

CHAPTER SIX



Addressing Special Advocacy Issues

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CHECKLIST

Addressing Special Advocacy Issues

Substance abuse

- Be discerning about when and how much information you share with the court regarding your client's substance abuse issues.
- Urge your client to speak openly with you about his history of substance abuse problems so you can advance his goals and advocate for proper treatment.
- Be mindful of statutory timelines and promptly identify appropriate treatment and services.
- Even if the evidence of abuse is unassailable, challenge the agency's attempts to tie the father's substance abuse to his parental fitness.

Mental health concerns

- Ask your client to sign releases to allow you to speak with his mental health care providers. Remind him of attorney-client privileges.
- Ensure greater confidentiality by seeking services from a local mental health clinic rather than through the court clinic.
- Only request a guardian ad litem (GAL) for your father client in extraordinary circumstances when his capacity to make significant decisions is truly diminished. Be sure to have the court clearly define the GAL's role so that it does not supplant or undermine the father's stated wishes or goals for the case.

Domestic violence allegations

- Investigate allegations of domestic violence by interviewing law enforcement, agency workers, and the mother (if counsel will allow) and reviewing documentary evidence carefully. Determine the source of the allegations and whether they are true.

- Explain to your client whether domestic violence evaluations are confidential. Help him weigh the benefits of cooperating with case plan goals.
- If your client decides to challenge the agency's allegations, provide the agency and court exculpatory evidence and favorable information as soon as possible.

Immigration concerns

- Consult an immigration lawyer or specialist for assistance.
- Counsel your client on whether going to court may negatively impact his situation if there is an outstanding immigration detainer.

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Your client wants custody of his daughter. The child welfare agency removed her from her mother and is unwilling to place her with your client. The agency alleges that he is an alcoholic and has physically abused the mother. As you investigate the case, you determine the allegations have merit. Further, your client discloses to you that he is bipolar and that he rarely takes his medication. In your office, he thanks you for all the work you are going to do for him, and tells you that his family is in your hands. How do you proceed?

As the lawyer for the nonresident father, you must help him determine the right course of action, considering his wishes, strengths, and limitations. You will need to work with the agency to negotiate an appropriate case plan. You may also need to independently determine the services your client needs. If a cooperative resolution of the case is not possible, you must be prepared with evidence to rebut the agency's allegations against your client.

The following discussion will help you address some common problems nonresident fathers face in the child welfare system. This chapter is not exhaustive, but it gives you some ideas for how best to accomplish your clients' goals.

Substance Abuse

Many child welfare cases involve parental drug or alcohol use, abuse, or addiction.¹ Substance abuse is not just a terrible problem for parents to address; allegations of substance abuse are very difficult for lawyers to rebut.

Communication and investigation

To start, explain to the father the agency's allegations of substance abuse and the evidence the agency has (or claims to have) to support those allegations. He may deny that he uses or abuses alcohol or illegal drugs. He may confirm the substance use but deny that it impairs his parenting. Or he may agree that the allegations are true and he needs treatment.

Do not pursue a strategic direction yet; you need more information about your client and his needs. Urge him to speak openly to you about his history of substance use and abuse. Make sure he is aware of the rules of attorney-client confidentiality, and that you will not disclose to the agency or law enforcement any substance use he admits to you.² You cannot understand your client's history and needs, or advocate for proper treatment to advance his goals, if you have inadequate information. If you need assistance to determine his needs, ask the court for funds for an expert to perform a confidential substance abuse evaluation. (File your request *ex parte*, if your rules allow, to avoid disclosing information to the agency and other parties. Do not, at this stage, ask the court to

When a Father Relapses

Relapse is Normal

Substance abusing and addicted clients often relapse after entering treatment. While it can happen at any time during recovery,¹ relapse often occurs shortly before trial. Trial is stressful for parents, and stressful events trigger relapses.² Relapse is not the same as failure of treatment; it is normative.³ What matters is your client's commitment upon returning to treatment.

Trial=Stress=Relapse

Sometimes relapse on the eve of trial signifies the father's own doubts about his ability to parent. The father may struggle with low self-esteem and lack confidence. It is not surprising that some fathers believe that they cannot handle the responsibility of caring for a child. You should work closely with the client to determine how he feels about trial and the possibility of reunification. Work closely with his treatment providers to ensure they are aware of trial dates in order to monitor your client's stress.

Sources:

1. Breshears, Elizabeth M., Shaila Yeh and Nancy K. Young. *Understanding Substance Abuse and Facilitating Recovery: A Guide for Child Welfare Workers*. Washington, D.C.: U.S. Department of Health and Human Services, 2005, 18 [Pub. No. (SMA) 05-3981].
2. *Stress and Substance Abuse: A Special Report*. Bethesda, MD: National Institute on Drug Abuse, available at www.drugabuse.gov/stressanddrugabuse.html (last accessed 04/06/09), and studies cited therein.
3. Breshears et al., 2005, 18.

appoint a substance abuse evaluator or refer the father to the court clinic. Such evaluations are generally shared with the agency, other counsel and the court, and you do not yet know if the client is best served by sharing or withholding the information.) If your evaluation suggests that the father does *not* have a problem, consider sharing it with the agency (with your client's consent) to keep unnecessary services off his case plan. If the evaluation shows that he needs treatment, do not share it (although it may later prove useful in negotiating a case plan); rather, use it to urge your client to participate in appropriate services. Explain to him that treatment is vital if he wants custody of his child. The agency and the courts often support reunification efforts for fathers who seek, and faithfully participate in, treatment.

Regular communication with the substance abusing or addicted father may be difficult. He may not have steady housing or telephone service. He may not

answer the door or the phone while using drugs. He may pass in and out of detoxification programs and hospitals. Generally, such facilities will not confirm his presence absent a release. You must leave messages for him in the hope he is there and will return the call. Keep handy a list of addresses and phone numbers of local detoxification centers, shelters, and hospitals.

