

# Tips & Tools for Providing High-Quality Legal Representation to Children and Parents in Child Welfare Proceedings

## In-Court Advocacy

November 2021

The Family Justice Initiative's (FJI) 2017 [FJI Attributes of High-Quality Legal Representation](#) draw from and build upon existing Standards of Practice<sup>1</sup> for attorneys representing children and parents in child welfare proceedings. They also incorporate findings and recommendations from the U.S. Department of Health and Human Services, Children's Bureau, National Quality Improvement Center on the Representation of Children in the Child Welfare System<sup>2</sup> and Administration for Children and Families.<sup>3</sup>

### Introduction

As an attorney for children or parents in child welfare proceedings, you have the same ethical duty as all attorneys to be diligent when pursuing your clients' case goals. You must be equally comfortable with and skilled at using out-of-court and in-court advocacy to achieve those goals. You must also be able to adjust your legal theory and strategy to account for ever-evolving facts. This guide provides discussion, tips, and tools to enhance **in-court advocacy** for your clients to help them achieve their case goals. While there are times when you can achieve your clients' goals through negotiation and cooperation, you should also be a skilled trial litigator willing to use the court process to advance your client's case goals.

As a parents' or children's attorney, you are in court often. Child welfare cases typically involve multiple evidentiary hearings, review and status hearings, motion hearings, and other frequent court appearances. An effective trial attorney can integrate these frequent hearings into an overall case strategy. However, in-court advocacy cannot be separated from out-of-court advocacy, which can help the client and legal representation team create positive facts for moving the client's case forward. This guide should be read together with the FJI [Out-of-Court Advocacy How-To Guide](#). While this guide emphasizes the strategic use of interdisciplinary teams, attorneys without access to a full team should also be able to use these advocacy tips and tools.

You should develop strategies to achieve your client's goals that involve in-court advocacy, out-of-court advocacy, and combinations of both when appropriate. Deciding whether to handle an issue out of court (using teaming, negotiation, and client counseling) or to handle it using the court (filing a motion, filing a report, asking for a court order) is strategic. You should exercise independent

### Effective in-court advocacy components

- ▶ Establish rapport with clients.
- ▶ Set case goals.
- ▶ Develop a case theory and legal strategy.
- ▶ Focus on legal rights while emphasizing the right to family integrity.
- ▶ Ensure your client's court experience is productive.
- ▶ Prepare for trials and all hearings; avoid delays when possible.
- ▶ Participate actively in trials.
- ▶ Use the court to advance the case.
- ▶ Be mindful of the appellate record and file appeals when needed.

judgment driven by your client's interests and informed by the law, independently investigated facts, and overall goals/case theory (and informed by relationships, the judge, the likelihood of success, etc.). Important advocacy happens at all stages—in formal trials or evidentiary hearings, but also at initial hearings, review and permanency hearings, and in between those events.

### Components of Effective In-Court Advocacy

The following guidance outlines the components of effective in-court advocacy for parents' and children's attorneys.<sup>4</sup>

## Establish rapport with clients.

Representing children and parents in child welfare cases differs from other areas of practice. Unlike in criminal cases, for example, you will not just focus on past events but will engage in ongoing litigation *through* a client's life. This relationship is not static. You are responsible for continually working to build and maintain trust so you can fully counsel your clients and set goals with them. Ensure your client understands your role as their attorney, especially if you represent children in a best interest capacity. This includes letting the client know whether you can keep information confidential and under what circumstances you may not be able to maintain confidentiality. Fully explain that while you can and will state your client's goals in court, you are also responsible for presenting your assessment of their best interests.

