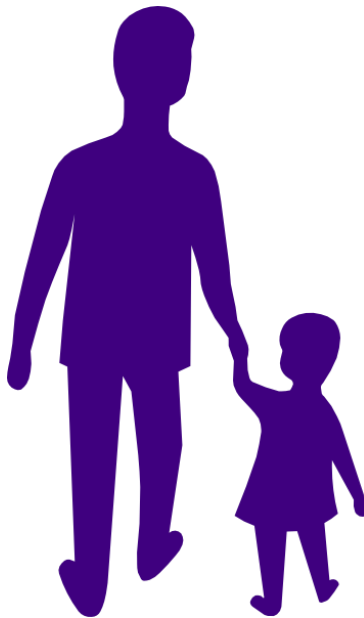


CHIPS TRIAL ATTORNEY PROTOCOL

Effective and Zealous Representation of Parents or Children in Children-in-Need- of-Protection-or-Services (CHIPS) Cases in Wisconsin



Based on TPR Protocol written Katie Holtz, 2014
Written by Matthew Giesfeldt, 2021

TABLE OF CONTENTS

Introduction 3

The “Holtz” CHIPS Diamond 4

Ongoing Expectations & Ethical Considerations 5

Timeline of a Case 5

CHIPS Petition & Appointment 6

Initial Discovery/Investigation – Existing Court Files and Department/Agency Records 9

Client Interview & Establishment of Goals 9

Continued Discovery/Investigation 11

Issue Spotting 11

The Big CHIPS Cases You Need to Know 12

Develop Defenses & Theory of the Case 14

Motions 14

Witness Interviews (Work with CSS & Investigators) and Exhibits 14

Motions in Limine 14

Negotiations 16

Litigate 16

Disposition 18

Appeal 18

Conclusion 18

Introduction

Children-in-Need-of-Protection-or-Services (“CHIPS”) touch the lives of thousands of Wisconsin families every year. In 2020, Wisconsin saw 4,011 CHIPS petitions filed amid its 72 counties.¹ In such cases, petitioners (often government prosecutors) seek to insert the government into the most intricate aspects of families’ lives: intruding on such things as therapy sessions, children’s bedtime routines, and child discipline practices.

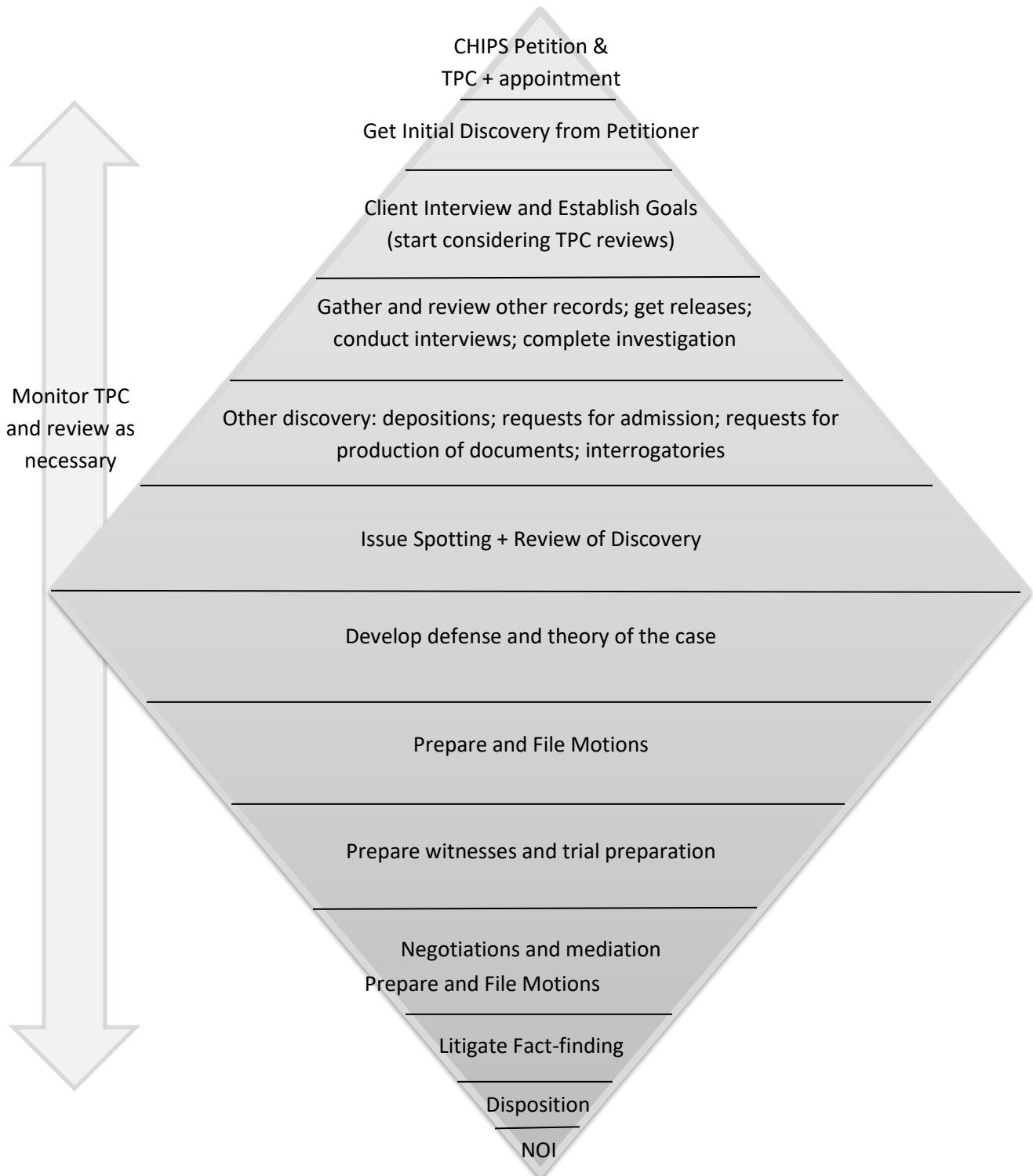
The Office of the State Public Defender (“SPD”) appoints attorneys to represent children, aged 12 or older, who are subject to CHIPS cases. WIS. STAT. §§ 48.23(1m), 977.08(2)(g). The SPD also appoints attorneys to represent parents in CHIPS cases in certain circumstances and locations. See WIS. STAT. §§ 48.23, 48,233, 977.08(2)(g).