Services

There are many services for substance addicted and abusing parents.³ Many state health and human services or public health departments list counseling programs, day-treatment programs and residential programs on their Web sites.⁴

Treatment can be a long-term commitment. Fathers with chronic substance abuse problems may need one to two years to stabilize in recovery.⁵ Neither the Adoption and Safe Families Act (ASFA) nor most state child welfare statutes accommodate such a schedule. Permanency hearings must take place within 12 months of the initial custody order to the agency.⁶ If the father is not actively involved in treatment, the court might approve a goal of adoption and determine that the agency need no longer provide reunification services. Accordingly, there is little leeway for relapses or the father's inability to complete one program and need to start afresh elsewhere. (See *When a Father Relapses* box.) While some judges may delay a trial to accommodate your client's "graduation" from a program, others will not. You must push, both in and out of court, for the agency to provide necessary services and referrals.

Carefully negotiate the case plan with the agency. Your father client must enter treatment quickly, and the program must match his needs. Consider retaining an expert (or asking the expert you used for any initial evaluation) to recommend appropriate treatment programs for the client. Do not delay. An expert hired on the eve of trial who testifies that the father needs certain treatments that the agency failed to provide is unlikely to sway a court to return a child or delay termination.

Waitlists for treatment programs, especially inpatient programs, can be long. ASFA deadlines will not wait. Discuss with your client the possibility of negotiating with the agency for placement of the child with a relative. Such placements allow the agency to delay filing termination petitions.⁷ This may buy your client enough time to get into, or finish, the right program.

Because treatment can last so long and ASFA timelines are so short, your father client may be mid-treatment at the time of trial. If so, request a continuance until the end of his treatment. Courts are more likely to grant such requests if they are for a short period. If the court refuses to continue the start of trial, request that it begin trial on schedule but continue subsequent days until the father has

finished the program. Alternatively, ask the court to stay the close of evidence (or agree to reopen the evidence) to allow the father and program staff to testify after he finishes the program.

Challenging agency allegations

Your client may deny that he has a substance abuse problem, refuse services, or fail in treatment. You have no choice, then, but to attempt to refute, or at least undermine, the agency's proof that the substance abuse renders him unfit. Determine and investigate the sources of the agency's information. Prepare to challenge the evidence in court by getting answers to these questions:

- **Does the agency have witnesses to your client's drug use?**
 Contact the witnesses (as permitted by ethical or other rules). If they, themselves, are drug-involved, determine if they can be located, are reliable and/or unbiased, and will come to court to testify even if subpoenaed. Determine their likely testimony; depose them if your court rules allow. Ask your client if other witnesses might contradict the sources or present the evidence in a better light. The agency may try to enter witness statements in evidence through police reports or agency records. If so, move to exclude the statements as hearsay if they do not satisfy any exceptions.
- **Does your client have one or more drug-related convictions?**
 Know the rules governing the admission of convictions and criminal history reports. Object if the agency attempts to introduce the records improperly. Move to strike portions of the criminal history report that are not probative of any offense, such as dismissals, continuances without a finding, and not-guilty verdicts. Object to the admission of older convictions on staleness grounds.
- **Does the agency have drug screens that show positive results for illegal drugs?** Learn about the testing underlying the screen results. Courts have excluded certain types of screens as unreliable.⁸ Determine whether the agency will try to introduce them under the "business records," "medical records," or other hearsay exception. Object if the proper certifications or other foundational requirements are missing. Similarly, drug screens may be privileged under state or federal drug treatment statutes.⁹ Know and assert such privileges.

Even if the evidence of the father's substance use is unassailable, that alone is generally not enough for the agency to prove unfitness. The agency must still

show a connection between his substance use and poor parenting or risk of harm to the child.¹⁰ Many judges assume such a connection exists, which places the burden on you to disprove it. To do so, make the following inquiries:

- During the time the father was using drugs, was he parenting the subject child (or other children)? If so, was he providing her with adequate food, supervision, medical care, and attention to other daily needs?
- Did he get her to school regularly, on time, and dressed appropriately?
- If he was visiting the child during a time he was using, was he appropriate, attentive, and affectionate during visits?
- During this period, was he able to hold a job, maintain housing, and refrain from illegal activities—that is, could he have maintained a stable environment for the child?

The answers to these questions dictate the evidence you must offer at trial to show the father can parent effectively regardless of his substance use.

In most cases, however, the agency will be able to show a connection between your client’s substance use and risk of harm to the child. Then, if he has not participated successfully in treatment, the outcome of trial is clear. Explain to your client that he is unlikely to get custody. Further, unless the mother secures a return of custody and the case is dismissed, the most likely result of trial will be termination of his parental rights. Do some “concurrent planning” with him. Work together to locate his relatives or friends who may serve as guardianship or adoptive resources. Explore with him the possibility of an open adoption agreement to permit him some future contact with the child.

Mental Health Issues

The agency does not usually allege that a child is at risk simply because a father has a mental illness. Rather, the agency usually alleges some behavior that suggests an untreated mental illness; or, if the social worker is already familiar with the father and his mental health issues, the allegations may focus on his failure to seek or stay in treatment or his failure to regularly take his medication.

Communication and investigation

Discuss the agency’s allegations with the father. He may be very uncomfortable discussing his mental health history with a stranger. You may need to meet with him several times to earn his trust. Make sure he understands the confidential nature of your conversations.

Learn about his current mental health providers and medications, if he has

Addressing Unfounded Allegations

The allegations raised by the child welfare agency—or another party—against the father may be unfounded or greatly exaggerated. In such circumstances, your client may be very angry that “trumped up” charges have, at least temporarily, deprived him of his child. Make sure he remains calm. Any demonstration of hostility—especially if the false allegations concern domestic violence—will make it difficult to negotiate an appropriate case plan with the agency and harm his chances in court.