### Practice Tips

- ✓ *Use motivational interviewing techniques.*<sup>5</sup> These techniques can help when communicating with clients during the postdispositional period. All interdisciplinary team members should be trained on using motivational interviewing.
- ✓ *Recognize your client is the expert on their own life.* This includes child clients.
- ✓ *Check in with clients before and after hearings but also during hearings.* Do not be afraid to ask the court for a moment to consult with and ensure your client understands what is happening during the proceeding.
- ✓ *Approach interactions with clients and all participants in the proceeding with an antiracism and antipoverty focus.* This includes asking your client about their racial identifiers and pronouns and respecting that identity and ensuring the court and other professionals respect that identity.
- ✓ *Develop cultural competency and humility.* Acknowledge diversity, avoid assumptions and stereotypes, and make an ongoing commitment to learn about cultures. Recognize that the job of learning is never done, and exercise empathy. Acknowledge that culture is layered and more than race and ethnicity but also includes age, socioeconomic status, education, sexual orientation, and religion.<sup>6</sup>
- ✓ *Raise client priorities during court hearings.* Counsel clients to ensure they understand why you raised their priorities in a particular manner.

## Set case goals.

All attorneys should engage in goal-oriented advocacy.<sup>7</sup> Discuss case goals and likely outcomes with your clients. Once goals are set, focus all of your advocacy on pursuing those goals. Goals can include overall case goals (i.e., reunification or another permanency goal) and more immediate goals (i.e., no reasonable efforts finding, expanding visitation/family time, service requirements).

### Practice Tips

- ✓ *Recognize clients are the experts on their own lives.*
- ✓ *Limit use of technical terms for likely outcomes such as adjudication and disposition.* Prepare your client to hear these terms in court.
- ✓ *Engage in proactive case planning.* Develop and propose a case plan, identify service providers, and identify relatives and fictive kin. Set a robust visitation schedule (if family maintenance or immediate family reunification is not possible) and continually advocate for expanding visitation when appropriate.
- ✓ *Discuss abilities and achievements not just deficits or "things left to do."* Praise even those things that appear to be slight achievements.
- ✓ *Routinely ask about the family's experiences.*
  - Parents' attorneys: "How are you feeling about your parenting class?" "Do you want to get a different treatment provider?"
  - Children's attorneys: "How are you doing in your foster placement?" "How is school going and are you having any trouble with your classes?" "Are you making progress in your therapy counseling sessions?"
- ✓ *Allow/empower clients to talk about their goals and how they are relevant.* Permit/empower clients to challenge agency requested services.

## Develop a case theory and legal strategy.<sup>8</sup>

Advance that theory consistently to further other client objectives and issues that support the case goal and your client's goal (e.g., litigation to increase visitation). To succeed in your cases, be familiar with binding legal authority (federal child welfare laws, case law, state statutes, local court rules and policies). Conduct legal research to advance your client's interests consistent with applicable law. Also understand what is not binding legal authority, such as agency policies and rules that often limit progress in the case.

Develop a theory of the case, or “a logical, persuasive story of ‘what really happened.’”<sup>9</sup> The theory incorporates existing legal standards and case facts and is a guidepost that helps you make advocacy decisions and advance case goals. In child welfare cases, the theory should expand and change with new information, new legal issues, and changes in the progress clients make. The need for a case theory does not conclude at adjudication unless a case is dismissed. After adjudication the theory of the case focuses on reunification or another permanency goal that the client is seeking.

### *Practice Tips:*

- ✓ *Be proactive in moving the case forward.* Do not limit your advocacy to reacting to agency action. Push your case theory forward rather than limiting advocacy to a critique of the agency’s case theory.
- ✓ *Assess the case facts and seek to understand the family’s needs in a trauma-responsive manner.* Use in-court advocacy to ensure the record reflects the family’s needs.
- ✓ *Work with your clients to develop their own options/choices.*
- ✓ *Communicate with all parties outside of court to develop quality plans.*
- ✓ *Communicate what you discussed with the judge and other attorneys during sidebar conversations with your client.*
- ✓ *Be clear and consistent with your own role and expectations.* Avoid “moving target” goals.
- ✓ *Ask for your client’s opinions on strategy and case planning:* “How do you feel about this approach?” “Do you think you can meet that objective?” “Is that program close to your home?” “What can I do for you?”
- ✓ *Consider filing your own hearing report, perhaps using information gathered by interdisciplinary team members.* When possible, have interdisciplinary team members attend court to provide you with needed information and to support the client.
- ✓ *File motions between hearings.* Do not limit courtroom advocacy to hearings.
- ✓ *Speak to collateral sources,* such as relatives, teachers, therapists, and others who have relevant and meaningful information for your client’s case.
- ✓ *Follow your case theory* when advocating in agency/special education meetings.

