorization, placement, and visitation) that may be discussed at the preliminary hearing. If the

49. See supra note 45 (sampling studies on visitation).
50. John Bowlby, a developmental psychologist and a leader in the field of attachment, described the effect of separating a young child from his or her parent. He wrote, “Whenever a young child who has had an opportunity to develop an attachment to a mother-figure is separated from her unwillingly, he shows distress; and should he also be placed in a strange environment and cared for by a succession of strange people, such distress is likely to be intense.” John Bowlby, 2 Attachment and Loss: Separation: Anxiety and Anger 26 (1973). From the child’s perspective, placement in foster care is typically an unwilling separation from a person to whom a child is attached. Visitation is one way to ameliorate the child’s distress.
parent will accept services immediately, the attorney should request that the court order the agency to begin providing those services by a specified date. Because the first permanency planning hearing must be held within 12 months of a child’s removal, parents should begin participating in services immediately. That will maximize the services provided within the first 12 months, and thus maximize the parents’ opportunity to regain custody of the child. Some clients may hesitate to accept services prior to the jurisdiction trial because they fear that information revealed during services such as a parenting class or a counseling session could be used against them at trial. If this concern exists, counsel should consider requesting a protective order that limits the disclosure of that sensitive information until the dispositional stage of the case — if the case proceeds that far. Such an order will encourage the client to begin participating in services immediately.

In practice, the court may make all of the decisions described above in a matter of minutes. But the import of these decisions for the future course of the child protective case and the child’s life cannot be overstated. Although parents’ attorneys often request a summary dismissal at the preliminary hearing, courts seldom dismiss cases outright at that point. More often, the case enters the pre-adjudication phase. The next section discusses the strategic issues that arise during that phase.

§ 30.4 • PRE-ADJUDICATION PROCEEDINGS

§ 30.4.1—Pre-Adjudication Counseling

During the pre-adjudication phase, the attorney should focus on the client’s immediate needs — on issues such as placement, visitation, and services. After that, the focus will shift to resolving the allegations in the petition and preparing for a trial on jurisdiction if the parties cannot resolve the case without a trial.

If the court authorizes the child’s removal at the preliminary hearing, then the period immediately following that hearing is crucial. The parent may feel alienated, disempowered, and frustrated. The loss of control often makes parents want to disengage from the process completely. The parent’s attorney can counter these understandable but self-defeating tendencies by ensuring that the agency

keeps the parent involved in the child’s life. As a first step, the attorney must explain the importance of the client attending each scheduled visit with the child. If the parent has to miss a visit, the parent must notify the caseworker as soon as possible so the child will not be transported to the visitation site and then be disappointed when the parent fails to appear. If scheduling difficulties arise, then the attorney and the parent must discuss those issues with the agency supervising the case. For its part, the agency has an obligation to ensure that transportation difficulties do not impede a parent’s efforts to visit the child. The agency should offer transportation assistance when necessary.

The attorney can help to preserve the parent’s involvement in other ways. Even after a child is removed from a parent’s home, the parent still retains important parental decision-making rights. For example, parental consent is typically necessary for some types of medical care. Similarly, parents retain the right to make major educational decisions for a child. They may attend educational planning meetings. In addition, they retain the right to decide whether the child will receive special education services. The parent’s attorney should encourage the parent to attend school meetings, doctor’s appointments, and therapy sessions, unless the court order prohibits such involvement. At a minimum, the attorney should make sure that the parent continues to receive updated information about the child from the service providers. Keeping the parent involved in the child’s life will show the court that the parent remains concerned about the child’s well-being and wants the child to return home even though the child has been temporarily placed elsewhere.

§ 30.4.2—Maximizing The Parent’s Opportunity To Receive Agency Services

Making sure that the agency complies with all court orders, statutes, and departmental policies will help keep the parent invested in the process. Therefore, the parent’s attorney must actively monitor and enforce the court’s orders related to placement, visitation, and services. The attorney should encourage the client to call immediately if any problems arise. If the agency fails to implement court orders in a timely manner despite requests from the parent and attorney, then the attorney should file a motion requesting that the court hold the agency in contempt of court. Depending on the date of the next scheduled court hearing, the attorney may ask the court to hear the contempt motion even earlier, at a specially scheduled hearing.

53. See 34 C.F.R. § 300.519 (stating that a surrogate parent is needed only when a foster child is made a “ward of the State.”).
Chapter 30

In all cases, federal law requires that the agency do certain things within specified intervals after the child's removal or the preliminary hearing. Within 60 days of removal, the agency must prepare an initial service plan specifying the services that the agency will recommend that the parent complete before the child can be returned home.\(^{54}\) The service plan must specify measurable objectives the parent is expected to achieve. Additionally, the agency must encourage the parent to actively participate in developing the service plan, which includes the ability to suggest and challenge requirements. If the parent does not participate, the plan that the agency submits must document the reasons for a parent's nonparticipation. Any delay in providing services to parents jeopardizes reunification. Therefore, if the agency does not prepare the plan within the time allowed, or if the parent is not sufficiently involved in the planning process, the parent's attorney should follow up with the appropriate persons. If necessary, the attorney should request that the court review a placement order or the initial services plan and modify those orders and plan if modification is in the client's interests.

