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§366.26(*l*) Writs in Three Easy Steps

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PURPOSE OF STATUTORY WRIT PROCEDURE

- Expedited appellate review of the trial court's findings and orders before the §366.26 hearing is held. Rule 8.450(b)
  - Adopted 1995
  - Appeals took too long
  - Need to resolve alleged errors within 120 days
  - Not really a writ

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PURPOSE: Expedited Appellate Review

- Same procedures for §366.28 writs
  - Expedited review of post-termination adoptive placement decisions

WHY IS A WRIT PETITION NECESSARY?

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- "The purpose of section 366.26, subdivision (*l*) is to ensure that error in the proceedings underlying the order setting a section 366.26 hearing does not fatally infect that hearing." *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501

WHY IS A WRIT PETITION NECESSARY?

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- "That purpose is carried out by an accelerated procedure designed to provide for the preparation of the record, briefing, and decision within 120 days, the statutory deadline for the setting of the section 366.26 hearing." *John F. v. Superior Court* (1996) 43 Cal.App.4th 1014

WHY IS A WRIT PETITION NECESSARY?

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- The failure to seek writ review of these orders forfeits the client's right to *any* appellate review
- It is trial counsel's duty to to ensure that this avenue of review is not forfeited; *i.e.*, it is trial counsel's duty to file the Notice of Intent *and* the writ petition.

WHEN MUST A .26(*l*) WRIT PETITION BE FILED?

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- Writ review must be sought of ANY order made at ANY hearing at which a §366.26 hearing is set, including:
  - a disposition hearing where services were denied, *In re Rebekah R*. (1994) 27 Cal.App.4th 1638
  - any review hearing, *In re Rashad B*. (1999) 76 Cal.App.4th 442, and
  - any other hearing (*e.g*., §388) at which the court sets a section 366.26 hearing

WHY MUST TRIAL COUNSEL FILE THE PETITION?

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- "Trial counsel should be familiar with the issues raised during the hearing at which the matter is set for a section 366.26 hearing, and should thus be in the best position to meet the short deadline for filing the extraordinary writ petition pursuant to [the] rules [of court]." *John F. v. Superior Court, supra,* 43 Cal.App.4th 1014

SHOULD I FILE A WRIT PETITION IN THIS CASE?

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- Counsel has ethical duty to maintain only those actions s/he believes are "legal or just." You are not required to file a petition in every case where the client has filed a Notice of Intent. *Glenn C. v. Superior Court* (2000) 78 Cal.App.4th 570
- Counsel may be sanctioned for filing a frivolous brief. See, *LADCFS v. Superior Court* (1995) 37 Cal.App.4th 439 [county counsel sanctioned for filing frivolous writ petition.]

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SHOULD I FILE A WRIT PETITION IN THIS CASE?

- Things to consider:
  - Waiver/Forfeiture--was error preserved?
  - Standards of review/prejudice
  - Bad facts make bad law
  - Arguable issue: within existing law or reasonable extension thereof?
    - Straight face test
    - Your credibility with the Court of Appeal

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WAS THE ERROR PRESERVED?

- Failure to preserve issue for appeal = waiver/forfeiture of right to raise issue in court of appeal.
  - Purpose: To give trial court opportunity to do the right thing. Can't "sandbag" the trial court by failing to object or otherwise bring error to court's attention and then complain to the court of appeal that trial court erred

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WAS THE ERROR PRESERVED?

- Erroneous admission of evidence:
  - Objection to *admission* of evidence: you must state ground(s) *and you must get a ruling*
  - If court sustains objection to evidence you want to get in: you must make an *offer of proof* as to what that evidence would show
  - Experts: adequate foundation for expertise
    - Use voir dire to show lack of expertise of other side's expert and object to court recognizing as an expert.

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WAS THE ERROR PRESERVED?
Practice Tips

- Adequate record: Be sure you have a copy of all documents admitted into evidence
- Failure to give notice: If party is not present, get on record that party was provided with notice of the hearing
  - If hearing is continued, get on record who has duty to notify absent parties

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WAS THE ERROR PRESERVED?
Practice Tips

- In-Chambers/Off the Record: Make sure record reflects what happened if significant
- Implied Findings: Make sure court makes all required findings
  - Absence of a required finding may result in court of appeal implying the finding from the evidence
- Recommended findings: Object to recommended finding if there is no evidence to support it

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EXCEPTIONS TO PRESERVATION RULE

- ICWA notice issues--parent's failure to object cannot waive tribe's rights
- Because the court of appeal wants to make an exception
  - Important legal issue
  - Inherent discretion—but does not apply to failure to preserve evidentiary issues

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WHAT ARE MY CHANCES OF WINNING? STANDARDS OF REVIEW

Substantial Evidence

- Generally applied to findings of fact
  - Accepts trial court's determinations of credibility
  - Accepts trial court's determinations of conflicting evidence; does not reweigh evidence
  - Reasonable inferences from evidence may support finding of fact
  - Speculation, conjecture, and assumptions will not support findings of fact

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STANDARDS OF REVIEW

Substantial Evidence

- Court will uphold trial court's findings if there is any evidence to support them
  - Good dependency case on what constitutes substantial evidence:
    - *In re Savannah M*. (2005) 131 Cal.App. 4th 1387
  - Another good case:
    - *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634

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STANDARDS OF REVIEW

Abuse of Discretion

- Hardest to win
- Most deferential standard of review
- Court will not reverse unless trial court exceeded the limits of legal discretion by making an "arbitrary, capricious, or patently absurd" determination.