Act Quickly

As a result of the false allegations, the agency may insist on inappropriate services. Or it may unnecessarily require that visits be supervised or reduced. It is therefore crucial that you aggressively challenge false allegations at the earliest opportunity. Send the social worker letters in support of your client and any other favorable documentation. Thoroughly prepare your client to address the allegations at any meeting at the agency. Make sure he can do so calmly; arrange to speak on his behalf if he cannot. Ask the worker or supervisor if you can bring any character or fact witnesses to the meeting.

Prepare for Court

You must be even more prepared to address any false allegations in court. Have your witnesses and documentary evidence ready for the initial post-removal hearing. Prepare your client to testify and be cross-examined. If the allegations arise later in the proceeding, bring the issue to the court’s attention promptly. The longer the allegations remain unchallenged, the harder it will be to convince the court of their falseness.

Plan for Success

If you successfully rebut the allegations, you may be able to keep unnecessary services off your client’s case plan. You may even be able to convince the court to grant the father custody of his child. Your aggressive defense of your client, both in and out of court, will assure him that you are his “champion” and that he will be “heard” by both the agency and the court.

Plan for a Loss

Make sure your client understands that he may not be vindicated. You may not be able to convince the agency to change the case plan; you may not win in court. If the mother tells the social worker or testifies that your client uses drugs or has been physically abusive, you may not, despite your best efforts to cross-examine or discredit her, be able to convince the agency or the court otherwise. If your client loses, the best way to preserve the lawyer-client relationship—and your client’s chances to gain custody in the future—is to empathize with his disappointment and anger, but also to plan with him how to work cooperatively with the agency so that he can convince the agency and the court of his parental fitness later in the proceeding.

any. Have him sign releases so you can speak freely with any providers. If he is on any medications, learn what they are and what they are for. Ask his providers about his mental health history, diagnosis and prognosis, his attendance and commitment to treatment, and their assessment of his functioning on and off medication. Learn their opinions about his ability to parent.

If your client did not have providers before the filing of the child welfare case, consider seeking court funds for an expert to evaluate him and recommend appropriate treatment.

Services

The agency tends to put an evaluation and counseling on the case plan of every parent alleged to have mental health issues. This may be all your client needs. Do not allow the evaluation to be done by anyone who will share it with the agency and the court, such as the court clinic. Rather, have your client request the evaluation from a local mental health service. This ensures greater confidentiality. Have him sign releases so that you can speak freely to the providers, and remind them not to speak to the agency without speaking to you first. Or retain an expert to recommend services. Share the results of any evaluation only if they are favorable (and your client consents).

Your client may need more extensive services. He may need parenting classes specifically geared toward parents with similar needs and abilities. He may need day treatment or residential treatment that permits parents and children to stay together. Such programs may not exist in your area. If they do exist, they may have long waitlists or be far from the client's home. Negotiate with the agency to have all appropriate services on the case plan. Share your expert's recommendations, if strategically appropriate. ASFA requires that the agency provide parents with "reasonable efforts" to reunify the family if the child has been removed.¹¹ To be "reasonable," such efforts may need to include extensive referrals and coordination of service providers.¹² Remind the agency of this ongoing obligation, and bring the matter to the court's attention if the agency is not providing the necessary referrals and services.

Competence to direct litigation

If your client has serious mental health issues, he may not be capable of making decisions about the litigation.¹³ This depends on many factors, including his "ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."¹⁴ Just because you disagree with the father does not

mean he is “incompetent” or has diminished capacity. Clients are entitled to disagree with you; indeed, they are entitled to make *poor* decisions.

Rule 1.14(a) of the ABA Model Rules of Professional Conduct provides that, when a client’s capacity to make adequately considered decisions is diminished because of mental impairment, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”¹⁵ A “normal” relationship means that you owe the client, among other things, the duties of loyalty, confidentiality and diligence.¹⁶ You must keep in regular contact with the father and inform him of case developments.

Your client may be competent to advise you and participate in some decisions but not others.¹⁷ For example, he may tell you that he wants his sister to care for his child, although he does not understand the distinction between foster care, guardianship, and adoption. You should be guided by his wishes. Rule 1.14 allows you to decide how best to fulfill those wishes and protect his interests. It also allows you to seek guidance from others in making various decisions.¹⁸

The Model Rules allow you to ask the court to appoint a guardian ad litem (GAL) if your client has diminished capacity and is at risk of substantial harm.¹⁹ Arguably, such risk exists whenever a client’s child may be lost to the agency. But requesting, or acquiescing to another party’s request for, a GAL has drawbacks. First, admitting the father is unable to make reasoned decisions all but confirms that he is unfit to care for his child. Second, if the GAL is appointed to “replace” the father as decision maker (an appointment known as a “next friend” in many jurisdictions), the appointment greatly disempowers the client.

Generally, you should request a GAL for the father only in extraordinary circumstances, and should contest a motion for appointment filed by another party. If a GAL is appointed, ensure that the court clearly defines the GAL’s role.

Challenging agency allegations

Your client may deny that he has mental health issues and refuse to participate in treatment. (See *Addressing Unfounded Allegations* box.) Or he may participate but still fail to improve his functioning or ability to parent. You must then attempt to rebut the agency’s allegation that your client has a mental health issue. If his mental health issues are beyond dispute, you must show that his illness does not present a risk of harm to his child.²⁰ Many parents with mental health issues can adequately care for their children without professional assistance or medication.

As noted earlier, consider retaining an expert to evaluate your client. The expert may be able to offer an opinion about your client’s level of functioning or challenge prior diagnoses. The expert may be able to state that the client did not receive proper services from the agency, and that such services were available.²¹

If the father has been engaging in services, talk to his providers about his commitment to, and progress in, treatment. If their assessment is favorable, prepare them to testify and subpoena them if necessary.