§ 30.4.3—Exploring Settlement Possibilities

Attempting an informal resolution of the petition's allegations constitutes the attorney's second major task during the pretrial phase. The attorney should first consider whether some resolution short of the court assuming jurisdiction is possible. The alternatives include dismissing the case with a voluntary agreement that the parent will participate in services, holding the petition in abeyance while the parent complies with services, or asking the parent whether he or she will consider ceding custodial rights to another caregiver, either temporarily or permanently. If so, then the attorney should consider arrangements like a guardianship, a direct placement adoption, or a voluntary relinquishment of parental rights. But those options can have major collateral consequences that the parent must consider. For example, in some states, if the parent agrees to voluntarily relinquish parental rights to one child, that act, depending on the allegations, can be grounds for the court later terminating that parent's rights to a future child.\(^{55}\) Also, ceding custodial rights to another caregiver may make it very difficult for the parent to regain custody of the child in the future. Regardless, all options must be explored, and the attorney must review the consequences of the decision with the client. Then, if a settlement possibility exists, the attorney must negotiate with the other parties to ascertain whether a mutually agreeable resolution can be reached without a trial.

\(^{54}\) See 45 C.F.R. § 1356.21(g).
The attorney and client should also discuss the possibility of entering a limited plea or stipulation that allows the court to take jurisdiction over the child. The attorney should first assess the strength of the agency’s case and estimate the parent’s chances of prevailing at trial on the jurisdictional issue. A plea that allows the court to take jurisdiction may be appropriate when the facts alleged in the petition are undisputed and clearly establish a statutory basis for jurisdiction. In addition, the client may prefer that the child remain out of the home temporarily while services are provided. Entering a plea that allows the court to take jurisdiction may create positive strategic momentum for the parent by causing the other parties and the court to view the parent as cooperative and focusing on solutions rather than fault.

Additionally, the plea will avoid an adjudication trial, which often carries negative consequences for the parent. During a trial, the agency may present detailed evidence of abuse or neglect by the parent. That will inevitably focus everyone’s attention on the parent’s past mistakes. A trial may also exacerbate hostilities between the parent and the caseworker, service providers, and any family members who testify about the parent’s past conduct. Entering a plea that allows the court to take jurisdiction may avoid some of these consequences because the plea will allow the case to move directly to the dispositional phase, where the goal will likely be to reunify the family.

Despite the possible advantages of entering an adjudication plea, attorneys must also advise their clients about some possible negative consequences. By entering a plea, the parent waives, among other things, the right to a trial. Many parents will view this trial as their first real opportunity to tell their story, and they will want to exercise that right regardless of the possible negative consequences. Also, if the parent waives the right to a trial by entering a plea, the court’s power over the family increases significantly. All future decisions regarding placement, visitation, or closure of the case will then rest with the court. The court may also use the parent’s plea as evidence in a later proceeding to terminate parental rights.

Ultimately, after being advised by his or her attorney, it will be the parent who must decide whether to agree to the court’s jurisdiction or proceed to trial. Under no circumstances should anyone, including the attorney, try to force the parent to enter a plea.

If the parent will at least consider entering a plea, the attorney should negotiate the plea’s details with the agency attorney and the other parties’
attorneys. In most jurisdictions, the parent can either admit to all or some of the allegations in the petition or plead “no contest” to the allegations in either the original petition or a petition that the agency has amended after negotiations with the parent’s attorney. The attorney should review these options with the client and then propose to the agency’s lawyer the plea language that the client finds acceptable. Before reviewing the options with the client, counsel must determine the consequences of the plea, including both those noted above and others determined by local practices. For example, despite the usual expectation that “no contest” means neither admitting nor denying the allegations in the petitions but being willing to accept the court’s jurisdiction, in some jurisdictions, a no contest plea is treated as a finding by the court that the petition’s allegations are true. In those jurisdictions, the agency and the court then may be able to use those non-contested “facts” against the parent at a later termination of parental rights hearing. Other judges will expect a parent who has pled no contest on the jurisdictional issue to (later) make explicit admissions during the dispositional phase. These judges view the belated admissions as evidence that the parent now fully appreciates the wrongfulness of the previous conduct, which indicates to these judges that the parent has made real progress in treatment. Understanding these differing local practices will allow the attorney to better evaluate the possible plea deals discussed during negotiations.

§ 30.4.4—Preparing For A Trial Or Fact-Finding Hearing

If the parent wishes to proceed to a trial, much of the pretrial phase will be consumed by trial preparation similar to that in any case. The attorney should thoroughly investigate the matter by interviewing potential witnesses and reviewing relevant documents. There may be alternate explanations for the alleged abuse or neglect, and the context in which something occurred may be determinative of the need for state intervention. Potential witnesses may include medical or psychological experts, teachers, neighbors, police officers, and family members. To obtain information from non-parties, attorneys can use their subpoena power. Attorneys should also obtain a copy of the complete child protective files, which — if not already allowed by state statute or court rule — they should be able to do with a subpoena and a release signed by the client. If the agency will not open its files, the parent’s attorney should first seek to resolve that issue with the attorney representing the agency. If negotiating fails, counsel should then request a court order compelling disclosure.

Where permitted by state law, attorneys should also use formal discovery procedures to uncover the details of other sides’ case so that no information unknown to the parent’s attorney will be presented at trial. Discovery procedures
may include interrogatories, requests for production of documents, depositions, and requests for admissions. As part of this inquiry, the attorney should also interview all of the witnesses testifying on behalf of the state, the guardian ad litem, and the children’s attorney. Some states have mandatory disclosure procedures in lieu of or in addition to the availability of discovery.