## Representing Incarcerated Parents

- ▶ **Advocate for a visitation plan tailored to each family’s needs.** In general, children in foster care and their incarcerated parents have the same right to in-person visits as other child welfare involved families. While video or phone visits may help supplement in-person visits, virtual visits often do not meet the developmental needs of young children to bond with their parent through touch.
- ▶ **Address concerns about in-person visits.** If parents or children are reluctant to visit in-person, be sure they have all information they need to make an informed decision. For instance, children may fear going to jail based on what they have seen on TV. Be familiar with what visiting actually looks like in your local jail or prison so you can fully counsel your client.
- ▶ **Include incarcerated parents in planning for their child.** Be sure to advocate for your parent client’s right to be included in all planning meetings about their family.
- ▶ **Protect incarcerated parents’ right to receive regular communication and reasonable efforts toward reunification.** Incarcerated parents are frequently denied quality services and supports to help them achieve reunification. It is important to protect your clients’ rights and ensure reasonable efforts are made to help them reunify with their children.
- ▶ **Stay informed of incarcerated parents’ location.** Parents are often relocated during their stay in prison or jail. Log onto [vinelink.com](http://vinelink.com) to locate incarcerated parents and register to be notified when they are released or transferred to a new facility.

### **Focus on legal rights while emphasizing the right to family integrity.**

Attorneys for parents and children should anchor their advocacy efforts, when consistent with client goals, around the shared rights and important due process considerations in child welfare cases. Parents and children share the right to family integrity,<sup>10</sup> which means both parties can and should challenge erroneous family separations and advocate for high-quality family time and kinship placements where

separations must occur. Attorneys should consider using a safety-driven framework<sup>11</sup> to guide decision making and advocacy and should emphasize well-being.

### Practice Tips

- ✓ *Challenge the child's removal at the initial hearing.* Trauma occurs at the time of removal and children should not be separated from their family longer than necessary.
- ✓ *Raise and address prevention efforts when challenging the child's removal and family separation at the initial hearing.* During other hearings and throughout the case, identify ancillary civil legal issues like lack of housing, domestic violence, public benefits, and education that may be delaying reunification or another permanency goal. Seek appropriate legal assistance for clients during the case. Ensure these ancillary issues, when not related to safety, do not delay reunification or other permanency options.
- ✓ *Fight for expanded visitation/family time.* Seek more frequent visits in family-like settings rather than in a visitation space at the agency, when appropriate for your client's family. Liberal family time is critical for the child's well-being, enhances parent motivation, and leads to better outcomes for the family.<sup>12</sup>
- ✓ *Advocate for unsupervised/least-restrictive family time as the default in your jurisdiction.*
- ✓ *Support family activities.* Advocate for opportunities for parents and siblings to attend school events, medical appointments, and other typical family activities.
- ✓ *Advocate for remote family contact for additional family-time* (not in place of in-person time).
- ✓ *Use kin as a family time resource.* Research and investigate family members and fictive kin and proactively present these options to the agency and court.
- ✓ *Object to reasonable efforts findings or request a no-reasonable efforts finding* when appropriate.
- ✓ *When talking with family members, explore their relationship with your client.* Don't assume the relationships are positive.
- ✓ *Use a family tree/genogram to understand the family structure.* Recognize that children may not use formal relationship terminology when identifying individuals they consider family.

- ✓ *At each hearing and agency meeting, parents' and children's attorneys should ask why reunification cannot happen immediately.* If information or the child's case assessment shows reunification is not immediately possible, make a record reflecting that recommendation.