Clients with serious mental health issues may have been hospitalized. The agency will often bring in such treatment records. Because these records represent your client at his worst, try to keep them out of evidence. Assert all applicable privileges. If the agency is seeking to admit the records under a hospital or medical records hearsay exception, ensure the agency has followed all statutory and common law rules for certifying and authenticating the records. Depending on the jurisdiction, not all hearsay and opinion in the records may be admissible. Therefore, review them promptly so you can move to exclude inadmissible portions before trial. Timely review will also allow you to discuss the records with your expert and, if necessary, subpoena hospital staff for cross-examination. If the court must review the records *in camera*, ensure it follows the prescribed procedures and object if it does not.

Domestic Violence

Communication and investigation

Domestic violence plays a significant role in child welfare cases.²² Representing the alleged (or actual) perpetrator of domestic violence presents many challenges for the child welfare lawyer. The batterer may be dangerous to his partner, to other people and even to you. (See *When Your Client is Dangerous* box.) He may be facing criminal charges arising from the abusive acts. (See *Handling Concurrent Criminal Charges* box.)

If the batterer wants custody of his children, advocate zealously for this goal. But also seek to further his interests by helping prevent future violence.²³ Batterers who accept treatment and refrain from violent conduct are far more likely to gain (and keep) custody of their children.

Obtaining a factual history of the case and any past violence may be difficult. Most batterers present as rational, law-abiding, persuasive, and even charming.²⁴ They may claim that the partner is violent, suggesting that any physical confrontations were mutually aggressive or the batterer was defending himself.²⁵ Batterers also frequently minimize their abusive behavior. This may lead you to downplay or disbelieve the allegations of abuse. Indeed, many batterers do not understand that their behaviors are abusive; some do not understand that occasional or sporadic violence is also abuse. Early on, inform the father about the types of behaviors the courts consider abusive.

When Your Client is Dangerous

Threats to Partners

You may overhear the father threaten his partner or another person. He may communicate this threat to you directly. Consult your local ethics rules and opinions to determine how to proceed. Keep in mind that, in most jurisdictions, you can only breach a client confidence in limited circumstances. Many states' ethics rules provide that you may disclose a client communication to prevent commission of a criminal act that you reasonably believe is likely to result in death or substantial bodily injury to another.¹ Whether an overheard threat meets this high standard will depend on the circumstances.

Even the most violent batterers are unlikely to threaten the partner in court. But batterers often make nonverbal threats and gestures that the victim interprets (correctly) as threatening, but that others might assume are harmless.² Tell your client to refrain from making such gestures. If the judge catches on, he or she may throw your client out of court. The judge may even consider threatening gestures for evidentiary purposes.³

Threats to You

Fathers who abuse their partners or children may also treat you poorly. Keep detailed case notes in the event the batterer sues you or complains about you to the licensing authorities.⁴ Take any threat of physical violence seriously. If you do not feel safe meeting with a violent client in his home or in your office alone, meet him in a public place. To preserve confidentiality, meet him at restaurants or coffee shops during off-peak hours or in private courthouse conference rooms. When meeting in isolated courthouse rooms, inform a court officer of the location of the meeting and ask the officer to knock on the door and check in with you periodically.

Sources:

1. See ABA Model Rules of Professional Conduct 1.6(b)(1); *cf.* *Purcell v. District Atty. for Suffolk Dist.*, 424 Mass. 109, 110-16 (1997) (lawyer permitted to disclose client's communication of intent to burn building).
2. See Fischer, Karla et al. "The Culture of Battering and the Role of Mediation in Domestic Violence Cases." *Southern Methodist University Law Review* 46, 1993, 2117, 2120.
3. See *O'Brien v. O'Brien*, 347 Mass. 765, 766 (1964) (holding that court can consider demeanor of witness as evidence of custodial fitness).
4. See Quirion, Pauline. "Domestic Violence Issues." In 2 *Paternity and the Law of Parentage* § 12.6(b) (MCLE 2002), and sources cited therein.

■ Handling Concurrent Criminal Charges

The father may, as a result of the incidents giving rise to the child welfare case, be criminally charged or face potential criminal exposure. Or he may be arrested for an unrelated crime during the child welfare case. There are several stages in a child welfare proceeding that require your diligence.

Reports

CPS may (and, in some cases, must) notify and provide state prosecutors copies of reports of suspected abuse or neglect.¹ If you have been appointed by this time, ensure that the father understands the report will be turned over to law enforcement, and any statements he makes to CPS investigators may be admissible against him in the criminal action and the child welfare proceeding.

Interviews

In the child welfare case, CPS personnel, court-appointed investigators, and service providers may question the father about the charges. Other than certain mental health providers, most of these individuals have no confidential relationship with the father, and may be called by the prosecution to testify against him.

Accordingly, you should:

- be present at all interviews of the father by CPS personnel, the court investigator, probation officers, and court clinicians or evaluators;
- carefully prepare him for such interviews;
- make sure he knows that any statements made to service providers, including during batterers' counseling, sex offender counseling, and parenting groups, may in certain circumstances be introduced in both the child welfare proceedings and the criminal proceedings;
- work out a plan for whether, or to whom, the client will speak about the incidents at issue;
- discuss all of the above with your client's criminal defense lawyer, and make sure he or she understands the procedures in the child welfare case and the consequences to your joint client of refusing to speak to providers and investigators.

Testimony

Whether or not the father testifies in the child welfare case is another concern. If he testifies, state law may give prosecutors access to the transcript. State law may

also allow the prosecution to access records in the child welfare case. If the father asserts his Fifth Amendment right not to testify in the child welfare case, there may be other unpleasant consequences. Child welfare cases are civil matters, and the court may draw an adverse inference against the father if he fails or refuses to testify.² Such an inference may include deeming certain allegations by CPS admitted by the father.

This presents a Catch-22 for your client. If he wants custody of his child, he may need to testify. But if he testifies, he may be providing information to the prosecutor in the criminal case. Unfortunately, the best outcome for the father—a continuance of the child welfare case until the criminal matter is resolved—is rarely available. Delays, which are anathema to child welfare courts seeking speedy permanency for children, are common in criminal matters. The judge in the child welfare matter usually has broad discretion to grant or deny a continuance in this situation.³ That discretion is rarely granted to accommodate parents with pending criminal matters.