§ 30.4.5—The Pretrial Hearing

The pretrial hearing presents another opportunity for the parent’s attorney to resolve issues concerning placement, visitation, and services. Generally, these issues may be addressed at any hearing in a child welfare case. Updated information regarding the parent, including compliance with services, changes in employment and living situation, or successful visitation, may cause the court to revisit orders entered at the preliminary hearing. At every hearing, it is critical that the attorney make the court aware, through testimony, exhibits, and argument, that the parent is making continued progress, something that will create and maintain positive momentum.

The pretrial hearing also allows the jurist and the attorneys to anticipate and resolve issues that may arise during the trial. The parent’s attorney should inform the court whether the parent is willing to enter into a plea admitting jurisdiction or if the client wants a trial. At the pretrial hearing, attorneys may file trial-related motions or enter stipulations regarding particular pieces of evidence. For example, if the agency has failed to respond to a discovery request, the pretrial hearing affords a good opportunity to raise that issue with the jurist and, if necessary, request that discovery be compelled by the court. If the petition contains factual allegations that have no relevance to the jurisdiction determination, the attorney should request that the agency amend the petition by striking the irrelevant allegations. The pretrial hearing may also resolve motions in limine on issues such as the admissibility of specific pieces of evidence or the manner in which children’s testimony or out-of-court statements will be presented at trial.

At the pretrial hearing, the parent’s attorney should give the court an estimate of how many witnesses will testify at trial and what exhibits will be introduced. A thorough pretrial investigation and discovery effort will have prepared the attorney to provide that information. The attorney should also request that the court’s pretrial order include deadlines for exchanging witness and exhibit lists and for filing any remaining motions. At the end of the pretrial hearing, the court will set a trial date, if it has not already done so.
Through zealous advocacy at the pretrial stage, the parent’s attorney can achieve or advance the client’s goals by facilitating a mutually agreeable plea bargain or assembling a strong case for trial. If the allegations cannot be resolved completely during the pretrial phase, then a trial regarding jurisdiction will be necessary. The next section addresses the issues that may arise at a trial.

§ 30.5 • THE TRIAL

§ 30.5.1—Use Traditional Trial Practice Techniques

The role of the parent’s attorney during the trial resembles that of a defense attorney in a criminal case. The agency bears the burden of proving the petition’s allegations by a standard of proof defined by state law and the parent’s attorney usually will offer an alternate case theory to dispute the agency’s allegations. As appropriate, counsel should call witnesses, cross-examine the agency’s and child’s witnesses, and introduce exhibits that support the client’s position. If the client is going to testify, the attorney must prepare him or her to present the testimony as sympathetically as possible. At a minimum, the attorney must meet with the client to practice the direct examination and anticipated cross-examination questions and advise the client on the disadvantages of appearing hostile or inconsistent. If there is a possibility of a parallel criminal trial, the decision to testify should be coordinated with the criminal defense attorney. Ultimately, the referee, judge, or jury will determine whether the agency has proven that grounds exist for the court to take jurisdiction of the child. If the court assumes jurisdiction, the case then will proceed to its dispositional phase, which this chapter discusses in a later section.

A comprehensive guide to trial practice is beyond the scope of this chapter. To prepare for trial, parents’ attorneys may wish to review a trial practice manual to familiarize themselves with such basics as delivering opening statements and closing arguments, asking direct and cross-examination questions, and introducing documents into evidence.56 (See Chapter 34, “Trial Advocacy”.) Parent’s counsel should also inquire about a county’s local practices. He or she should try to ascertain the judge’s preferences on procedural matters such as marking exhibits, submitting witness and exhibit lists, and entering stipulations.

In all trials, the parent’s attorney has two overarching tasks in addition to other responsibilities: (1) develop and present a coherent theory of the case, and (2) preserve trial errors for later appellate review.

§ 30.5.2—Theory Of The Case

To tell the client’s “story” effectively at trial, the parent’s attorney must develop a coherent theory of the case that adapts the client’s story to the case’s legal issues. A successful theory speaks directly to the case’s legal issues and is logical, simple, and easy to believe. In Chapter 34, Steven Lubet and John Myers suggest three questions for attorneys to ask when developing and expressing their case theory: What happened? Why did it happen? Why does that mean the client should win?

An ideal case theory can be expressed in a single paragraph. For example, if the agency alleges that a mother left her 10-year-old child unsupervised for several hours while she was at work, the mother’s case theory could be: “Being poor does not make one a neglectful parent. Ms. Smith is a hardworking, single parent who was forced by emergency circumstances to leave her child alone. Court supervision, however, is not needed to protect this child.”

The attorney can formulate a solid case theory only after conducting a thorough investigation that has uncovered both the good and bad facts of the case. The theory must then address both the positive and negative aspects of the case. Attorneys preparing for trial may draft several case theories before settling on the one that best explains their client’s actions.

A coherent theory of the case will guide the attorney’s tactical decisions at trial. Should a specific witness be called? What types of cross-examination questions should the attorney ask? Should a document be introduced into evidence? Should the attorney object to a particular line of questioning? The parent’s attorney can make better trial decisions by always considering which actions best support the prepared theory of the case.

§ 30.5.3—Preserving Issues For Appeal

The need to preserve issues for appeal also will determine some of the attorney’s actions at trial. If the parent loses the trial, the court will then enter a dispositional order, which most jurisdictions consider an appealable final order. A parent who wishes to appeal the trial court’s assumption of jurisdiction must act quickly. Inexperienced parents’ attorneys often make the mistake of waiting until the client’s parental rights have been terminated (a much later phase of some
child welfare cases) before challenging the court's initial decision to take jurisdiction, and often these appeals are deemed moot.\textsuperscript{57} Attorneys must know at what points appeals are available as a matter of right or within the court's discretion, and must know the applicable deadlines for filing notices of appeal or extraordinary writs. (See Chapter 28, "Child Welfare Appellate Advocacy.")