Whether representing a parent or a child, attorneys must provide zealous and competent representation to their clients in these cases due to the importance and severity of the consequences at stake, but also because the law so dictates. In cases under ch. 48, Wisconsin Statutes, the “best interests of the child . . . shall always be of paramount consideration.” WIS. STAT. § 48.01(1). Further, a parent has a right to “the companionship, care, custody, and management of his or her [or their] children . . . [that] warrants deference[.]” *Sheboygan County D.H.H.S. v. Julia A.B.*, 2002 WI 95, ¶22, 255 Wis. 2d 170, 648 N.W.2d 402.

This Protocol is available for attorneys representing clients in CHIPS cases. This Protocol is not designed to be a comprehensive or exhaustive checklist of everything a competent attorney must do for a client in a CHIPS case, nor is it designed to be a substitute for legal research, statute study, or consultation with colleagues. Instead, this Protocol serves as a general guide and outline to help attorneys develop a comprehensive and wholistic plan for representation. This Protocol also focuses on the trial level of representation and does not address specific obligations of appellate attorneys in CHIPS cases.

¹ The Annie E. Casey Foundation, KIDS COUNT DATA CENTER - Search: Wisconsin, available at <https://datacenter.kidscount.org/data/tables/7624-chips-petitions-filed#detailed/2/any/false/574,1729,37,871,870,573,869,36,868,867/any/14769> (last visited 27 Sept. 2021).

The "Holtz" Diamond Model



Ongoing Expectations & Ethical Considerations

The expectations for each attorney representing a parent or a child in a CHIPS proceeding include the following:

1. Advocate for the client's goals and empower the client to direct the representation, making informed decisions based on thorough and strategic counsel. *See also* WI:SCR 20:1.4.
2. Act in accordance with the duty of loyalty owed to the client – the same duty owed to *any other* client in a case involving a constitutional liberty interest.
3. Meet and communicate regularly with the client in advance of all court proceedings. Counsel the client about all legal matters related to the case. This includes specific allegations related to/against the client, the client's rights in the pending proceedings, all court orders and the consequences for failing to abide by the same. *See also* WI:SCR 20:1.4.
4. Adhere to all laws and ethical obligations concerning confidentiality.
5. If the client falls out of contact with counsel, counsel should take diligent steps to locate and communicate with the client.
6. Be familiar with WIS. STAT. § 48.23(2), which requires that parents (not children-clients) maintain contact with counsel, and failure to do so constitutes a presumed waiver of the right to counsel. Unless a client expresses a desire to waive or remove counsel, counsel should object to removal of counsel to, at least, preserve a record for appeal.
7. As far as reasonably possible, attempt to maintain a normal client-attorney relationship with a client with diminished capacity, such as a child client or a client with mental illness. Advocacy counsel does not have a duty to raise the issue of competency in CHIPS cases. *See also* WI:SCR 20:1.14, WIS. STAT. § 48.235(1)(g).
8. If the case involves the Indian Child Welfare Act or Wisconsin Indian Child Welfare Act (ICWA or WICWA), consider the impact thereof throughout the proceedings.
9. If family members or alternative placements are identified, communicate these possible placement providers to the caseworker/social worker.
10. Continually encourage the parent to remain actively engaged in services, whether or not the Court ordered the agency to provide such services.
11. Be alert to, and aware of, potential conflicts of interest that would interfere with the competent representation of the client. This is an ongoing obligation throughout the case, as conflicts may arise at any point, especially as parties conduct discovery and proceedings continue. *See also* WI:SCR 20:1.7.
12. Conduct a throughout and independent investigation at every stage of the proceedings. *See also, e.g.*, U.S. CONST., AMEND VI.
13. Notify the client of all upcoming court dates and other important meetings or appointments.