Therefore, assume the child welfare trial will precede the criminal trial. Consult with criminal defense counsel and address the pros and cons of having the father testify. Ultimately, the choice of whether to testify rests with your client.⁴

Sources:

1. See, *e.g.*, G.L. Mass. c. 119, § 51B(k).
2. See, *e.g.*, *Custody of Two Minors*, 396 Mass. 610, 616 (1986); *Care and Protection of Quinn*, 54 Mass. App. Ct. 117, 121 (2002).
3. See *Quinn*, 54 Mass. App. Ct. at 120.
4. See *Jones v. Barnes*, 463 U.S. 745, 51 (1983); ABA Model Rule of Professional Conduct 1.2(a).

Do not assume the agency’s allegations are groundless based purely on client interviews. Read the documentary evidence carefully, and determine the source of the allegations. A police response to an incident of violence may have triggered the filing of the child welfare case. If so, obtain copies of all reports. Interview the investigating or arresting officers if they are willing to speak to you. The mother may have told the agency social worker of the father’s behavior. If so, ask her lawyer if you can speak to her about it (without the father present). If you cannot question her, request and review the social worker’s notes (also known as dictation or “run sheets”) to determine exactly what the mother has told the agency. Your client may have a long record of restraining order violations or domestic assault and battery convictions. If so, secure any required releases to run his criminal history report, and get an explanation from him about each offense.

Your client may concede that he has a problem and agree to treatment. Or

you may be able to convince him that he is more likely to get custody of his child if he enters treatment. If the evidence against him is strong and he is reluctant to enter treatment, explain to him that he will likely lose custody, or even his parental rights, at trial.

Services

Agency case plans for alleged batterers usually include a domestic violence evaluation and, if the evaluation calls for it, batterer's treatment.²⁶ Explain to your client that such evaluations are rarely confidential. Any incriminating statements he makes are likely to end up in a report seen by the agency and the judge. You must work closely with the client to weigh the benefits of cooperating with the case plan against the potential drawbacks of disclosing violent conduct to the agency, the court, and potentially law enforcement personnel.

Treatment for batterers is conducted primarily in group sessions known as batterers' treatment or intervention programs.²⁷ Programs are long-term commitments. They may, depending on the state, require several sessions per week for up to a year. Programs often require the batterer to provide them with employer names, police reports, criminal records, and histories of substance abuse, mental illness, and abusive behaviors. Program staff generally communicates freely with the client's current partner and any prior victims. The batterer must admit to his violent acts. Explain to your client that such admissions may be entered in evidence in the child welfare case; they may also be admissible in a pending (or future) criminal case against him.

Become familiar with local batterer's treatment programs and their rules. The rules are strict, and the consequences to the client of being removed from a program may be severe. If he is participating to comply not just with the agency case plan but also with probation requirements, he may be surrendered and face jail time. Because the programs last so long, if he must start "fresh" at a second program, he is unlikely to complete it before trial in the child welfare case.

If the father is willing to participate in batterer's treatment, urge him to do so before the agency puts it on his case plan or before the court orders it. This will show his good faith and will give him a "jump" on long-term treatment.

Challenging agency allegations

You and your client may decide to challenge the agency's allegations of domestic violence. Your client may not have committed the acts alleged. Or the agency's evidence may be thin or stale. Provide the agency with exculpatory evidence and favorable information about the father as early in the case as possible. For example, if your client has a new partner with whom he's lived, violence-free, for

many years, ask her to speak to the agency. Make sure the agency knows if his partner, friends, or relatives believe he is a loving, gentle caretaker to his or other children. If the agency agrees that your client does not pose a danger to his child, it may not put unnecessary services on his case plan.

If the agency remains unconvinced, and your client is unwilling to participate in services for batterers, you have no choice but to try to rebut or undermine the agency's proof. Object to admission of the father's criminal history report, or move to strike any portions of it that are not probative of unfitness (such as dismissals or not-guilty findings) or are stale. Prepare to cross-examine the sources of the allegations. If the agency intends to present the information through its social worker or reports, object to all hearsay statements that do not satisfy exceptions. Have your client identify any character or rebuttal witnesses, and subpoena them for trial.

If the agency is able to prove that your client is or has been violent, it will be difficult to argue that there is no nexus between his conduct and risk of harm to the child. In some states, courts presume that batterers should not have custody; in other states, courts cannot give the batterer custody absent specific findings that, despite the abuse, the child's best interests are served by such an order.²⁸ This is a difficult hurdle to overcome.²⁹ Most judges acknowledge that batterers present many dangers to children, even if they never direct their violence to the children themselves.³⁰

Immigration Issues

Status

Many fathers in child welfare cases have immigration issues. Neither the agency nor the courts usually consider immigration status alone as determinative of parental unfitness. It is, however, a factor courts consider. Judges are loath to return children to parents who face detention and/or deportation.

Immigration law is highly specialized, and few child welfare lawyers practice it regularly. If your client is in the country illegally, consult an immigration lawyer or other immigration specialist for assistance.³¹ In addition, attend trainings and read articles on immigration law.³² Many agencies assist people with immigration problems. Either you or your client should consult the U.S. Citizenship and Immigration Services Web site, www.uscis.gov.

Immigration issues arise in several ways. Your client may have entered the country illegally, or he may have entered it legally with a "nonimmigrant visa"³³ but overstayed the visa. Foreign tourists and students generally are not allowed

Addressing Language Barriers

Your father client may speak little or no English. He may speak it clearly but not understand the nuances of your speech. For fathers who speak English but are not fluent, you can use several methods to aid communication.

Basic communication skills

Be patient and allow extra time for communication, and never overload him with information. Use simple language, such as, “Where do you live?” instead of “What is your place of residence?”¹ Speak slowly, but not loudly, when the father does not understand. Be wary of using hand signals or gestures, which may mean something else in his language or culture and may confuse him.