### Ensure your client's court experience is productive.

Court can be an alienating and overwhelming experience for adults and children. Be sure to help your parent and child clients attend court. Lower barriers to your clients' attendance and work with the court and agency to ensure hearings are scheduled when your clients can attend (i.e., scheduling hearings when school is not in session) and have access to transportation.

### Practice Tips:

- ✓ *Explain hearings and prepare clients for court.* Prepare clients/families before hearings so they know what to expect. Explain legal terms used in court. Coach your clients on courtroom decorum, including appropriate dress and the general flow of the proceedings so they know what to expect. Children may need to tour the courtroom before the hearing.
- ✓ *Advocate for clients who want to attend court proceedings to attend in person.* Explain to clients their right to attend court hearings. Take time to help your client understand the court experience in advance. This may include discussing what the courtroom looks like, who will be there, what will be discussed, and what decisions will be made during the hearing. If your client is connected to a clinician, consider whether you should ask that individual to attend court either as a support for your client or as a witness.
- ✓ *Talk with your client about participating in court by video or phone.* Ask the court to allow this type of participation if the client prefers or has a barrier to participating in person. Know the available options for your client (e.g., Incarcerated clients may have an automatic right to participate by phone).
- ✓ *During hearings, ensure clients have an opportunity to speak directly with the judge* if they want to and if is consistent with case strategy.
- ✓ *Consider providing a support person.* If you work with an interdisciplinary team, ask a peer mentor or social worker to provide extra support to the client throughout the hearing.

- ✓ *Debrief after hearings* to make sure the client understood what happened. Explain what is expected of clients moving forward. Never promise an outcome but, when possible, be clear about the direction of a case.
- ✓ *Fill in gaps in understanding.* Ask clients if you missed anything.
- ✓ *Avoid assumptions about your client's literacy and language fluency.* Ensure the client can meaningfully access information in reports and motions.
- ✓ *Engage interpreters and use translation services in and out of court where appropriate.* Do not assume that conversational fluency in English necessarily includes an understanding of legal phrases and concepts. Instead ask what your client prefers.
- ✓ *Be clear and consistent with your own role and expectations.* Avoid “moving target” goals. All case goals should be tied to reunification or the permanency goal in the case. Expectations for your clients should not be constantly shifting.
- ✓ *Apologize to family if they must wait for hours for the hearing to be held.* Respect their time.
- ✓ *Find quiet places to meet away from crowded wait rooms.* Is there a supportive person who can be in the room?
- ✓ *Give your client a note pad to keep notes during the hearing.* Taking notes gives the client a way to actively listen and record any questions, things missed, and what they may need to do. It also allows your client to focus their thoughts. Check with your clients during the hearing and set a time to speak with them if they have questions.
- ✓ *Provide distractions and snacks.* Anticipate long wait times. When appropriate, bring snacks and games or coloring books to use as a distraction.
- ✓ *Refer to your client by name.* Avoid “mom,” “dad,” or “minor child” and push other actors to do the same.
- ✓ *Consult your client about the hearing schedule.* When the court is scheduling hearings, ask your clients before agreeing to a date or time.
- ✓ *Prepare for remote court participation.* Talk to your client about the court's instructions for remote hearings. Practice accessing the remote courtroom in advance.<sup>13</sup>

## **Prepare for trials and all hearings; avoid delays when possible.**

Invest significant time in preparing for hearings. Both parents' and children's attorneys should serve discovery strategically to gather needed information, prepare for trial, and narrow the issues in dispute. Use negotiation and mediation in the pretrial process to resolve issues before trial, or at least to determine the true issues in dispute and streamline the trial. Take an independent approach to trial preparation, which may include issuing subpoenas, filing motions, and preparing witnesses. Be well-prepared and wary of delays and continuances, particularly where important rights are at stake.