For the parent to have any significant chance of prevailing on appeal, the parent's trial attorney must have preserved the appellate issues during the trial. An attorney can preserve issues for appeal by clearly presenting them to the trial court and requesting rulings during the trial. The attorney should raise the issue with a timely objection or a motion \textit{in limine}. That gives the trial court the first opportunity to decide the issue, something that appellate courts almost always insist upon before they will rule on an issue. This general rule applies to both procedural and evidentiary rulings. Appellate courts routinely decline to consider unpreserved issues unless they conclude that the error was both plain and substantially affected the party's rights. In practice, that is a nearly insurmountable appellate standard. Trial attorneys must take care to preserve all potential appellate issues with timely objections or motions.

As a practical matter, the steps required to preserve an issue for appeal are straightforward. The precise steps will vary by state law. But generally speaking, if the parent's attorney disagrees with an evidentiary ruling, the attorney need only present a timely objection or motion to strike that states the specific ground for the objection. If the objection involves admitting or excluding a particular piece of evidence that the court has not yet heard or seen, the attorney must also ensure that the court knows the substance of the evidence. The attorney should consider having available written memoranda of law or copies of relevant court decisions construing the rules of evidence where the need for a particular objection is foreseeable. Once the court makes a definitive ruling on the record either admitting or excluding evidence, the attorney does not need to object repeatedly or make a formal offer of proof in order to preserve the question for appeal.

Similarly, for a procedural ruling such as one involving service of process, or how to present testimony by a child witness, the attorney need only state the objection, ensure that the court understands the basis for the objection, and request a ruling on the issue.

\textsuperscript{57} See, e.g., \textit{In re Hatcher}, 505 N.W.2d 834 (Mich. 1993).
To create the clearest possible record for the appellate court, the best practice often will be to file a written motion in limine before the issue actually arises, or a written motion for reconsideration if the court has already ruled. Filing written motions will eliminate any uncertainty as to whether the issue has been properly preserved for appeal. The same considerations about preserving issues for appeal apply at termination of parental rights hearings, which are discussed later in this chapter.

Through zealous advocacy at the trial, the parent’s counsel will further the interests of both the parent and the child by ensuring that the court intervenes only in appropriate cases. Winning a dismissal at the conclusion of the trial will end the attorney’s involvement in the case. If, however, the court decides to assume jurisdiction over the child, then the case will proceed to the dispositional phase, where different tactical considerations arise. These are discussed below.

§ 30.6 • DISPOSITIONAL HEARING

If the court finds — based on either the parent’s plea or the agency’s trial evidence — that a child comes within the court’s jurisdiction, the case then moves to the dispositional phase. At the initial dispositional hearing, the court typically decides who should have custody of the child, who is entitled to what services, and what steps must be taken to resolve the issues that led to the adjudication of abuse or neglect. The hearing is crucial because at its conclusion, the plan ordered by the court will guide the future of the case. Quite often, the subsequent termination of a parent’s rights is based on his or her failure to comply with the dispositional plan. Thus, attorneys representing parents must be very diligent in ensuring that the plan is narrowly tailored to address the specific issues that led to the child’s adjudication.

One of the first steps the attorney should take in preparing for a dispositional hearing is to ascertain the agency’s goals. Most states require the agency to submit a detailed, written dispositional report or service plan for the court to consider. Federal law requires a case service plan to be developed within 60 days of the child’s removal. The parent’s attorney must obtain all agency

58. Some courts may consolidate the evidence in one trial and make adjudicatory and dispositional findings and orders at the end of the trial while others may have separate phases sequentially within the same trial or set a separate dispositional hearing.
59. See 45 C.F.R. § 1356.21(g).
§ 30.6 reports well in advance of each hearing, read them carefully, and then review
them with the client. The agency’s reports and treatment plans should detail both
the services provided or planned for the parent and the behavioral changes that
the agency expects to result from the parent’s participation in those services. If
the attorney cannot obtain a copy of the report prior to the hearing, he or she
should consider requesting a short adjournment of the proceeding. The attorney
should also obtain copies of other reports filed by other individuals including the
guardian \textit{ad litem} or children’s attorney, the court-appointed special advocate,
and mental health professionals. The attorney should also meet with and provide
relevant information to the child’s legal representative and should consider
permitting that individual to meet directly with the parent.

To assess the appropriateness of the agency’s recommendations, the
attorney should conduct an independent investigation of the client’s
circumstances. At a minimum, this should include regularly discussing the case
with the client and asking the client to sign releases so the attorney can obtain
additional information directly from service providers. The parent’s attorney also
should obtain the service providers’ written documentation of the client’s
progress. Throughout the dispositional and review phases of the proceedings, the
parent’s attorney should communicate regularly with anyone who may possess
information that will help the attorney advocate for the client. That list includes,
at a minimum, the caseworker, the child’s guardian \textit{ad litem} or children’s
attorney, the state’s attorney, and other participants such as the child’s court-
appointed special advocate.

During this investigation, it may become apparent that the client has
needs that are not being met. For example, the attorney may learn that the client
is developmentally delayed or has a previously undisclosed substance abuse
problem or mental health diagnosis. In such circumstances, the parent’s attorney
must meet with the client and explain that additional evaluations and services
may identify deficits that have impaired the client’s ability to parent. But the
attorney also must explain that coming forward with such information may
further delay reunification or make it less likely. Parents’ attorneys should
counsel their clients carefully about the risks and advantages that accompany
each course of action.