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STANDARDS OF REVIEW

Abuse of Discretion

- However, discretion must be exercised within limits of applicable law that grants discretion
- Failure to exercise discretion is an abuse of discretion
- Good dependency case on abuse of discretion:
  - *In re Robert L.* (1993) 21 Cal.App.4th 1057

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STANDARDS OF REVIEW

De Novo Review

- Most favorable to petitioner
- "Pure" questions of law
  - Statutory interpretation
  - Constitutional interpretation
- Mixed questions of law and fact where facts are *undisputed*, the rule is clear, and issue is whether the facts satisfy the applicable legal standard.
  - E.g., does the petition state a cause of action under section 300?

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STANDARDS OF REVIEW

Mixed Questions of Law and Fact

- Facts found are reviewed for substantial evidence
- De novo determination of whether law properly applied to facts

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STANDARDS OF REVIEW

Differential Abuse of Discretion

- Three step process
  - Finding of fact are reviewed for substantial evidence
  - Conclusions of law are reviewed de novo
  - Application of law to facts reversed only if arbitrary and capricious
    - *In re C.B.* (2010) 190 Cal.App.4th 102

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PREJUDICE

The Home of Harmless Error

- In order to win, you must not only show that the court made a mistake but also that the mistake was *prejudicial* to your client
- Prejudice in most cases = reasonable probability of more favorable outcome for your client

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PREJUDICE

The Home of Harmless Error

- Cal. Const. Art. VI, §13: Judgments shall not be reversed for errors in proceedings unless court of appeal concludes that error has resulted in a miscarriage of justice.
- If the result would have been the same if the error had not been made, there is no miscarriage of justice.

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PREJUDICE

The Home of Harmless Error

- Few dependency errors are reversible *per se* (i.e., without having to show prejudice)
  - See *In re James F.* (2008) 42 Cal.4th 901
- Structural error is reversible *per se*
  - More than trial error. Deprives party of a fundamentally fair proceeding.

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PREJUDICE

The Home of Harmless Error

- Possible grounds for reversal *per se*
  - Complete denial of right to counsel
  - Biased judicial officer
  - Complete absence of notice of proceedings that result in TPR
  - Act in excess of trial court's jurisdiction

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PREJUDICE

The Home of Harmless Error

- Standards of prejudice
  - Federal constitutional error--harmless beyond a reasonable doubt (*Chapman* standard)
  - Trial error—reasonably probable that result would have been more favorable to appellant/ petitioner absent the error (*Watson* standard)

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PREJUDICE

The Home of Harmless Error

- *Watson* error—reasonably probable that result would have been more favorable to appellant/petitioner absent the error
  - A reasonable probability does not mean more likely than not but merely a "reasonable chance;" more than an "abstract possibility"
    - In most cases, you will be trying to argue a "reasonable chance" of a better result

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PREJUDICE

The Home of Harmless Error

- A judgment or order based on findings that are not supported by substantial evidence constitutes a miscarriage of justice
  - i.e., no prejudice analysis required. *(In re Catherine S*. (1991) 230 Cal.App.3d 1253, 1278.)

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WILL THE TRIAL JUDGE BE MAD AT ME?—Practice Tips

- When you can, give the trial court a chance to correct a mistake by requesting reconsideration and submitting additional authority supporting your position.
- Let the judge know up front that a writ petition is possible because you believe the issue is novel, difficult, or important, *i.e*., a "test case."
- Be professional--don't let it be known that you are trying to teach the judge a lesson (even if you are.)