Timeline of a Case

Counsel should be aware that ch. 48 prescribes certain time periods and deadlines for the course of a CHIPS case, though certain time periods are subject to change by local practice and utilization

of Wis. Stat. 48.315, which permits courts to extend timelines for good cause shown. The statutory time periods and deadlines are as follows:

Child taken into custody →

Immediately → custody-taker must attempt to notify parent (WIS. STAT. § 48.19(2))

Within **48 hours**, excluding weekends and legal holidays → court holds custody hearing (WIS. STAT. § 48.21(1)(a))

If no petition filed at time of hearing, court may grant additional **72 hours** (WIS. STAT. § 48.21(1)(b))

Personal service of summons must occur at least 72 hours before →

Plea Hearing (WIS. STAT. § 48.273(1)(c))

Petitioner files CHIPS Petition →

Within **30 days** of this date → Plea Hearing (WIS. STAT. § 48.30(1))

Plea Hearing →

At plea hearing, respondent must assert right to substitute and reserve right to jury trial (WIS. STAT. § 48.29, 48.30(2))

Within **10 days** of this date → Any facial challenge to the petition due (WIS. STAT. § 48.297(2))

Within **20 days** if child is in secure custody → Fact Finding Hearing (Trial) (WIS. STAT. § 48.30(7))

Within **30 days** if child is not in secure custody → Fact Finding Hearing (Trial) (WIS. STAT. § 48.30(7))

72 hours before any hearing subsequent to plea →

Notice required by moving party/person to other parties (WIS. STAT. § 48.27(3)(a)1.)

File pre-trial motions →

Before trial, unless otherwise specified by the court (WIS. STAT. § 48.297(1))

Fact Finding Hearing (Trial) →

Within **10 days** if child is in secure custody → Disposition (WIS. STAT. § 48.31(7)(a))

Within **30 days** if child is not in secure custody → Disposition (WIS. STAT. § 48.31(7)(a))

Disposition →

At close of hearing → Court makes dispositional order (WIS. STAT. § 48.335(5))

Within **20 days** after dispositional order entered →

Parent must file notice of intent to pursue post-dispositional relief (WIS. STAT. § 809.30(2)(b))

Appointment, CHIPS Petition, TPC Hearing

The expectations for SPD appointment to represent a party in a CHIPS case include the following:

1. Prior to being appointed to represent a child or parent in a CHIPS case, ensure that you have applied to be placed on the SPD appointment list and completed all necessary requirements to be SPD certified.
 - a. SPD certification in CHIPS cases requires either juvenile certification or TPR parent advocacy certification. Each such certification, requires specific CLEs and other litigation experience. For specifics, see your local SPD office or WIS. ADMIN CODE PD §§ 1.04(8)-(10).
 - b. SPD minimum performance standards are available at www.wisspd.org.
 - c. SPD offers regular training sessions to meet the certification requirements. See the SPD Family Defense Practice Coordinator and/or SPD Training Division for more information.

2. Ensure that you are knowledgeable and up-to-date on state and federal statutes and case law regarding both CHIPS issues and civil discovery. Examples of specific laws of which you should be aware include, but are not limited to, the following:
 - a. Wisconsin Children's Code, Ch. 48, Wisconsin Statutes.
 - b. Wisconsin Rules of Evidence, chs. 901-911, Wisconsin Statutes.
 - c. Wisconsin Rules of Civil Procedure, chs. 801-807, Wisconsin Statutes.
 - d. Titles IV-B and IV-E of the Social Security Act, including the Adoption and Safe Families Act (ASFA), 42 U.S.C. §§ 620-679 (and corresponding regulations at 45 C.F.R. Parts 1355, 1356, 1357); and the Fostering Connections to Success and Increasing Adoptions Act, 42 U.S.C. § 622.
 - e. Family First Prevention Services Act, P.L. 115-123.
 - f. Child Abuse Prevention Treatment Act (CAPTA), P.L. 108-36.
 - g. Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (and corresponding regulations at 25 C.F.R. Part 23, and the Guidelines for State Courts: Indian Child Custody Proceedings at 45 Fed. Reg. 67, 584 (Nov. 26, 1979)).
 - h. Wisconsin Indian Child Welfare Act (WICWA), WIS. STAT. §§ 48.028 and 938.028.
 - i. Multi-Ethnic Placement Act (MEPA), as amended by the Inter-Ethnic Adoption Provisions of 1996 (MEPA-IEP), 42 U.S.C. § 622(b)(9) (1998); 42 U.S.C. § 671(a)(18)(1998); 42 U.S.C. § 1996b (1998).
 - j. Interstate Compact of the Placement of Children, WIS. STAT. § 48.988.
 - k. Foster Care Independence Act of 1999 (FCIA), P.L. 106-169.
 - l. Individuals with Disabilities in Education Act (IDEA), P.L. 91-230.
 - m. Family Education Right to Privacy Act (FERPA), 20 U.S.C. § 1232g.
 - n. Health Insurance Portability and Accountability Act of 1996 (HIPPA), P.L. 104-192 § 264; 42 U.S.C. § 1320d-2.
 - o. Public Health Act, 32 U.S.C. § 290dd (and corresponding regulations at 42 C.F.R. Part 2).
 - p. Wisconsin Supreme Court Rules Chapter 20: Rules of Professional Conduct for Attorneys.
 - q. Wisconsin Actions Affecting the Family, ch. 767, Wisconsin Statutes.

3. Ensure that your current caseload will permit you to devote the time and attention necessary to represent your CHIPS client with the zealously and competency required. See WI SCR 20:6.2.