The parent’s attorney should obtain official documentation showing that
the client has complied with or completed services. In addition, the attorney
should advise clients to document their own efforts. For example, the attorney
may suggest that the parent keep a journal of dates, times, and details of: (1)
interactions with the caseworker or other professionals, (2) attempted or made phone calls to service providers, (3) attendance at services, and (4) visits with his or her children. Any documentation that the parent has benefited from services will be especially helpful. Examples of that include certificates from parenting classes, residence leases (to show that the parent has obtained proper housing), and sign-in sheets for substance abuse treatment programs. Counsel should present copies of these documents to the court at the initial dispositional hearing and at subsequent review hearings. Counsel should also share this information with the guardian ad litem or children’s attorney and all other parties before the hearing, as the information may affect the recommendation those parties make to the court. The attorney should comply with any pretrial disclosure deadlines.

As during the other phases of a child welfare case, client counseling is crucial before and after the dispositional hearing. The parent’s attorney should encourage the parent to cooperate with the agency’s efforts to provide services directed at reunification, and should explain the consequences of failing to cooperate. The parent’s attorney should also advise the client that, although reunification will not occur unless the parent complies with the agency’s recommendations, compliance alone will not ensure reunification. The parent must also demonstrate that he or she has benefited from the services. If the agency worker does not agree that the parent has benefitted from services and made progress, the parent’s attorney should explore with the client ways to convince the court that the client has benefited. For example, if possible, the attorney should retain a social worker to observe a visit and testify or write a report, or encourage one of the service providers to observe a visit for that purpose.

The attorney should also counsel the parent about alternative dispositional options that could resolve the case. For example, if the child has been placed temporarily with a relative, the attorney might discuss trying to resolve the case through a custody or guardianship agreement or through an adoption, if the client wishes to do so. In some cases, a change of custody to the child’s other parent may resolve a child welfare case. Finally, if the attorney concludes that the parent does not wish to take any steps to regain custody of his or her child, the attorney should consider counseling the parent about releasing his or her parental rights so that the child will be eligible for adoption. Of course, the attorney must discuss with the parent the potential pros and cons of any dispositional alternatives.

At the actual dispositional hearing, the parent’s attorney should zealously advocate for a plan that meets the client’s objectives. Where the client believes
that the agency report includes inaccurate information, the attorney should explain the disagreement to the court and request an explicit finding as to which version is true. If the court finds that a statement made in a written report is inaccurate, the parent’s attorney should request that the report be amended. A failure to take those steps will allow the inaccurate information to become part of the court’s continuing record that the court may rely upon at later stages in the proceeding. Parents’ attorneys should also consider submitting into evidence their own written reports that summarize their clients’ views regarding participation in services, the benefits derived from that participation, the child’s best interests, and other relevant matters. For example, a report filed by a parent’s attorney could include information regarding the parent’s efforts to comply with and benefit from the following components of the court-ordered service plan: visitation with the child, participation in counseling, substance abuse treatment, parenting programs, and other services. The parent’s report also could direct the court’s attention to any difficulties the parent has encountered in accessing agency services or contacting the caseworker. Finally, the report may include the attorney’s requests that the court order additional or different services (or eliminate the requirement of compliance with a service). The submission of an independent report can do much to counterbalance inaccurate or incomplete information in the agency’s report. It also serves to balance the entire written record of the case, which could be vitally important if the court reviews its file in a subsequent termination proceeding.

Parents’ attorneys should also advocate for the services that best suit the client’s individual needs. In order to do this effectively, an attorney should learn everything possible about the local community’s service providers. Regardless of the client’s apparent capacity to parent, if reunification is the articulated goal, the agency has a statutory duty to make reasonable efforts to provide services that address the parent’s deficits. This means that the services must address the primary barriers to reunification in the particular case. That may require more than the agency’s favored boilerplate services, which often will not address a particular client’s identified parenting deficits. The attorney should be prepared to use cross-examination of the caseworker or to submit evidence from experts or service providers to support an argument for services individualized to the client’s needs.

The agency must offer services of sufficient quality, duration, and intensity to allow a parent who complies with the service plan a fair chance to demonstrate that he or she has made the needed changes. When services do not address the parent’s needs, are not of sufficient quality, do not last long enough,
or are not sufficiently intense, parents’ attorneys should argue that the agency has failed to make reasonable efforts to reunify the family.

Some clients’ parenting deficits result from conditions covered by the Americans with Disabilities Act (ADA). If so, the agency must provide services that go beyond the general “reasonable efforts” requirement. The ADA additionally requires the agency to make “reasonable accommodations” to address that parent’s specific disability. For example, a developmentally delayed parent should attend parenting classes that are hands-on rather than classes that use a lecture format, or be provided with parenting coaching in-home or during visits. To give developmentally delayed parents a fair opportunity to learn and integrate the necessary parenting information, they usually need to attend more class sessions over a longer period of time. The parent’s attorney should track the agency’s compliance with the ADA throughout the dispositional and review hearing process.

Parents who have two or more co-existing problems (e.g., substance abuse and a mental illness) may be required to engage in multiple services. That will require substantial time commitments, and can be especially difficult for parents who work. Those competing demands may cause conflicts or transportation difficulties. Therefore, counsel may have to ask the agency (or the court if the agency refuses) to prioritize the services schedule in a way that gives the parent a fair chance to comply.