FILING A WRIT PETITION IS AN EASY THREE STEP PROCESS

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- **Step One:** File a Notice Of Intent To File Writ And Request For Record in the Juvenile Court.
- **Step Two:** Review and augment the record if necessary
- **Step Three:** Draft and file your writ petition and memo of points and authorities

FILING A WRIT PETITION IS AN EASY THREE STEP PROCESS

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- "No special knowledge of writ procedure is required to file the petition. Counsel may use the Judicial Council writ petition form. … Counsel need merely summarize the factual basis for the petition, making reference to 'specific portions of the record, their significance to the grounds alleged, and disputed aspects of the record,' and attach applicable points and authorities." *John F. v. Superior Court*, *supra,* 43 Cal.App.4th 400

STEP ONE: FILE THE NOTICE OF INTENT

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- *What do I file?*
  - Judicial Council form JV-820 (.26)
  - JV-822 (.28)
  - These forms are available at the Judicial Council's website in fillable.pdf format: http://www.courts.ca.gov/forms.htm
    - Put form number in search box

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STEP ONE: FILE THE NOTICE OF INTENT

- *What do I need to know about filling it out?*
  - List every hearing date that resulted in the order you are challenging. Rule 8.450(d)(2)
  - Better practice is to have adult client sign the Notice of Intent
    - Eliminates issues about authority to file
    - Attorney must have authority from client to file Notice of Intent. Rule 8.450(e)(3)

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STEP ONE: FILE THE NOTICE OF INTENT

- ***When do I file it?***
- The Notice of Intent must be filed within 7 days of the date of the order setting the .26 hearing if your client was present in court, or
- Within 12 days from mailing by the clerk if the client received notice of the order by mail, or
- Within 17 days if client's address is out of state (.26 writs only), or
- Within 27 days if client's address is out of the U.S. (.26 writs only).
  - Rule 8.450(e)(4)

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STEP ONE: FILE THE NOTICE OF INTENT

- ***Where do I file it?***
  - The Notice of Intent is filed with the clerk of the juvenile court. Rule 8.450(e)(1)

STEP ONE: FILE THE NOTICE OF INTENT

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- ***When does the time start running?***
- The date of the order is the date the court orally sets the section 366.26 hearing, or
- The date a written order issues setting the .26 hearing, whichever is earlier
- Rule 8.450(e)(4)

STEP ONE: FILE THE NOTICE OF INTENT

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- ***When does the time start running?***
- Where the order is initially made by a referee who was not sitting as a temporary judge, the time is calculated from the date the referee's order becomes final under rule 5.540(c).
- Rule 8.450(e)(4)(E)

STEP ONE: FILE THE NOTICE OF INTENT

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- ***When does the time to file start running?***
- The juvenile court may not extend this time.
- The court of appeal may extend this time upon an "*exceptional* showing of good cause." Rule 8.450(d)
  - Showing that delay was caused by a court official or by a prison official at facility where parent incarcerated would have been sufficient to to show good cause. *Jonathan M v. Superior Court* (1995) 39 Cal.App.4th 1826

STEP ONE: FILE THE NOTICE OF INTENT

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- A premature or late Notice will *not* be filed by the trial court clerk.
- Clerk must return the NOI to the *client* with a notice that the client should contact his or her attorney.
- Clerk must send attorney a copy of the notice to client that NOI was not filed. Rule 8.450(f)

STEP ONE: FILE THE NOTICE OF INTENT

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- The superior/juvenile court clerk must serve the Notice on the parties of record (including de facto parents and siblings entitled to notice), their counsel, the social worker, and the CASA. Rule 8.450(g)
- Trial court clerk required to send a copy of the NOI to the Court of Appeal with a list of who was served. Rule 8.450(g)(2)(A)

STEP ONE: FILE THE NOTICE OF INTENT

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- Court of appeal clerk must immediately "lodge" Notice of Intent. When NOI is lodged, reviewing court gains jurisdiction of the writ proceedings. Rule 8.450(j)(1)
- A late Notice will forfeit review, unless the Court of Appeal grants relief on an *exceptional* showing of good cause.

STEP ONE: FILE THE NOTICE OF INTENT

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- A defective Notice (e.g., not signed) can result in immediate dismissal, which "is final as to the court," depriving the court of appeal of jurisdiction to hear the matter.
- The sole remedy at that stage may be to file a petition for a writ of habeas corpus. (See *Katheryn S. v. Superior Court* (2000) 82 Cal.App. 4th 958 [court of appeal treats late-filed petition as a petition for writ of habeas corpus].)

PRACTICE TIP

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- Discuss the availability of writ review with the client *before* the hearing any time the possibility that a .26 may be set arises in the case.
- If the client authorizes you to file a writ petition should it become necessary, obtain a signed Notice of Intent form from the client to keep in your file.
- File that Notice form within 7 days of the setting of the .26 hearing.

PRACTICE TIP

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- ***Online dockets***
- Keep track of deadlines and timelines by going to court's on-line docket
- Start at http://www.courts.ca.gov/courtsofappeal.htm
- Click "Search Case Information," choose correct Court of Appeal, and hit "Search"
- Enter trial court case number in first box

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PRACTICE TIP

- *Online dockets*
- When case comes up, click on Docket.
- Docket will show you what has been filed and when it was filed
- You can register for automatic emails of specified events in the case.
- You can figure out when things are due and find out whether others have filed on time.

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STEP TWO: THE RECORD

- Review the record immediately upon receipt to determine whether anything is missing
- Move to augment or correct the record if necessary.