The general steps counsel should take upon receipt of the CHIPS petition include the following:

1. Review the petition for potential facial defects. The petition must set forth allegations that, if true, would grant the petitioner the relief sought. *See, generally, e.g., In the Interest of Courtney E.*, 184 Wis. 2d 592, 601, 516 N.W.2d 422 (1994). Grounds for finding children in need of protection or services are found at WIS. STAT. § 48.13. The petition must also include the name, birth date, address, and adoption status of the child; the name and address of each parent; the custody status of the child; a factual basis alleging that the child is in need of protection or services; a copy of the Uniform Child Custody Jurisdiction and Enforcement Act Affidavit; whether ICWA applies; and the name/information of the petitioner. WIS. STAT. § 48.255. Consider moving to dismiss the petition if it fails to meet facial sufficiency.
2. Review the initial filings to ensure that the petitioner filed, along with the petition, a summons to the first hearing and information about whether your client was served with a copy of the summons and the petition.
3. Determine whether your client wishes to substitute on the judge assigned, reserve the right to a jury trial, and whether he/she/they wish to contest the allegations in the petition, all of which must be addressed at plea hearing. WIS. STAT. §§ 48.29, 48.30.

At the Temporary Physical Custody (“TPC”) hearing, counsel should do the following, if appointed at that time:

1. Seek/obtain information from the court and/or petitioner/agency/department about the circumstances under which the child was taken into custody prior to the hearing. *See* WIS. STAT. §§ 48.19, 48.193, 48.195.
2. Review whether the place at which the child is held in custody meets the statutory criteria for such a placement. WIS. STAT. §§ 48.203, 48.205, 48.207, 48.208, 48.209.
3. Confirm that the hearing is scheduled within statutory time periods. *See* WIS. STAT. § 48.21.
4. Speak to the client about his/her/their wishes: Does the client want the child be temporarily placed out of home? Does the client want there to be specific rules that apply to the parents and child during the pendency of the TPC order? Does the client want to ask the court to require the department/agency to do anything specific with the family, such as referrals for services, supervised visitation, etc.?
5. Consider raising the issue of ‘reasonable efforts,’ as defined/required by ASFA, and probe the agency for testifying to such efforts at the time of the hearing. Defense counsel is entitled to police reports prior to the plea hearing, and counsel should request such records as soon as possible. *See* WIS. STAT. § 48.293(1).
6. Consider challenging the need for the TPC order based on both the allegations (are they sufficient to warrant the order?), as well as past department/agency contact and other contextual/environmental factors such as a) What services were previously offered to the family informally? What was the outcome of such agency contact? b) What family members or friends may exist in the family’s support network to help facilitate safe care of the child without a TPC order? c) How did the family respond to the department’s first contact? How did the department first engage the family? Was this contact productive? Responsive to needs? Defense counsel is entitled to certain discovery (police reports,

department records, department notes, eWisSACWIS notes, etc.) that will assist in probing for answers to these questions. *See* WIS. STAT. §§ 48.293, 48.396, 48.78.

Initial Discovery/Investigation – Existing Court Files and Department/Agency Records

Unlike criminal cases, CHIPS are civil matters that require counsel to request discovery and other information; as such, counsel should engage in discovery right away upon appointing, starting with the following:

1. Request discovery of police reports and department/agency notes right away at the commencement of your appointment. *See* WIS. STAT. §§ 48.293, 48.295. Receipt of this information as early as possible will help you maneuver the case at its earliest stages to help your client prepare for trial (or for a plea), and to help your client and you determine how/whether to request changes in placement or review of the TPC order. *See* WIS. STAT. §§ 48.21, 48.217. Discovery is ongoing before unless/until the Court sets a particular deadline, so counsel may make multiple discovery requests over time (subject to certain quantitative limitations). *See* WIS. STAT. §§ 48.293, 48.295, ch. 804.
2. Seek and obtain a court order granting you permission to any existing court records. This may be another CHIPS case for another child, a family law action, a criminal case, or something else. Depending upon the type of case, you may be able to obtain such records through a release signed by your client, but you may also need a court order. *See* WIS. STAT. §§ 48.293, 48.295, 48.396, 48.78, 938.396, 938.78.

Client Interview & Establishment of Goals

Counsel should take reasonable steps to maintain adequate and appropriate contact with the client throughout the proceedings to ensure that the client's goals drive the course of the attorney's representation. *See* WI SCR 20:1.2, 20:1.3, 20:1.4. Counsel should interview the client as soon as possible after appointment to identify the client's goals and make the initial plan for the case, as follows:

1. Obtain your client's contact information and preferred method of communication.
2. Schedule an initial meeting/interview. Given the sensitive nature of these cases, take care to respect your client's comfort, wishes, and situation.
3. Explain attorney-client privilege, the role of advocacy counsel, and the duty to zealously advocate for the client's stated interests. *See* WI SCR 20:1.2, 1.3, and 1.4.
4. Get to know your client. Consider such elements as:
 - a. Cultural competency/humility – know that you may not, and probably do not, have the ability or capacity to fully appreciate the client's perspective and scope of experiences.
 - b. Uniqueness and capacity – consider that your client may have unique characteristics that render him/him/them different than other clients such as competency, incarceration, mental health challenges, addictions to or use of drugs, socioeconomic disparity, domestic violence history, etc.
 - c. Incarceration requires special considerations in CHIPS cases, for the court may not impose conditions of return that, due to incarceration, are impossible for the client

to meet. See *Kenosha Co. Dept. of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 429, 716 N.W.2d 845. Relatedly, incarceration may be a barrier to the receipt of services, either pre- or post-disposition; counsel should be aware of these barriers to help the client maneuver various systems and to hold the court and department/agency accountable to appreciating and accommodating your client's position as an incarcerated parent.