Visitation aims to maintain and strengthen the parent-child attachment, which is crucial to a child’s development and successful reunification. The visitation schedule must be tailored to the individual needs of the child. Particularly for infants and young children, weekly, supervised one-hour visits at the agency’s office will not suffice to maintain the parent-child relationship. The parent’s attorney should advocate for maximum visitation in order to develop, preserve, or enhance the natural bonding between parent and child.

The parent’s attorney must consider two additional issues concerning services. First, the attorney must advocate for the availability of services to

60. See 42 U.S.C. § 12101.
parents at times outside traditional office hours, which is particularly important because many parents do not have jobs that allow for much time off or for flexibility. This means that agencies sometimes must accommodate the parent’s or child’s need for services in the evenings and on weekends. Second, the service location may present problems because many parents do not have access to reliable transportation. The attorney should know the local community’s public transportation options and advocate for services in convenient locations, or for special transportation services that will allow the parent to travel to and from the service providers.

After the court has concluded a dispositional review hearing, the parent’s attorney should obtain and carefully review the dispositional order. If the order does not accurately reflect the hearing’s outcome, the attorney should immediately ask the court to amend the order. The attorney should provide the client a copy of the order and review it with the client to ensure that the client understands what the order requires and the possible consequences of failing to comply with it.

§ 30.7 • ADVOCACY BETWEEN HEARINGS

After the dispositional hearing, the next court hearing — the review hearing — will occur approximately three to six months later. During the intervals between court hearings, agency personnel often make critically important decisions. In many states, administrative meetings occur on a regular basis at which many issues are discussed, including modifications to the case service plan such as additional services for the family, selection of treatment/service professionals, and changes to the visitation schedule. Ideally, attorneys for parents should attend these meetings and view them as opportunities to solve problems prior to heading to court. At the very least, parent’s attorneys should closely monitor these developments through in-person and phone contacts with the client, the caseworker, and service delivery personnel. Because these decisions will often be ratified by the court, an attorney can dramatically improve case outcomes by advocating for the client between court hearings. If formal conferences are not routinely held, the parent’s attorney should request opportunities to address issues as they arise. Ideally, the attorney should seek to convene a meeting before every court hearing to attempt to resolve issues.
In some states, before making a placement or any change in the child's placement between hearings, the agency convenes team decision-making meetings (TDM) that include the parent, caseworkers, the guardian *ad litem* or children's attorney, and other members of the family. Critical decisions about placement, visitation, and services are made at TDM meetings, and, because there will be an inherent power imbalance if a parent attends alone, the parent's attorney should try to attend TDMs and ensure that the parent has additional support persons in attendance. Even when the parent's attorney cannot attend the TDM, the attorney should encourage the parent to attend and to work cooperatively with the team members to ensure that the parent's voice is heard. These administrative meetings provide additional opportunities for parents to stay involved in their children's lives and for attorneys to address their client's concerns.

### § 30.8 • REVIEW HEARINGS

Review hearings are post-disposition proceedings at which the judge assesses the progress of the case and determines whether any changes need to be made to the service plan. Typically, the primary issues addressed at a review hearing are placement, services, and visitation. The court will determine whether the agency has met its obligations to provide services and facilitate visitation under the statute and the court order and will ascertain whether the parent has made progress towards remedying the factors that led to the adjudication. At each hearing, the court should also be assessing whether the grounds for dependency continue to exist.

Preparing for a review hearing is similar to getting ready for the initial dispositional hearing. The attorney should obtain a copy of the agency's report and all documents prepared by other parties and interested actors in the case. The attorney should review the documents with his or her client and should also independently speak to all of the service providers working with the client to determine who may be able to provide the court with information helpful to the parent. Potential service providers may include the parenting class instructor, the mental health therapist, or the visitation supervisor. Once these individuals are

---

63. Team decision-making meetings are a key component of the Family to Family initiative pioneered by the Annie E. Casey Foundation. For more information about the Family to Family program, see www.aecf.org/MajorInitiatives/Family%20to%20Family/Resources.aspx.
identified, the attorney should obtain written reports from them and should consider subpoenaing them for the hearing so that they can provide testimony to the court. As is the case before the initial dispositional hearing, the attorney should also consider filing a written report documenting the client’s progress towards fulfilling the case service plan.

At the review hearing, the attorney should request modifications to the service plan and court orders — including changes in placement and visitation — that the client requests. Counsel should advocate for return of the child to the parent’s custody where the risk to the child is eliminated, the child is no longer vulnerable to risk, or the parent has sufficient protective capacities to manage or control the threats of danger to the child. (See Chapter 15, “Child Safety: What Judges and Lawyers Need to Know.”) Parent’s counsel should use every opportunity to demonstrate to the court that progress is being made and should ensure that the court focuses on the parent’s strengths and successes, not just on the shortcomings that the other parties may dwell on. Counsel should also ensure that the agency’s actions are consistent with state and federal mandates and that the state made reasonable efforts towards reunification. Additionally, if the grounds for dependency no longer exist, counsel should request the immediate closure of the case.

After the hearing, the attorney should carefully review the order with the parent to ensure that the court did not err in its findings and that the parent understands exactly what is expected by the court and the agency.

§ 30.9 • PERMANENCY PLANNING HEARING

Federal law requires the court to hold a permanency planning hearing (PPH) within 12 months after the child’s removal from the home or within 30 days of a determination that no reunification efforts are necessary.64 The requirement to hold a PPH was intended to make courts expedite a permanent placement for the child, which may include reunification, adoption, or a legal guardianship, among other options. At the PPH, the court may direct the agency to file a petition to terminate the parent’s legal rights to the child. The specific decisions that are made at the PPH and the legal standards may vary from state to state.