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STEP TWO: THE RECORD

- ***Clerk's preparation of the record***
  - The juvenile court clerk and court reporters must immediately begin preparation of the record. Rule 8.450(h)
    - Court reporter has 12 days to complete transcript and give to trial court clerk.
    - Court clerk has 20 days from date of NOI to prepare clerk's transcript.

STEP TWO: THE RECORD

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- ***The Record***
- The clerk's transcript must include the petition, all reports, notices of hearing, jurisdictional findings, and minute orders contained in the court file, any transcript of a sound or video recording, all documents considered by the court, the Notice of Intent, and proof of service; Rules 8.450(h)(2) and 8.407(a)
- The reporter's transcript should include all dates of the hearing at which the order setting the .26 hearing was made. Rule 8.450(h)(1)

STEP TWO: THE RECORD

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- ***Filing of the record***
  - Clerk must file record with Court of Appeal and send a copy to each counsel of record and each unrepresented party by means at least as fast as express mail. Rule 8.450(i)
  - The Court of Appeal will notify you when the record has been filed, and it will provide a due date for the writ petition (usually 10 days.) Rule 8.450(j)(2)

STEP TWO: THE RECORD

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- ***Augmenting the record***
  - If the record prepared by the clerk is insufficient, file a motion to augment it in the Court of Appeal.
  - A motion to augment must be filed within 5 days, unless
    - the record is more than 300 pages=7 days, or
    - 600 pages=10 days. Rule 8.452(e)(2)

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STEP TWO: THE RECORD

- ***Augmenting the record***
  - Motions to augment are governed by Rules 8.155 and 8.452(e) and sometimes by local appellate court rule.
    - Local appellate rules are available on the Judicial Council's website
  - If possible, attach a copy of any document you want added to the record. Court may chose to augment with the copy.

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STEP TWO: THE RECORD

- ***Augmenting the record***
  - It is your responsibility to make sure that the record is adequate to permit review of the order
  - If a document supporting your argument is not in the record, the court will not consider it.
    - If you discover that something is missing after the time to augment has run, file a motion to augment with your writ petition and attach the document to the motion

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STEP TWO: THE RECORD

- ***Augmenting the record***
  - The court may grant no more than 15 days to permit the trial court to complete required augmentation of the record. Time to file petition is extended by same number of days. Rule 8.452(e)(5) and (6)
  - If the record is still inadequate after the clerk has responded to the augmentation order *(e.g.,* the clerk can't find the exhibits), file missing documents as exhibits to your writ petition.

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PRACTICE TIPS

- The need to augment may be avoided by designating additional documents you want in the record when you file your Notice of Intent
  - *e.g.*, exhibits, "other documents" etc.
  - Attach document listing documents you want to make sure are included
- List *all* hearing dates you want included on the Notice of Intent form.

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STEP THREE: DRAFT & FILE THE WRIT PETITION

- ***What Do I File?***
- The Judicial Council provides a form for the petition--the JV-825. This is not a mandatory form; you do not have to use it.
- However, if you use the form, you will ensure that you have included all the necessary components required by the rules

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PRACTICE TIP

- There is not enough room on the writ petition form to put in details, e.g.,
  - #6 [reason order was erroneous]
  - #8 [summary of factual basis for the petition].
- Instead of trying to explain in summary fashion, consider filling in that blank with this: "See attached Memorandum of Points and Authorities."

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STEP THREE: DRAFT & FILE THE WRIT PETITION

- ***What Do I File?***
  - You *must* attach a Memorandum of Points and Authorities to the JV-825. Rule 8.452(a)(2)
  - The Ps & As must contain a statement of facts which may be combined with the procedural history (statement of the case) but it must be a full and fair recitation of the material facts supported by references to the record. Rule 8.452(b)

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NUTS AND BOLTS OF BRIEF WRITING

- ***Your Memo of P's & A's is an appellate brief!***
  - Courts of Appeal expect you to follow basic appellate brief form and content

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Covers
  - Writ petition and writ opposition should have red covers; bound on the left
  - Caption-COA case no. and trial court case no.
  - If stay is sought, cover must state that the petition seeks a stay, *e.g.*,
    - "Immediate Stay of April 2, 2015 Welf. & Inst. Code Section 366.26 Hearing Requested"

NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

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- Covers
  - Must include your name, state bar number, address, telephone number, fax number and email address
    - If more than one attorney is listed on the cover, you must put an asterisk next to name of attorney to whom notices should be sent.
  - Must state the name of the party or parties the attorney(s) represents

NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

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- Table of Contents
  - Table of contents lists each portion of brief
  - Contents include each argument separately:
    - Petition for Extraordinary Writ …… 1
    - Memorandum of Points and Authorities …4
      - Introduction…… 4
      - A Stay Is Necessary Because etc. …… 5
      - Integrated Statement of the Facts, etc. 7
      - Argument……....9
      - I. The Court's Reasonable Services Finding Is Not Supported by Sufficient Evidence... 9

    etc.

NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

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- Table of Authorities—Separately list:
  - Cases: Alphabetically by case name
    - Some people list Supreme Court cases separately from Court of Appeal cases and USSC cases separately from state cases
  - Constitutions
  - Statutes: alphabetically by code name and then numerically within each code
  - Rules of court—in numerical order
  - Treatises: Alphabetically
  - Other authorities: Alphabetically
- Page number(s) for every authority cited

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PRACTICE TIPS

- Legal citation form:
  - California Style Manual (originally written by B. Witkin)--now edited by Reporter of Decisions
  - Available online at http://www.sdap.org/downloads/Style-Manual.pdf
  - Also available at law school bookstores

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Introduction
  - Concise overview of case
    - Nature of action
    - Order appealed from
    - What trial court did
    - Issues to be decided
    - Relief sought
- Appellate justices and their clerks want to know up front what the case is about

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Statement of Facts and Statement of the Case (procedural history)
  - Generally combined in dependency briefs into section call "Integrated Statement of Facts and Statement of the Case."
    - "It is impossible to give the reader an accurate 'feel' for what is really going on in most juvenile dependency cases without integrating the statement of the case with the statement of facts." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522, fn. 2.)

NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

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- Statement of Facts and Statement of the Case (procedural history)
  - 2nd District COA has recently stated preference for separate statements in appellate briefs in dependency cases

PRACTICE TIPS: WRITING THE BRIEF

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- Writing the statement of facts:
  - You don't need to state every fact in the case. You only need to state the "material" facts and procedural events.
  - Things to leave out unless they are material:
    - Dates unless relevant
    - Continuances/other irrelevant hearings
    - Extraneous facts/evidence
  - The more concise your brief is, the better the court is going to like it.
  - Cut to the chase: Decide what facts/procedures are relevant to your arguments and include only that information.

PRACTICE TIPS: WRITING THE BRIEF

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- "Material" Facts:
  - You *must* include the "bad facts" as well as the facts that favor your position
  - You may *not* include facts that are not in the record or events that occurred after the date of the order being challenged
- Try to tell a story. You can tell the story in whatever order makes sense or is most persuasive, as long has you have citations to the record.

PRACTICE TIPS: WRITING THE BRIEF

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- Citations to Record:
  - You *must* support every statement of fact in your brief (including facts restated in your arguments) with a reference to the place in the record where this fact appears. It may be in a report or other document (CT), or it may be in a witness's testimony (RT).
  - It is improper to assert something as a fact without giving a corresponding reference to the record and some courts of appeal (and opposing counsel) can get quite snarky about it if you assert a fact without a record reference.

PRACTICE TIPS: WRITING THE BRIEF

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- References to the record:
  - "CT" is used to denote the Clerk's Transcript.
  - "RT" is used to denote the Reporter's Transcript.
  - You must include a volume number if there is more than one volume.
  - So "2 CT 313" would be a reference to volume two of the Clerk's Transcript at page 313.
  - Augmented record: Usually "ACT" or "Aug. CT."
    - Drop a footnote to explain any nonstandard references

PRACTICE TIPS: WRITING THE BRIEF

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- Confidentiality
  - Rule 8.401: Use child's first name and last initial in body of brief unless first name is so unusual that it would defeat anonymity. If so, use initials.
    - General practice is to use first name only after first reference.
  - Same goes for names of parents, relatives, foster parents, etc.
    - Or, identify as "mother," "father," "grand-mother," "foster mother," etc.

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PRACTICE TIPS: WRITING THE BRIEF

- Tone:
  - How *not* to write an appellate brief: *In re S.C.* (2006) 138 Cal.App.4th 396
    - violated rules of court, ignored standards of review, misrepresented the facts, based arguments on matters outside the record, failed to support arguments with analysis or authority, raised issues not cognizable on appeal, unjustly challenged agency's integrity, made a contemptuous attack on the trial judge, and referred to the developmentally-delayed child as "akin to broccoli."

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Argument(s): Divide into sections (and subsections) discussing each error you are asserting separately
  - Each "claim of error" must be set forth under a separate heading
- Each argument should address
  - Lower court's ruling and your objection to it
  - Standard of review
  - Applicable law and application to facts of your cases (including citations to record for factual statements)
  - Prejudice, unless arguing lack of substantial evidence

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PRACTICE TIP

- *Most Important Part of Your Argument(s): Prejudice*
- End each of your arguments (except substantial evidence arguments) with an argument/ analysis as to how the error was prejudicial to your client—*i.e.*, how there is a reasonable chance that there would have been a better outcome but for the error, why it's a miscarriage of justice, and why the court of appeal should issue a writ to correct the error

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Conclusion: Summarize your argument and reiterate the relief you seek:
  - "For the reasons set forth above, the trial court's order that no reunification services be provided to mother pursuant to section 361.5(b)(6) was an abuse of discretion because the juvenile court incorrectly applied the provisions of that statute to mother when there was no evidence that mother knew or should have known that father was abusing the child. This court is respectfully requested to issue a writ of mandate directing the juvenile court to order that reunification services be provided to mother."