5. Discuss with the client his/her/their goals for the course of the case – What is the ideal outcome? What outcomes are tolerable? What outcomes are worth fighting against?
6. Besides goal-setting and interviewing, counsel should also do the following at this first meeting:
 - a. Provide the client with counsel's contact information in writing and establish a preferred and regular communication system. See WI:SCR 20:1.4.
 - b. Provide the client with copies of the petition, any court orders, department records, or other relevant information.
 - c. Explain the CHIPS legal process to your client, from TPC hearing to trial to disposition.

Continued Discovery/Investigation

Discovery, investigation, and other information-gathering in CHIPS cases are multi-faceted, complex tasks involving different statutes, different methods of requesting information, and different persons/entities from whom to request such information. The rules of civil procedure apply to litigants, but other rules/laws govern confidentiality and accessibility of records. The importance of continued discovery and investigation cannot be overstated – oftentimes, these cases require litigation of circumstances instead of single events, and the recitation, recording, and recitation of such circumstances is often shown to the court through biased (intentional or implicit) lenses of likely-well-intentioned professionals imposing a paternalistic system upon marginalized families. Plucking nuggets here-and-there from oodles of discovery will often allow defense counsel to connect-the-dots to show a bigger, client-centered picture to the jury or judge. To that end, though this is not necessarily an exhaustive list, consider the following discovery and investigation tools:

1. Utilize civil discovery with, as appropriate, *all* other parties (GAL? Another respondent parent?), not just the petitioner:
 - a. Depositions of the social worker, other parent, third parties, etc. WIS. STAT. § 804.02, 804.045, 804.05.
 - b. Interrogatories, limited to 25 unless otherwise authorized by court order or stipulation. WIS. STAT. § 804.08.
 - i. In almost any CHIPS case, be sure to ask the petitioner to a) produce a witness list for trial, b) explain what efforts the department/agency engaged in to prevent child removal or other formal department/agency involvement, c) explain what alternative familial or community alternatives the department/agency pursued in addition to foster care or other department intervention.
 - c. Production of documents. WIS. STAT. §§ 804.09, 804.10 (This may also require utilizing provisions of confidentiality in ch. 48. See WIS. STAT. §§ 48.293, 48.396, 48.78).

- i. In almost any CHIPS case, be sure to ask the petitioner for a) eWisSACWIS notes, b) police reports, c) other department/agency records, d) standards of care followed by department/agency workers, e) correspondence (including emails, texts, call logs, etc.) by and between department/agency workers, f) evaluations done of any parent or child, g)
 - d. Requests for admissions. WIS. STAT. § 804.11.
- 2. Gather records with the permission of your client, including:
 - a. Children’s school records. *See* WIS. STAT. §§ 118.125, 120.13, and FERPA.
 - b. Mental health records of the parent and/or child. *See* HIPPA, WIS. STAT. § 51.30, 42 C.F.R. Par 2.
 - c. Children’s and parent’s medical records. *See* HIPPA.

In addition to seeking information, defense counsel must be prepared to respond to discovery demands from other parties. And, unlike criminal matters, failure to respond timely or adequately may result in sanctions and adverse inferences or rulings against the client. *See* WIS. STAT. § 804.11.

Issue Spotting

Issue-spotting in CHIPS cases is multifaceted; unlike simply identifying defenses to criminal charges, as a defense counsel would do in a criminal case, a CHIPS advocate attorney should issue-spot for both *grounds* (Is this child a child in need of protection or services under WIS. STAT. § 48.13?) and *disposition* (Even if this child is a child in need of protection or services, what should that protection or services look like?).

1. At the *grounds* phase, consider all the statutory grounds under which a child may be found to be in need of protection or services:
 - a. Is the child without a parent or guardian? WIS. STAT. § 48.13(1).
 - b. Has the child been abandoned? WIS. STAT. § 48.13(2).
 - c. Has the parent relinquished custody of the child? WIS. STAT. § 48.13(2m).
 - d. Has the child been a victim of abuse? WIS. STAT. § 48.13(3).
 - e. Is the child at a substantial risk of becoming a victim of abuse? WIS. STAT. § 48.13(3m).
 - f. Is a parent requesting assistance and jurisdiction because he/she/they is unable or needs assistance to care for the child? WIS. STAT. § 48.13(4).
 - g. Is the parent unable or does the parent need assistance to care for the child? WIS. STAT. § 48.13(4m).
 - h. Has the child been placed for adoption or care in violation of law? WIS. STAT. § 48.13(5).
 - i. Is the child receiving inadequate care during a period of time when the parent is unavailable? WIS. STAT. § 48.13(8).
 - j. Is the child at least 12 years old and requesting jurisdiction and assistance because the parent is unwilling, neglecting, unable, or needs assistance to provide? WIS. STAT. § 48.13(9).
 - k. Does the parent refuse, or is the parent unable (for reasons other than poverty), to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child? WIS. STAT. § 48.13(10).