Interpreters

You may need an interpreter to help the father in and out of court.² Determine the language and dialect spoken by the father to ensure he receives the *right* interpreter. Many countries have more than one widely-spoken language, and words in the same language often differ in different countries.³ For example, certain Spanish terms have different meanings to speakers from Puerto Rico and those from Mexico.⁴ Also be careful to use interpreters who are familiar with child welfare court practice. You may need to familiarize the interpreter with the legal terms and procedures.⁵

Family members as interpreters

Circumstances may require that you use one of the father’s family members or friends to interpret. Do not ask relatives who have an interest in the proceeding to interpret for you, unless your client supports that interest. Remember that the accuracy of the translation will depend on that person’s comprehension and translation skills. An unskilled interpreter may summarize your wording, thereby leaving out crucial information. He or she may also attempt to “explain” some of your language, thereby conveying inaccurate and misleading information to the father. Further, in some circumstances, using an informal interpreter may waive attorney-client privilege and render the family member or friend an unwitting witness in the case. This is not to say that the use of informal interpreters is never appropriate; rather, it should be done only when absolutely necessary, when there is no time to obtain the services of a certified interpreter.

Translation services

For some simple communications—letters to set up meetings with the client or reminders about court dates—online translation services may be useful.

Use them with care, and make sure your client understands the translations generated by the site. A few to consider:

- **Freetranslation:** www.freetranslation.com
- **Prompt-online:** <http://translation2.paralink.com>
- **Babel Fish:** <http://babelfish.yahoo.com>

Sources:

1. See Mahony, Dianne E. "Language and Communication Skills for Effective Cross-Cultural Communication." In *Ensuring Equal Justice: Addressing Cultural and Linguistic Differences in the Courts of Massachusetts*. Boston: Massachusetts Bar Association 1996, 17.
2. For more information on the role of and best practices for court interpreters, see National Center for State Courts. *Court Interpretation Resource Guide*, available at www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=CtInte.
3. See Reagan, Helen E. "Considerations in Litigating a Civil Case with Non-English Speaking Clients." *American Jurisprudence Trials* 65, 2004 1, §4.
4. Ibid.
5. For a discussion of the mechanics of court interpreting at trial and the proper use of an interpreter, see Grabau, Charles M. and Llewellyn J. Gibbons. "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation." *Northeastern Law Review* 30, Winter 1996, 231.

to work, and doing so violates their visa status. Certain types of temporary non-immigrant visas allow the holder to work, but others do not. The fact that your client has a U.S. citizen child does not give him any legal status in the U.S. The child cannot petition for his "alien" father to live permanently in the U.S. until the child reaches age 21. Fathers with U.S. citizen children may be deported; either the child goes with the father or stays behind.

If your father client is an undocumented alien, he may be uncomfortable speaking to you about his circumstances. Encourage him to speak openly and honestly. Remind him about the rules of attorney-client confidentiality. (See *Addressing Language Barriers* and *Cultural Sensitivity and Fathers* boxes.)

Immigration consequences in child welfare

Your client may be wary of appearing in court, fearing the judge or probation officer will hold him for Immigration and Customs Enforcement ("ICE"). This fear is founded if your client has an outstanding immigration detainer; the court may then inform ICE that it is holding an undocumented alien. If your father client does not have an outstanding detainer, the court is unlikely to contact ICE.

Absent an outstanding immigration detainer, there is no federal requirement that judges or other court officials report information to ICE about the status of a suspected undocumented alien. But there is also nothing prohibiting such a

Cultural Sensitivity and Fathers

Fathers in child welfare cases come from every country and every ethnic, religious, and cultural group. Be sensitive to cultural differences when dealing with fathers from countries or ethnic groups that are unfamiliar to you. For resources on cultural sensitivity and competence, see:

- ▶ Cultural Competence, Child Welfare Information Gateway
www.childwelfare.gov/systemwide/cultural
Provides resources on cultural competence in the child welfare context.
- ▶ National Center for State Courts, Best Practices Institute: Racial Fairness
www.ncsconline.org/WC/Publications//BestPrac/BPRacFai.htm
Lists resources on combating racial bias in the courts.
- ▶ Izawa-Hayden, Althea. “Promoting Culturally Competent Legal Services for Latino Families.” *ABA Child Law Practice* 24(2), April 2005, 17.
- ▶ Howze, Karen A. *Making Differences Work: Cultural Context in Abuse and Neglect Practice for Judges and Attorneys*. Washington, D.C.: ABA Center on Children and the Law, 1996.

report. Whether or not to report the father depends on local court rules and practices, and the discretion of court personnel, the agency, or other parties or counsel to the child welfare case. Upon receiving a report, immigration officials may issue a detainer for the alien to be held for up to 48 hours for ICE to determine whether to take custody of him.³⁴

Your client’s behavior—particularly regarding criminal activity—and his substance abuse and mental health status may have consequences in immigration proceedings.³⁵ Consult an immigration lawyer or specialist before advising your client in this regard.

Conclusion

Representing a nonresident father is particularly challenging when the agency alleges he is unfit. Your client may need services to address his substance abuse, mental health, domestic violence, or other problems. Becoming familiar with the relevant services in your area will help when negotiating an appropriate case plan with the agency. If your client refuses services or fails in treatment, challenge the agency’s unfitness allegations in court. This entails thoroughly investigating the

sources of the allegations and, once the matter is in court, making all necessary objections based on the rules of evidence and privilege. In some circumstances, an expert may help convince the court that the agency's allegations are unfounded or exaggerated and the father is capable of parenting his child. Most importantly, maintain regular communication with your client to clearly understand his wishes and needs as the case progresses.

Nonresident fathers may be—or may become—excellent custodial parents. Their opportunity to prove this to CPS and the court depends on your zealous and informed advocacy.