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Certificate of Word Count:
  - Separate page after the Conclusion in which counsel certifies the number of words in the brief according to the word processing program used to prepare the brief. (Does not include cover, tables, certificate of word count.)
  - Maximum allowed: 14,000 words
    - Practice tip: Don't go there. Keep under 10,000 words if possible.

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NUTS AND BOLTS: ELEMENTS OF EVERY APPELLATE BRIEF

- Proof of Service:
  - Last page of brief or inside back cover. Serve:
    - Trial court clerk for delivery to judge
    - Client
    - Attorneys of record
    - Unrepresented parties
      - De facto parents (confidential address)
      - Tribe and/or Indian custodian
    - Siblings (if also dependents and 10 or older) and siblings' atty(s)
    - CASA

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PRACTICE TIPS: FORMATTING

- Fonts:
  - No smaller than Times New Roman 13 pt.
    - *Including footnotes*
- Paper—Unlined
  - Printed on at least 20 lb. 8.5 x 11 inch paper
- Margins:
  - 1 inch top and bottom
  - 1.5 inch on left and right

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PRACTICE TIPS: FORMATTING

- Spacing:
  - Double-spaced except
    - Headings
    - Quotes over 5 lines may be indented on both sides and single spaced
      - Better to make them 1.5 spaced in order to make them easier to read
- Argument Headings:
  - Don't use all Caps—too hard to read.

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WHAT ISSUES CAN/ SHOULD BE RAISED?

- Stay of the section 366.26 hearing:
  - "The reviewing court may stay the hearing set under Welfare and Institutions Code section 366.26, but must require an exceptional showing of good cause." Rule 8.452(f)
  - It may be easier to secure a continuance in the juvenile court than a stay in the court of appeal but if continuance request is denied, you can still apply to the court of appeal for a stay

WHAT ISSUES CAN/ SHOULD BE RAISED?

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- If the .26 hearing is set at disposition:
  - Jurisdictional issues
    - application of subdivision to facts
    - agency's failure to state or prove grounds for jurisdiction, e.g., risk of harm
    - §355.1/erroneous admission/exclusion of evidence
  - Disposition findings/orders
    - failure to make required findings
    - sufficiency of evidence to support findings
  - Due process notice/opportunity to be heard issues

WHAT ISSUES CAN/ SHOULD BE RAISED?

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- If the .26 hearing is set at disposition:
  - Challenges to the sufficiency of the evidence
  - Paternity issues
  - Removal
  - Denial of services
  - ICWA issues
  - Relative placement
  - Any other issue that might lead to reversal of order setting .26

WHAT ISSUES CAN/ SHOULD BE RAISED?

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- If the .26 hearing is set after services terminated at a review hearing:
  - The failure to order the child returned to parental custody (detriment finding)
  - Reasonable services/active efforts
  - Termination of services: timing, substantive progress, client's regular participation
  - Placement and visitation orders
  - Any other issue that might lead to reversal of order setting .26

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WHAT ISSUES CAN/ SHOULD BE RAISED?

- If the .26 hearing is set at a 388 hearing:
  - Grant or denial of the 388 petition

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PRACTICE TIP: WRITING THE BRIEF IN 10 DAYS

- If you wrote a trial brief, writing the Memo of P.'s and A.'s will be an easy cut and paste job.
  - In contested cases, you should always consider writing a trial brief. It helps the court and it helps you focus on the issues and on what evidence you may need to present to win at trial. (If you win at trial, you won't need to file a writ petition.)
- If you did not write a trial brief, you can complete the petition and begin writing your memorandum of points and authorities even before you get the record.

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PRACTICE TIP: WRITING THE BRIEF IN 10 DAYS

- Use your file copies of the documents and your notes of witnesses' testimony to write your statement of facts and your argument.
  - Note the document and page where the stated fact is found. Go back later to add the volume and page where that document is found in the Clerk's or Reporter's Transcripts.
- By the time you get the notice from the Court of Appeal that you have 10 days to file your writ petition, you will have it mostly done.

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NUTS AND BOLTS: PRINTING THE WRIT PETITION

- ***Do I Have to Pay for Printing the Petition?***
- Yes, unless you want to print out sufficient copies on your computer and bind them all yourself.
- Except where COA has adopted electronic filing.
  - 1st, 3rd, and 5th DCAs

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NUTS AND BOLTS: PRINTING THE WRIT PETITION

- ***How many should I print?***
- 1 copy for each person/entity who must be served
- An "original" + 5 to file with the court if you are requesting an endorsed-filed copy for yourself

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NUTS AND BOLTS: PRINTING THE WRIT PETITION

- ***How many should I bind?***
- Only copies filed with courts need to be bound (on left side) and have red covers
  - Binding can consist of two or three staples covered with tape
- Service copies can be stapled in upper left corner—colored cover not necessary

NUTS AND BOLTS: FILE THE WRIT PETITION

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- ***Where do I file it?***
  - The Petition is filed in the appropriate District Court of Appeal and must be served on all parties and the juvenile court.