- l. Is the parent at a substantial risk of neglecting, refusing, or being unable (for reasons other than poverty) to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child based upon credible information of the same to another child in the home? WIS. STAT. § 48.13(10m).
 - m. Is the child suffering from emotional damage for which the parent has neglected, refused, or been unable (for reasons other than poverty) to obtain necessary treatment or take necessary steps to ameliorate the symptoms? WIS. STAT. § 48.13(11).
 - n. Is the child suffering from alcohol or other drug abuse impairment for which the parent is neglecting, refusing or unable to provide treatment? WIS. STAT. § 48.13(11m).
 - o. Has the child not been immunized as required but not otherwise exempted? WIS. STAT. § 48.13(13).
 - p. Does the parent live in a family-based residential treatment facility and seek department assistance to have the child reside in the same place? WIS. STAT. § 48.13(14).
2. At the *dispositional* stage, a parent can present evidence and propose specific ideas for what protection/services/placement the court should order, as follows:
- a. Defense counsel may call witnesses and present evidence as to what protection/services/placement the court should consider. WIS. STAT. § 48.335(3). While the rules of evidence do not strictly apply to these hearings, defense counsel should consider the diminished weight of hearsay or other unauthenticated evidence. WIS. STAT. §§ 48.299.
 - b. Evidence should be presented through the lens of the best interest of the child, which is what the court must consider when entering a dispositional order. The best interests of the child. WIS. STAT. § 48.345.
 - c. At disposition, the court may place the child in or out of the home. WIS. STAT. § 48.345(3).
 - d. At disposition, the court may enter an order placing the child under the supervision of the department/agency, impose conditions on the parents, and require the department/agency to provide certain services to the family. WIS. STAT. § 48.345.

The Big CHIPS Cases You Need to Know

Though not necessarily exhaustive, the following list includes big CHIPS cases that shape CHIPS jurisprudence in Wisconsin:

- *In re Interest of: F.Q.*, 162 Wis. 2d 607, 470 N.W.2d 1 (Ct. App. 1991)
 - Big takeaway(s): Rules of civil procedure apply in CHIPS cases
- *State v. Thomas J.W.*, 213 Wis. 2d 264, 570 N.W.2d 586 (Ct. App. 1997)
 - Big takeaway(s): *Miranda* and the 5th Amendment right against self-incrimination do not apply in CHIPS cases
- *State v. Gregory L.S.*, 2002 WI App 101, 253 Wis. 562, 643 N.W.2d 890

- Big takeaway(s): determination of CHIPS status made from time of filing; one parent's actions may, irrespective of the other parent's, may render a child in need of protection or services
- *State v. Thomas F.*, 196 Wis. 2d 259, 538 N.S.2d 568 (Ct. App. 1995)
 - Big takeaway(s): petitioner does not need to prove what services will be available for a child once adjudicated as prerequisite to the court adjudicating the child in need of protection or services.
- *Sheboygan County Dept. of Human Services v. Jodell G.*, 2001 WI App 18, 240 Wis. 2d 516, 240 Wis. 2d 516, 625 N.W.2d 307
 - Big takeaway(s): a parent's refusal to cooperate with intake cannot be used as evidence in support of a CHIPS case
- *Kenneth S. v. Circuit Court for Dane County*, 2008 WI App 120, 313 Wis. 2d 508, 756 N.W.2d 573
 - Big takeaway(s): petitioner may only dismiss a CHIPS petition with the court's approval
- *In re Interest of: T.L.*, 151 Wis. 2d 725, 445 N.W.2d 729 (Ct. App. 1989)
 - Big takeaway(s): if a parent is represented by GAL and advocacy counsel, advocacy counsel must advance stated interests
- *In re Interest of: T.M.S.*, 152 Wis. 2d 345, 448 N.W.2d 282 (Ct. App. 1989)
 - Big takeaway(s): At disposition, the petitioner bears the burden of proof by the greater weight of the credible evidence
- *In re: Elijah W.L.*, 2010 WI 55, 325 Wis. 2d 524, 785 N.W.2d 369
 - Big takeaway(s): The conditions of return implicitly require the Department to help the parent meet those specific conditions, regardless of whether the court expressly directs the Department to do so.
- *State ex rel. Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 561 N.W.2d 729 (1997)
 - Big takeaway(s): definition of "child" in ch. 48 does not include viable fetus.
- *La Crosse County Dept. of Human Services v. Tara P.*, 2002 WI App 84, 252 Wis. 2d 179, 643 N.W.2d 194
 - Big takeaway(s): Facts that arise before the issuance of a CHIPS dispositional order may be relevant to the continuing-CHIPS TPR ground
- *Kenosha County Dept. of Human Services v. Jodie W.*, 2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845
 - Big takeaway(s): Unconstitutional to impose conditions of return that are impossible for a parent to meet

Develop Defenses & Theory of the Case

Consistent with ethical duties, defense counsel should develop a theory of the case and other potential legal and/or factual defenses for the client's case. Further, counsel should consider how best to implement these defenses and theories at every stage of the proceeding, considering whether a client should testify or otherwise present information to the court, whether to argue for inferences in your client's favor based on the petitioner's burden and/or make more active efforts to present evidence, and the best sources for potential evidence.