64. 42 U.S.C. § 675(5).
Parents' attorneys should begin thinking about the permanency plan at the inception of the child welfare case, when they counsel their clients about complying with the case service plan. A parent's failure to comply with the court-ordered service plan is typically considered evidence that the child will be at risk if returned to the parent's custody. Conversely, where a parent has substantially complied with the ordered services, the parent's attorney should be prepared to make an argument that any risk of harm has been reduced or eliminated and that the child should be returned home.

To prepare for a PPH, the parent's attorney should consider how best to demonstrate that returning the child home would not subject the child to harm — even if the parent has not completed all treatment services. Counsel should informally lobby the caseworker to recommend a return home or, at least allow more time for the parent to complete the court-ordered services.

Before a PPH, the attorney should interview all the service providers to assess the client's compliance with and benefit from services. If the providers offer helpful information, the parent's attorney should subpoena them to testify at the hearing.

The service providers often can clarify a parent's issues in ways that caseworkers cannot or will not do. If sympathetic providers cannot testify in person at a PPH, the attorney should request permission for them to testify telephonically or solicit reports, letters, or affidavits from them to help the court understand the parent's progress in the treatment program. Hearsay is typically admissible at the hearing.

Just as evidence provided by those working directly with the parent can impact the court's permanency planning determination, the views of the guardian ad litem or children's attorney, who works directly with the child, also will carry considerable influence. Before a PPH (and ideally before every hearing), the parent's attorney should consult with the child's attorney regarding the permanency recommendation. The parent's attorney should try to persuade the child's legal representative to support the child's return home or, at least, continued efforts to reunify the family. This conversation also should include a realistic assessment of other permanency options and their likely effects on the child. Questions to ask the child's representative may include the following: What is the long-term permanency goal? Is adoption likely? If so, has the GAL already identified a viable adoptive placement? Does the child have special needs that would make adoption difficult to arrange? If the plan is for the child to transition
to adulthood from foster care, how would termination of parental rights further the child’s best interests?

In addition to advocating for the client when meeting with the GAL, the parent’s attorney should consider permitting the GAL to meet with the parent so the GAL can independently assess the parent’s progress. Counsel may want to be present if such a meeting occurs.

Also before the permanency planning hearing, the parent’s attorney should counsel the client about all possible options. In cases in which reunification appears unlikely, the attorney should consider discussing with the client the possibility of consenting to a legal guardianship, custody order, or adoption decree, or of relinquishing his or her parental rights. Pursuing one of these options, where reunification appears in doubt, may enable the client to avoid the involuntary termination of his or her rights. If the client decides to relinquish his or her parental rights, counseling may be appropriate, and the attorney can help construct a therapeutic process so that the parent and the child can say goodbye in the least detrimental way possible.

At the hearing itself, the attorney should zealously advocate to achieve the client’s objectives. Attorneys should use state statutory language to request that a child be returned home if return does not pose a substantial risk of harm to the child.65 If the agency is seeking permission to file a petition to terminate parental rights, the attorney should argue that a petition is premature. Although federal law requires that a petition be filed if a child has been in foster care for 15 of the most recent 22 months, certain exceptions apply, including the placement of the child with a relative or the state’s failure to provide appropriate services to the family.66 The attorney should be prepared to argue that one of these exceptions applies or that compelling reasons demonstrate why filing the petition would be contrary to the child’s best interests.67 For example, termination of parental rights may not be appropriate in the case of an older child who does not wish to be adopted or for a child living with a relative who does not wish to adopt the child. The attorney should also consider having the parent testify, if he or she

65. See, e.g., Mich. Comp. Laws § 712A.19a(5) (child must be returned home unless return home would cause a “substantial risk of harm to the child’s life, physical health, or mental well-being.”); NY Family Court Act 1089(d) (requiring courts to determine whether “the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible.”).
can persuasively testify as to steps taken to address the issues that led to the foster care placement.

§ 30.10 • TERMINATION OF PARENTAL RIGHTS

§ 30.10.1—Investigation And Analysis

After the permanency planning hearing, the court, often acting on the agency’s recommendation, may order the agency to file a petition to terminate the parent’s rights. Generally speaking, a termination order permanently severs the legal relationship between the child and the parent. After the issuance of the order, unless the state permits open adoptions, the parent has no legal right to visit, plan for, or contact the child. Due to the severity of the sanction sought by the state, termination cases require the parent’s attorney to confront a new series of difficult legal and strategic challenges. Counsel must carefully identify the issues presented in the individual case and address each issue in turn.

When the agency files a termination petition, the parent’s attorney should meet with the client to review each factual allegation and the corresponding legal basis for termination cited in the petition, which the state must prove by at least clear and convincing evidence. The state must also prove that termination is in the child’s best interest. After hearing the client’s response to each factual and legal allegation, the attorney should then work with the client to develop a list of potential witnesses. For example, the client’s mental health evaluator, substance abuse counselor, or therapist might provide important testimony that will challenge the termination petition’s factual or legal allegations.