The author thanks Wendy Wayne, Esq., Massachusetts Committee for Public Counsel Services, for her assistance with immigration issues discussed in this chapter.

Endnotes

1. See Young, Nancy K., Sidney L. Gardner and Kimberly Dennis. *Responding to Alcohol and Other Drug Problems in Child Welfare: Weaving Together Practice and Policy*. Washington, D.C.: CWLA Press, 1998 (citing studies showing that drug use and abuse are a factor in 40-80% of child welfare cases, and estimating that substance use and abuse is a factor in 75% of all out-of-home placements).
2. See ABA Model Rule of Professional Conduct 1.6.
3. The Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services has a “Substance Abuse Treatment Facility Locator” that identifies local programs by city and zip code. The locator is available at <http://dasis3.samhsa.gov>.
4. See, e.g., www.mass.gov/dph/bsas/bsas.htm.
5. See D’Aunno, Lisa and Gay Chisum. “Parental Substance Abuse and Permanency Decision Making: Measuring Progress in Substance Abuse Recovery.” *Children’s Legal Rights Journal* 18, Fall 1998, 52, 53.
6. See 42 U.S.C. § 675(5)(C).
7. ASFA provides that, when a child has been in foster care for 15 of the last 22 months, the agency “shall file a petition to terminate the parental rights of the child’s parents” unless the child is being cared for by a relative, the state has documented a “compelling reason for determining that filing such a petition would not be in the best interests of the child,” or the state has not made the reasonable efforts necessary to achieve the goal of the case plan where the goal is reunification. 42 U.S.C. § 675(5)(E).
8. See, e.g., *Commonwealth v. Johnson*, 59 Mass. App. Ct. 164, 167-68 (2003) (urine screen that stated on its face that “[a] second test must be used to obtain a confirmed analytical result” was not sufficiently reliable to be admitted under the medical records statute).
9. See 42 U.S.C. § 290dd-2; 42 C.F.R. §§ 2.1-2.67.

10. *See, e.g.*, In re Brianna B., 614 N.W.2d 790 (Neb. Ct. App. 2000) (evidence insufficient to show that father's alcohol use harmed children); Adoption of Katharine, 42 Mass. App. Ct. 25, 31 (1997) (findings did not establish nexus between mother's cocaine use and harm to the child).

11. *See* 42 U.S.C. § 671(a)(15); 45 C.F.R. § 1356.21(b).

12. *See, e.g.*, Care and Protection of Elaine, 54 Mass. App. Ct. 266, 274 (2002). Your father client may have disabilities recognized under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (1994). Such disabilities include certain mental illnesses, as well as substance addiction. *See* 42 U.S.C. § 12102(2). In many states, failure to provide the parent with appropriate services as required by the ADA is not a defense to a termination of parental rights proceeding. *See, e.g.*, In re Torrance P., 522 N.W.2d 243, 245-46 (Wis. Ct. App. 1994) ("Because the ADA does not affect our inquiry of whether [CPS] made a diligent effort to provide [the disabled father] with court-ordered services as required under [the state termination statute], we do not determine whether [CPS] reasonably accommodated [his] disability. That is a separate inquiry under the ADA, unrelated to the TPR proceedings. . . . [The father] may have a separate cause of action under the ADA based on [CPS's] actions or inactions; such a claim, however, is not a basis to attack the TPR order."); Adoption of Gregory, 434 Mass. 117, 122 (2001) ("If a parent believes that the department is not reasonably accommodating a disability, the parent should claim a violation of his rights under either the ADA or other antidiscrimination legislation, either when the parenting plan is adopted, when he receives those services, or shortly thereafter. . . . However, where, as here, a disabled parent fails to make a timely claim that the department is providing inadequate services for his needs, he may not raise noncompliance with the ADA or other antidiscrimination laws for the first time at a termination proceeding."). *But see* In re C.M., 526 N.W.2d 562, 566 (Iowa Ct. App. 1994) (suggesting that ADA applies to termination proceeding); In re Angel B., 659 A.2d 277, 279 (Me. 1995) (same). *See generally*, Glennon, Theresa. "Symposium: Lawyering for the Mentally Ill: Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System." *Temple Political & Civil Rights Law Review* 12, Spring 2003, 273; Mosier, Teri. Note, "Trying to Cure a Seven-Year Itch: The ADA Defense in Termination of Parental Rights Actions." *Brandeis Law Journal* 37, Summer 1998-99, 785. You must therefore identify the appropriate services, and CPS's failure to provide those services, well before trial.

13. *See* ABA Model Rule of Professional Conduct 1.14; ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 18 ("Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case."), and Standard 18, commentary ("Attorneys representing parents must be able to determine whether a client's mental status (including mental illness and mental retardation) interferes with the client's ability to make decisions about the case.").

14. *See* ABA Model R. Prof. C. 1.14, Comment [6]; Renne, Jennifer. "Diminished Capacity." In *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*. Albany, NY: LexisNexis, 2001, 4-5.

15. ABA Model R. Prof. C. 1.14(a).

16. *See* Renne, 2001, 4.

17. ABA Model R. Prof. C. 1.14., Comment [1].

18. If your father client's ability to make adequately considered decisions is impaired and you reasonably believe him to be at substantial risk of harm (physical, mental, financial or other), you may take steps to protect him, even to the extent of disclosing confidential information. *See* ABA Model R. Prof. C. 1.14(c). You may "consult[]" with individuals or

entities that have the ability to take action to protect the client and, in appropriate cases, seek[] the appointment of a guardian ad litem, conservator or guardian.” ABA Model R. Prof. C. 1.14(b). Any such actions must be “least intrusive” to the client. For example, you may, to protect the father, divulge confidences to his mother who cares for him, but not to CPS or relatives vying for placement of the child.

19. ABA Model R. Prof. C. 1.14(b). In at least one state, judges must consider a GAL appointment for a parent alleged by the agency to be unfit because of mental illness, retardation or other mental impairment. *See* N.C. Gen. Stat. § 7B-1101(1) (“a guardian *ad litem* shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent . . . (1) where it is alleged that a parent’s rights should be terminated pursuant to G.S. 7B-1111[a](6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition.”).