NUTS AND BOLTS: FILE THE WRIT PETITION

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- *How Many Copies Must I File?*
  - Original + 4 copies
  - Additional copy with SASE if you want a filed-endorsed copy for the file
  - Check DCA's website to determine whether that court requires electronic submission/filing
  - If electronic *submission* is required, you need to file the original + three copies and also electronically submit a bookmarked .pdf version following the instructions on the DCA's website.

NUTS AND BOLTS: FILE THE WRIT PETITION

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- *How Many Copies Must I File?*
  - If electronic *filing* is required, you *must* file the petition electronically through the DCA's website; you are not required to file any paper copies.
  - You may serve paper copies on the parties and the trial court or, for a fee, the electronic filing provider will serve the petition electronically
    - They must have consented to electronic service
      - An electronic filing is a consent to electronic service. Rule 8.71(a)(2)(B)

PRACTICE TIPS: ELECTRONIC FILING

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- Now required in the 1st, 3rd and 5th DCAs:
- Must sign up in advance with vendor, Truefiling, https://www.truefiling.com, and must supply a credit card number to which filing fees ($7.50) and service fees ($6) will be charged
- Info on how to sign up and training videos: http://www.courts.ca.gov/truefiling.htm

PRACTICE TIPS: ELECTRONIC FILING

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- 1st DCA requirements, Rule 16: http://www.courts.ca.gov/documents/1DCA-Local-Rule-16.
- 3rd DCA requirements, Rule 5: http://www.courts.ca.gov/documents/3dca-Local-Rule-5.pdf
- 5th DCA requirements, Rule 8: http://www.courts.ca.gov/2997.htm#acc28012

PRACTICE TIPS: ELECTRONIC FILING

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- Guide to Creating Electronic Appellate Documents: Includes info on creating .pdfs from your Word or Wordperfect document and bookmarking the .pdf document: http://www.courts.ca.gov/ documents/DCA-Guide-To-Electronic-Appellate-Documents.pdf
- Formatting guidelines: http://www.courts.ca.gov/documents/TrueFiling-bookmarking.pdf

PRACTICE TIPS: ELECTRONIC FILING

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- Helpful tips for filing in the 1st DCA: http://www.fdap.org/efiling.shtml
- Helpful tips for filing in the 3rd or 5th DCA: http://www.capcentral.org/procedures/truefiling/index.asp

PRACTICE TIPS: ELECTRONIC SUBMISSION

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- 2nd DCA: http://www.courts.ca.gov/8872.htm
- 4th DCA: http://www.courts.ca.gov/9408.htm
- 6th DCA (writs): http://www.courts.ca.gov/17364.htm

NUTS AND BOLTS: FILE THE WRIT PETITION

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- ***When do I file it?***
- The petition must be *received* by the Court of Appeal no more than 10 days from the date of the filing of the record or other extended date.
- The appellate mailbox rule does not apply. The petition is not timely even if it is in the mail on the due date.
- Electronic *filing* can solve delivery problems
  - Electronic submission may not count as receipt

NUTS AND BOLTS: FILE THE WRIT PETITION

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- ***When do I file it?***
- Because an untimely petition can forfeit any appellate review of the issues raised, you should request an extension of time (EOT) if there is any doubt that you can get the petition to the court by the due date.
- EOT must be filed before the due date. Must be filed electronically in most courts of appeal.

PRACTICE TIP: EXTENSIONS OF TIME

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- A request for extension of time is in the form of an application/motion and must include a declaration setting forth *exceptional circumstances* justifying an extension of time
  - Some appellate courts have forms you can use on their website—electronic filing in some DCAs. Form=APP-006
- A separate, paper request for an extension of time requires stamped, addressed envelopes for all parties

NUTS & BOLTS: OPPOSITION/RESPONSE

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- Opposition/response must be filed and served within 10 days after the petition is filed (15 days if the petition was served by mail), or
- Within 10 days of receiving a request for a response from the reviewing court, unless a shorter time is designated by the court. Rule 8.452(c)(2)
  - The rules do not provide for any "reply" to the opposition.

PRACTICE TIP: OPPOSITION/RESPONSE

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- Opposition/response may be submitted in the form of a "letter brief" addressed to presiding justice of division of Court of Appeal in which action is pending.
  - County Counsel
  - Minor's Counsel
- Otherwise, it should be in brief form, bound with red cover, etc. as required for writ petitions.

WHAT HAPPENS AFTER THE PETITION IS FILED?