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### **Practice Tips**

- ✓ *Use every hearing as an opportunity to introduce positive information about your client.* Narrative shifting is crucial. Talking points at every hearing should include acknowledging progress the parent is making, even if incremental. Tone setting matters.
- ✓ *Find ways to introduce positive narrative through supplemental documentation you provide to the court.* Always get letters from service providers to introduce to court. Take advantage of hearsay being admissible at various stages, or that could be entered by stipulation. Develop quick templates to use as declarations to prepopulate for service providers.
- ✓ *Strategize about potential hearsay objections* related to letters/material from collateral sources.
- ✓ *Use every hearing as an opportunity to introduce comprehensive information on child well-being.* This includes safety in the foster home, school progress, service provision, and family time. When there are problems highlight them and propose solutions.

### **Participate actively in trials.**

Both parents' and children's attorneys should make opening and closing arguments, put on witnesses (independent expert witnesses when needed, including as a counterpoint opinion to other parties' witnesses), and make and argue objections where appropriate.

## Practice Tips

- ✓ *Prepare your client for the emotional impact of a trial.* Ensure the client has support in the courtroom or in the courthouse. Do not allow your client to be surprised by testimony, instead explain in advance who is expected to testify and what they are likely to say.
- ✓ *If your client testifies, practice their testimony with them in advance, including cross-examining them.* Help them understand why you are asking specific questions and seek to understand and empathize with your clients when those questions elicit an emotional response. Strategize how to support them through those moments during trial.
- ✓ *Prepare clients for the mechanics of testifying.* Explain where they will sit, what they should do if they do not understand a question, how they should respond during objections, where they should look, etc.
- ✓ *Challenge nonexperts when they attempt to provide expert testimony.* For example, in some jurisdictions volunteer child advocates assigned by the court are empowered to give opinion testimony. This should be challenged because lay-person volunteers are not qualified to provide these opinions.
- ✓ *Challenge experts who offer opinions outside their recognized expertise.* Use pretrial motions and voir dire cross to limit the scope of expertise.
- ✓ *Litigate issues and use experts, as needed, to achieve clients' case goals.* This includes active motion practice throughout proceedings, not only at statutorily set periodic reviews.

**Filing motions—or the threat of filing motions—may compliment out-of-court advocacy for services, modifications of the case plan, or changes in placement. Do not wait for regularly scheduled hearings to advance your clients' interests.**

### Use the court to advance the case.

Use the court process—including the strategic filing of motions—to advance the case and pursue your clients' goals. This is particularly true when the case plan is developed during disposition and review hearings. Request (and oppose) services and placements consistent with your clients' interests. Filing motions—or the threat of filing motions—may compliment out-of-court advocacy for services, modifications of the case plan, or changes in placement. Do

not wait for regularly scheduled hearings to advance your clients' interests.

## Practice Tips

- ✓ *At the start of the case, ask how your client prefers to communicate and communicate regularly with your client.* Use your interdisciplinary team to build a relationship that lets you gather important information as the case develops and update your client about the case status.
- ✓ *Communicate with your client's service providers.* When possible, use your interdisciplinary team to get regular updates on your client's progress, strengths, and any setbacks so you can be proactive with this information.

### Be mindful of the appellate record and file appeals when needed.

As a trial attorney, you must preserve the record in the event of an appeal. Ask for evidentiary hearings where facts are disputed and make positions clear on the record to preserve issues. As always, counsel your clients about the implications and likely outcomes of all strategic choices, including the decision to appeal. Attorneys representing children and parents on appeal should litigate strategically and zealously; trial attorneys should collaborate with appellate attorneys.

## Practice Tips

- ✓ *When stating an objection, object clearly and specifically.* Do not worry about which rule it is, state what is wrong.
- ✓ *File written motions.*
- ✓ *Coordinate trial tactics with appellate attorneys before appealing and while awaiting a decision.*
- ✓ *Make offers of proof on the record* about any testimony or exhibit excluded.
- ✓ *Explain the appellate process to the client.* This will help the client make an informed decision on whether to appeal.
- ✓ *Manage expectations* by having a frank discussion on the likelihood of outcomes.
- ✓ *Advise the client while the appeal is pending* so that they are in a better position if the matter is remanded.