20. In some states, presence of a mental illness is not sufficient to show unfitness; the illness must affect the parent’s ability to meet the child’s needs or cause him to abuse or neglect the child. *See, e.g.*, Adoption of Eduardo, 57 Mass. App. Ct. 278, 282-83 (2003).

21. *Cf.* In re Adoption/Guardianship Nos. J9610436 and J9711031, 368 Md. 666, 796 A.2d 778, 787 (App. Ct. 2002) (reversing termination decree because child protection agency never offered father any “specialized services designed to be particularly helpful to a parent with [his] intellectual and cognitive skill levels,” even though such services were available).

22. Domestic violence may play a part in one-third to one-half of child welfare cases. *See* Goodmark, Leigh. *Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence*. Reno: NV: National Council of Juvenile and Family Court Judges, 2008, 10 (citing Melanie Shepard and Michael Raschick). “How Child Welfare Workers Assess and Intervene around Issues of Domestic Violence.” *Child Maltreatment* 4, 1999, 148, 149.

Domestic violence may be physical, sexual, emotional or psychological. Physical abuse may be blatant and obvious, such as bruises or broken bones, or it may be less visible. The abuser may push the victim against the wall, throw objects at her, or threaten to hit her. While most perpetrators of abuse are men and most victims are women, these roles are occasionally reversed.

23. *See* Quirion, Pauline. “Why Attorneys Should Routinely Screen Clients for Domestic Violence.” *Boston Bar Journal* 42, Sept./Oct. 1998, 12.

24. *See* Goodmark, Leigh. “When a Parent is a Batterer: Understanding and Working with Abusive Fathers.” *ABA Child Law Practice* 22(8), October 2003, 121, 126.

25. *Ibid.*

26. Even if CPS does not require an evaluation, the court may. Judges are increasingly aware of domestic violence issues, and many require evaluations to assess the risk perpetrators pose to children and partners. *See generally*, Goodmark, 2008; Dalton, Clare, Leslie Drozd and Frances Wong. *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge’s Guide*. Reno, NV: National Council of Juvenile and Family Court Judges, 2004, rev. 2006.

27. For a selection of batterer’s treatment programs and a discussion of the nature of treatment, *see* Child Welfare Information Gateway, *Batterer Intervention Programs*, available at www.childwelfare.gov/systemwide/service_array/domviolence/treatment/intervention.cfm. There is little research on the effectiveness of such programs, and some scholars believe they are of limited benefit in reducing family violence. *See* Babcock, Julia C., Charles E. Green and Chet Robie. “Does Batterers’ Treatment Work? A Meta-Analytic

Review of Domestic Violence Treatment.” *Clinical Psychology Review* 23(8), January 2004, 1023-1053 (concluding that current batterer’s treatment programs “have a minimal impact on reducing recidivism beyond the effect of being arrested.”).

Note that anger management classes are not the same as batterer’s treatment, and are not considered appropriate for batterers. See Goodmark, Leigh. “Treatment Options for Batterers.” In “A Balanced Approach to Handling Domestic Violence in Child Welfare Cases.” *ABA Child Law Practice* 20(5), July 2001, 54. Family mediation and couples counseling are likewise inappropriate, because they subject the victim to greater risk of abuse. See Saunders, Daniel G. “Child Custody Decisions in Families Experiencing Woman Abuse.” *Social Work* 39(1), January 1994, 51, 55.

28. See, e.g., *Custody of Vaughn*, 422 Mass. 590, 599-600 (1996). The National Council of Juvenile and Family Court Judges has long advocated for a presumption against giving custody to the battering spouse. See National Council of Juvenile and Family Court Judges. *Model Code on Domestic and Family Violence*, § 401, 1994, 33.

29. The evidence might support an argument that the children were not harmed if they did not witness the abuse. See, e.g., *In re C.A.S.*, 828 A.2d 184 (D.C. 2003). But in most cases, the children will have witnessed it or will have witnessed the effects of it.

30. Children may be injured or killed in an assault by the batterer on the mother. See Quirion, Pauline, et al. “Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation,” *Boston University Public Interest Law Journal* 6, Winter 1997, 501, 509-10 & nn. 58-60, and studies cited therein. Many are injured when they try to intervene to protect the victim from the batterer’s rampage. See generally, Roy, Maria. *Children in the Crossfire*. Deerfield Beach, FL: Health Communications, 1988, 89-90. Further, exposure to assaultive behavior traumatizes children and negatively impacts their mental health and development in many ways. See Quirion et al., 1997, 511-12, and studies cited therein. Even a single episode of violence can produce post-traumatic stress disorder in children. See Saunders, 1994, 52, and studies cited therein.

31. There are several resources available online. The ABA Commission on Immigration has a state-by-state locator for free and low-cost immigration legal assistance, available at www.abanet.org/publicserv/immigration/legal_services_directory_map.shtml. Other resources include the American Immigration Lawyers Association (www.aila.org), and the Immigrant Legal Resource Center (www.ilrc.org).

32. See Goodmark, Leigh. “Domestic Violence and Child Maltreatment in Immigrant Communities.” *ABA Child Law Practice* 22(4), June 2003, 53, 62. See generally, Yali Lincroft et al. *Undercounted, Underserved: Immigrant and Refugee Families in the Child Welfare System*. Baltimore, MD: Annie E. Casey Foundation, 2006, available at www.f2f.ca.gov/res/pdf/UndercountedUnderserved.pdf.

33. Nonimmigrant visas are for temporary visitors to the United States. For more information, see the U.S. Department of State Web site at http://travel.state.gov/visa/temp/temp_1305.html.

34. 8 C.F.R. § 287.7.

35. See, e.g., 8 U.S.C. §§ 1182 and 1227 (detailing grounds for inadmissibility and deportability).