After developing the list of potential witnesses, the attorney should contact and interview each one. To interview some witnesses (e.g., therapists), the attorney will first need to have the client sign a release that authorizes the witness to reveal confidential information to the attorney. Counsel will need the guardian ad litem’s or children’s attorney’s permission or a court order to interview the client’s children. After interviewing the potential witnesses, the parent’s attorney will need to decide which witnesses’ testimony will bolster the parent’s theory of the case. The attorney should subpoena those witnesses and develop direct-examination

68. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the U.S. Supreme Court held that a clear and convincing standard of proof was constitutionally required in termination of parental rights cases. Where the case is governed by the Indian Child Welfare Act, the standard of proof is beyond a reasonable doubt. See 25 U.S.C. § 1912(f).
questions that will elicit the information that the court needs to understand the parent’s theory of the case. The parent’s attorney should also obtain the witness and exhibit lists prepared by the agency and the guardian ad litem or children’s attorney. The attorney should interview those potential adverse witnesses and obtain copies of all documents that the other parties will seek to introduce into evidence. This advance preparation will allow the parent’s attorney to develop a theory as to each adverse witness and a strategy for cross-examining that witness. The parent’s attorney should also gather documentary evidence that supports the parent’s case. As part of that effort, the attorney should request (and subpoena if necessary) the caseworker’s file. The attorney must review the file’s contents and make copies of important documents. When reviewing the history of the case, the attorney should identify the original basis for the court’s jurisdiction over the child and the services ordered by the court, and assess the agency’s efforts to work with the client and provide the required services. If the agency resists providing this information, the parent’s attorney should file a discovery motion seeking access to the information as permitted under state law.

§ 30.10.2—Pretrial Motions

While conducting a thorough investigation of the case, the parent’s attorney should evaluate whether any pre-trial motions are required. If the state intends to call witnesses whose sole basis of knowledge comes from hearsay evidence, the attorney should file a motion in limine to exclude the testimony. The attorney may also determine that expert evaluations are necessary to assess the relationships between the child, the foster parent, and the birth parents, or to determine the parent’s capacity to take care of the child. In some states, the court or the agency may be required to pay for such evaluations where the parent is indigent. Whether an attorney wants to take the risk inherent in requesting an evaluation of the parent may depend on the strength of the case. Where the facts are strong, the evaluation may be unnecessary and may only threaten to undermine the case. However, where the case is weak, the attorney may determine that a good evaluation may be crucial (and worth the risk) to prevent the termination of the client’s parental rights.

§ 30.10.3—Theory Of The Case

As with the trial, the parent’s attorney must develop a coherent theory of the parent’s case. (See Chapter 34, “Trial Advocacy.”) The theory should present a short and logical summary of the case’s facts and the parent’s legal position. An ideal theory distills both the client’s story and the applicable law. For example, the following might be the parent’s theory of the case for a termination case. “The existing attachment between this mother and her daughter is such that
§ 30.10.3

Child Welfare Law and Practice

a severing of the existing bond would be severely detrimental to the child.” Other theories may involve the feasibility of other, less drastic, permanency options such as guardianship, custody, or placement in a “planned permanent living arrangement” as defined by federal law.69 Or the theory may involve the agency’s failure to comply with services or a parent’s substantial compliance with services. Developing a coherent and comprehensive theory will help the attorney organize the facts and provides a framework for determining which witnesses to call, what evidence to present, and what questions to ask. To make sure that the judge understands the theory and sees how the evidence supports it, the attorney should outline the theory during both the opening statement and the closing argument.

§ 30.11 • APPELLATE ADVOCACY

When a court issues an adverse ruling at any point in the child welfare case, the attorney will need to consider whether to appeal the order. After determining whether the order is one that is appealable under state law,70 the attorney should counsel the client on the likely outcome of the appeal. The attorney should carefully review the record, including all transcripts and the court records and should make an initial determination of what potential issues can be raised on appeal. The attorney should consider constitutional claims, statutory arguments, and abuses of discretion by the trial court. To be a successful appellate attorney, counsel must be well-versed in the substantive and procedural constitutional rights afforded to parents by the Fourteenth Amendment, federal and state child welfare laws, and the intricacies of appellate practice. (See Chapter 28, “Child Welfare Appellate Advocacy.”)

If the parent’s attorney determines that legitimate claims exist for an appeal, then the attorney should counsel the client on the pros and cons of appealing. The attorney should advise the client about the length of time an appeal is likely to take and how the delay may affect the family’s situation. At times, appealing a determination of jurisdiction will slow efforts toward reunification; during an appeal of a termination of parental rights, the parent may not be allowed to see the child.

70. Typically, state laws permit the appeal of the initial dispositional order and the final termination of parental rights decision. Other appeals may be discretionary.
Ultimately, after counseling the client about the pros and cons of going forward with the appeal, it is the parent’s decision whether the claim should be pursued. If a parent wishes to go forward, the attorney should take all steps permitted under state law to expedite the completion of the process.

§ 30.12 • CONCLUSION

Parents have a constitutionally protected right to the care, custody, and control of their children. The state may interfere with these rights only by following proper procedures, and only after showing that the parent is unfit to parent his or her child. Parents’ attorneys must utilize the law to protect these critically important rights, working with the parent to establish the goals of the representation, which usually are to minimize the state’s interference with parental rights. The parent’s attorney must be a zealous advocate for the parent and must counsel the client based on a comprehensive knowledge of the law and a detailed understanding of the particular case. The parent’s attorney must carefully investigate the case at every stage and advise the client regarding all the options at each stage, but ultimately let the client determine the goals to be achieved. By taking these steps, the parent’s attorney will fully explore all aspects of the case, protect the parent’s interests, ensure that the need for court involvement continues to exist, and increase the likelihood that the court makes a decision that serves the best interests of the child.