- ✓ Advocate for appropriate continued family contact, including continued sibling contact, while waiting for the appellate court to decide about an appeal.

Incorporating the components of effective in-court advocacy highlighted in this guide, along with the *Out-of-Court Advocacy How-To Guide*, will result in an intentional approach to representing parents and children in the child welfare system. Each case is unique and offers an opportunity to pursue both in-court and out-of-court advocacy to best achieve your clients' goals.

## Endnotes

1. American Bar Association. ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, 2006; American Bar Association. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 1996; National Association of Counsel for Children. NACC Recommendations for Representation of Children in Abuse and Neglect Cases, 2001. Access these standards: [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/practice-standards/](https://www.americanbar.org/groups/public_interest/child_law/resources/practice-standards/)
2. Duquette, Donald N. *Children's Justice: How to Improve Legal Representation for Children in the Child Welfare System*. Washington, DC: American Bar Association, 2016).
3. U.S. Department of Health and Human Services, Administration for Children and Families. *Information Memorandum: High Quality Legal Representation for All Parties in Child Welfare Proceedings*, ACYF-CB-IM-17-02, January 17, 2017.
4. Note that this is general guidance issued without regard to any state- or jurisdiction-level authorities. Attorneys should follow all state statutes laying out the scope of representation and litigation procedures, state-level rules of professional conduct, state and local court rules and rules of evidence, and state or local practice standards or contract requirements. Nothing in this guide should be read to supersede applicable binding authority.
5. "Motivational interviewing is a guiding style of communication, that sits between following (good listening) and directing (giving information and advice). [It is] designed to empower people to change by drawing out their own meaning, importance and capacity for change [and] is based on a respectful and curious way of being with people that facilitates the natural process of change and honors client autonomy." Miller & Rollnick. *Motivational Interviewing: Helping People To Change* 3d ed., 2013.
6. For guidance, see Family Justice Initiative. *Implementing FJI System Attributes: Attribute 3: Diversity and Inclusion/Cultural Humility*, undated.
7. There are several models of child legal representation in child welfare cases. The ABA recommends that all children receive client-directed legal representation, where the client sets the goals of the representation (in consultation with the attorney) if the client has the capacity to do so. Several jurisdictions use this model, while others use attorney-directed representation (which may be using a best interests model, a substituted judgment model, or a "hybrid" model) where the attorney is responsible for ultimately setting the goals of the representation (in consultation with the client). The recommendations here apply to all parent and child attorneys in child welfare matters without regard to the model of representation.
8. American Bar Association. ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, 2006; American Bar Association. ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 1996. Access these standards: [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/practice-standards/](https://www.americanbar.org/groups/public_interest/child_law/resources/practice-standards/)
9. Mauet, Thomas A. *Trial Techniques and Trials*, 10th ed. 2017, 567.
10. ABA Resolution 118: *Children and Parents' Right to Family Integrity and Family Unity*, August 2019.
11. Lund, Therese Rowe & Jennifer Renne. *Child Safety: A Guide for Attorneys and Judges*. Washington, DC: ABA Center on Children and the Law, 2009.
12. Minnesota Department of Human Services, Center for Child Welfare. *Child and Family Visitation: A Practice Guide to Supporting Lasting Reunification and Preserving Family Connections for Children in Foster Care*. DHS-5552-ENG(1-6-09)
13. See Family Justice Initiative. *Covid-19 Legal Tools: How to Deliver High-Quality Legal Representation in the COVID-19 Crisis* (web page with resources on remote hearings).



The FJI unites professionals from around the country to ensure every child and every parent has high-quality legal representation when child welfare courts make life-changing decisions about their families. Through the FJI's work, child welfare lawyers, researchers, judges, social workers, policymakers, families impacted by abuse and neglect, and others are reenvisioning how to best protect children, strengthen families and support communities.