Motions

1. Timeliness:
 - Any motion challenging the sufficiency of the petition shall be filed within ten (10) days of the hearing on the petition. WIS. STAT. § 48.297(2).
 - Any other motion shall be made "before trial." WIS. STAT. § 48.297(1).
 - Summary judgment motions must be filed within eight (8) months of filing of the petition and so that opposing counsel has 20 days to respond before a hearing on the motion. WIS. STAT. §§ 802.08(1), (2).
2. Types of Motions:
 - (For more contact with kids at any stage in the proceedings!) Review of temporary physical custody *or* change of placement *or* revision of dispositional order. WIS. STAT. §§ 48.21(6), 48.217, 48.357, 48.363.
 - Facial insufficiency/lack of PC. *See In the Interest of Courtney E.*, 184 Wis. 2d 592, 601, 516 N.W.2d 422 (1994).
 - Summary judgment. WIS. STAT. §§ 802.08(1), (2).
 - Constitutional challenges.
 - Suppression of evidence. WIS. STAT. § 48.297(3).
 - Discovery. WIS. STAT. § 48.293, ch. 804.
 - Sever one parent's case from the other. WIS. STAT. §§ 803.06(1), 805.05(2).
 - Etc.
3. General considerations:
 - Preserve issues for appeal.
 - Research thoroughly.
 - Investigate factual bases for motions.

Witnesses (Work with CSS & Investigators) & Exhibits

When preparing the sources of evidence for your case (witnesses and exhibits), consider the following:

1. Counsel should identify and interview (with or through an investigator) all potential witnesses. If witnesses are represented by an attorney, counsel must obtain permission from that attorney before interviewing the witness. In some jurisdictions, corporation

counsel considers the department workers their clients,² so be aware of the practice in your jurisdiction.

2. Identify, secure, prepare, and qualify expert witnesses, as appropriate. Depose opposing parties' experts, if possible.
3. Identify and organize all exhibits that may be necessary for trial
4. The court may enter a scheduling order requiring exchange of witness and exhibit lists by a certain date, so be ready to follow such an order if entered.

Motions in Limine

Like any criminal case, counsel should consider each case individually and prepare motions in limine to address issues to arise in each individual case regarding the scope of evidence, expert witnesses, voir dire, openings, closing, courtroom practices, etc. There are, though, some motions in limine that may be applicable to most CHIPS cases, generally. Specifically, counsel may wish to move for the following:

1. A hearing prior to the commencement of the trial, pursuant to WIS. STAT. § 907.02(1), and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) to review the admissibility of any expert testimony, including, but not limited to, any proposed expert opinion offered by any department/agency social worker.
2. An order against irrelevant other acts evidence pursuant to WIS. STAT. § 904.03, 906.09.
3. An order directing that all proceedings in this matter, including, but not limited to, opening statements, side bar conferences, and closing arguments be recorded.
4. An order that no reference be made before the jury to the respondent's indigence or to the attorney as "public defender" or "appointed counsel" or any other reference that would imply that the defendant is in any way in a different situation from a person who hires his or her attorney.
5. To determine before trial the existence of any criminal convictions of record against any witness and to consider the admissibility of those convictions prior to trial.
6. An order requiring aligned parties to share preemptory challenges.
7. An order for sequestration of witnesses pursuant to WIS. STAT. § 906.15, and further directing that all witnesses be admonished not to discuss their testimony with one another. Such order shall include the sequestration of the foster parents.
8. An order prohibiting the Petitioner or guardian *ad litem* from referring to, using at the time of trial, or moving into evidence any document not disclosed pursuant to any discovery demand.
9. An order prohibiting the Petitioner or guardian *ad litem* from calling any witness not previously disclosed on a witness list.
10. An order permitting the parent to appear before the jury in street clothes and without shackles (if incarcerated).
11. An order prohibiting the Petitioner and the Guardian ad Litem from eliciting from any properly qualified expert witness any inadmissible facts or data upon which the expert

² Though it is important to be aware of the practices in your jurisdiction, that does not mean that such practices are legal or correct. Corporation counsel is specifically authorized to represent the "interests of the public," not a particular entity or person. See WIS. STAT. § 48.09.

based on an opinion, unless and until the court determines such disclosure appropriate WIS. STAT. § 907.03.

12. An order requiring the parties to exchange with the other parties any exhibits that any party may seek to introduce at trial, and to require such exchange at a specific date determined by the Court in advance of trial.
13. An order permitting the individual questioning of jurors during *voir dire* due to the sensitive nature of the proceedings.
14. An order requiring side-bars to occur during trial before the Court asks any witness any question so that the parties may be forewarned of the substance of the question to be asked and may raise any objections in the side-bar so as not to appear to the jury as if the attorney is arguing with the Court.
15. An order permitting the respondent to supplement these Motions in limine should new issues present themselves prior to trial.

Negotiations

The particular case and the wishes of the client may make settlement negotiations possible. For example, parties may agree on the placement of the child if the court obtains jurisdiction. For another example, a parent may seek jurisdiction under WIS. STAT. § 48.13(4) instead of another, more accusatory ground. If the circumstances are ripe for negotiations, consider the following:

1. Counsel must keep the client fully informed of all offers made by opposing counsel. Counsel should discuss the advantages, disadvantages, and consequences of any such offer. *See also* WI SCR 20:1.2.
2. Counsel should not let negotiations impact the progress of trial preparation.

Litigate

At and before trial, consider the following:

1. Attend and prepare for all hearings.
2. Discuss the differences between a jury trial and court trial.
3. Counsel should be familiar with the rules of evidence and law relating to all stages of the CHIPS process, as well as legal and evidentiary issues that can be anticipated based on the pleadings, investigation, and discovery. Counsel should be prepared to make all appropriate objections.
4. Thoroughly prepare the client to testify at the trial. Because these are civil proceedings, the prosecution can call your client as a witness during the case in chief. Preparations should include the likelihood of impeachment and the possibility that the client might incriminate herself when testifying. The client may invoke her Fifth Amendment privilege against self-incrimination when responding to questions about potential criminal activity, however the fact-finder may make an adverse inference if the privilege is invoked.
5. Prepare for hearings and/or trial and make all appropriate motions and evidentiary objections. When appropriate, counsel should:

- i. Develop a plan for direct examination potential witnesses.
 - ii. Determine the implications that the order of witnesses may have on the case.
 - iii. Consider the possible use of character witnesses and any negative consequences that may flow from such testimony.
 - iv. Consider the use of demonstrative evidence and other exhibits.
 - v. In the case of expert witnesses, ensure that proper notification and *Daubert* qualifications are met. If opposing parties are calling an expert witness, consider requesting a *Daubert* hearing challenging that witness' qualifications. Wis. Stat. § 907.02. If a department/agency worker will testify, ensure that the testimony is challenged to establish whether the worker is an expert, if she is going to be offering expert-like testimony.
 - vi. Be familiar with Wisconsin statutory and case law on objections, motions to strike, offers of proof and preserving the record for appeal; and
 - vii. Be familiar with Wisconsin statutory and case law on the admissibility of documentary evidence, the foundation necessary to secure introduction of evidence and any hearsay exceptions that might permit introduction of evidence without authentication.
6. Present and cross-examine witnesses, prepare and present exhibits.
 7. Actively participate in jury selection and drafting jury instructions.
 8. Counsel should have materials available at the time of the litigation that will be helpful to presenting the case. This may include:
 - i. Copies of all relevant documents filed in the case, including the petition;
 - ii. A copy of applicable statutes and cases related to anticipated or common issues;
 - iii. Department/agency reports and attachments;
 - iv. Expert reports;
 - v. Copies of subpoenas;
 - vi. A list of all exhibits to be offered and the witnesses through whom they will be introduced;
 - vii. Reports, certificates, and notes from assessments, programs, and counseling;
 - viii. Documentation concerning client's employment and housing;
 - ix. Documentation of any special achievements of the child while in the custody of the parent;
 - x. Documentation regarding result of drug screens;
 - xi. An outline of opening and closing statements;
 - xii. Plans or outlines for direct and cross-examination of witnesses.
 9. Counsel should consider whether there are tactical reasons to stipulate to damaging facts. This may include when facts are readily provable and uncontroverted, instances when the facts will have less impact on the fact-finder

if they are summarized rather than the subject of lengthy testimony, and when there is the possibility that the fact-finder will view the client as accepting responsibility for the stipulated facts or circumstances.

10. At the close of the petitioner's case and at the conclusion of all evidence, counsel should make appropriate motions to dismiss.

Disposition

1. At the *dispositional* stage, a parent can present evidence and propose specific ideas for what protection/services/placement the court should order, as follows:
 - a. Defense counsel may call witnesses and present evidence as to what protection/services/placement the court should consider. WIS. STAT. § 48.335(3). While the rules of evidence do not strictly apply to these hearings, defense counsel should consider the diminished weight of hearsay or other unauthenticated evidence. WIS. STAT. §§ 48.299.
 - b. Evidence should be presented through the lens of the best interest of the child, which is what the court must consider when entering a dispositional order. The best interests of the child. WIS. STAT. § 48.345.
 - c. At disposition, the court may place the child in or out of the home. WIS. STAT. § 48.345(3).
 - d. At disposition, the court may enter an order placing the child under the supervision of the department/agency, impose conditions on the parents, and require the department/agency to provide certain services to the family. WIS. STAT. § 48.345.

Appeal

To protect a client's right to appeal an unfavorable finding and order in a CHIPS case, counsel must do the following:

1. Defense counsel may petition the court for a re-hearing based on the acquisition of new evidence. WIS. STAT. § 48.46.
2. Appellate procedure for CHIPS cases is found at WIS. STAT. §§ 809.30-32.

Conclusion

The parent-child bond is a core value, rooted in the Constitution and the foundation of our society. CHIPS cases, by their nature, threaten the stability and strength of that bond. As such, parents and children in these cases deserve, and are entitled to, a zealous and effective representation. The CHIPS cases will impact the very nature and makeup of their daily lives. While these cases do not get media headlines, they could not be more important and vital to our clients.