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- The rules require the Courts of Appeal to issue a written opinion deciding the petition on its merits by written opinion "absent exceptional circumstances." Rule 8.452(h)(1)
- Courts of Appeal have identified a number of circumstances under which they will summarily dismiss the writ proceedings instead of deciding it on the merits.

WHAT HAPPENS AFTER THE PETITION IS FILED?

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- Circumstances where court may summarily dismiss without an opinion:
  - Failure to file Notice on time: *Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397
  - Failure to file writ petition on time: *Roxanne S. v. Superior Court* (1995) 35 Cal.App.4th 1008
  - Inadequate petition lacking citations to the record, adequate arguments, or adequate citations to legal authority *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, *Cheryl S. v. Superior Court* (1996) 51 Cal.App.4th 1000

WHAT HAPPENS AFTER THE PETITION IS FILED?

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- Circumstances where court may summarily dismiss without an opinion:
  - No memorandum of points and authorities attached to bare bones petition: *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570
    - No *Wende* review in dependency cases
    - Threat to sanction counsel who file inadequate writ petitions, or to report to State Bar, because summary denial punishes parent for having inadequate counsel

ORAL ARGUMENT AND BEYOND

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- Requirement that Court issue a written opinion "absent exceptional circumstances," requires the issuance of an order to show cause ("OSC") or an alternative writ in order to set it for hearing in the case of traditional writs. Some courts issue an OSC to set the matter for hearing.
  - Some courts do not issue an OSC. Instead, an order setting an oral argument date is treated as the functional equivalent of an OSC.

ORAL ARGUMENT AND BEYOND

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- If the petition is not summarily denied, the reviewing court must hear oral argument within 30 days after the response is filed or due to be filed. Rule 8.452(g)
  - Court may extend the time for good cause.
  - Counsel may waive oral argument.

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ORAL ARGUMENT AND BEYOND

- *Should I waive oral argument?*
- No consensus on whether counsel should or should not waive oral argument
- Schools of thought:
  - 1. Waiver of oral argument is concession that case has no merit
  - 2. Appeals are won or lost on the briefs. Oral argument rarely changes the court's mind.

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ORAL ARGUMENT AND BEYOND

- *Should I waive oral argument?*
- Some courts send you a letter/form inviting you to waive oral argument
- Some courts send you a letter/form requiring you to affirmatively request oral argument
- If you waive, matter is deemed submitted 30 days after response was filed or due to be filed
  - Submitted=Court's time to issue decision starts running

PREPARING FOR ORAL ARGUMENT

- Reread the briefs and the trial court's ruling
- Re-familiarize yourself with the record.
  - Outline key dates/timeline to have in front of you at oral argument
  - Make a list of key record cites
    - Some people include copies of important testimony or exhibits/documents in oral argument notebook so they can read them to the court if necessary

PREPARING FOR ORAL ARGUMENT

- Reread key cases, shepardize, and check for new cases that may have been published since you wrote your briefs
  - Notify court of new cases—most DCAs only permit a letter with citations; no argument

PREPARING FOR ORAL ARGUMENT

- ***Groundwork***
  - Try to boil your case down to a "mantra" or theme that you can keep coming back to during the argument
  - Pinpoint the errors. Why exactly was the subdivision (j) finding erroneous? Why isn't it harmless?

PREPARING FOR ORAL ARGUMENT

- ***Groundwork***
  - Identify the problematic facts and decide how you will deal with questions about them: *e.g.*, "Isn't it true that your client is a meth addict?"
  - Identify problematic law—how are you going to distinguish those cases or can you work within them?

PREPARING FOR ORAL ARGUMENT

- ***Groundwork***
  - Make a list of every possible question the court may ask—try to make your answers as short as possible and try to create answers that are "sound bites" instead of long explanations.
  - Helps you distill your key points to their essence

PREPARING FOR ORAL ARGUMENT

- ***Groundwork***
  - Include questions that may be asked if court accepts county's view of the case and different ways it may be asked, so you will know it when you hear it.
  - Include ideas for transitioning from each hostile question back to your mantra or key points

PREPARING FOR ORAL ARGUMENT

- Draft your presentation
  - A good argument is
    - Simple
    - Intelligent
    - Clear
    - Easy to follow
    - A roadmap for the court

PREPARING FOR ORAL ARGUMENT

- ***Draft your presentation***
  - Make an outline--not a script--of your argument:
    - Bullet points
    - Be selective—focus on your best issue(s)
    - Don't regurgitate the briefing
    - Be prepared to give a presentation that might <u>not</u> be interrupted by questions

PREPARING FOR ORAL ARGUMENT

- ***Opening lines***:
- It is imperative that you start strong.
  - Justices have long calendars, they're bored, and they think they've heard it all. If your opening suggests that your argument will be boring, they turn off.

PREPARING FOR ORAL ARGUMENT

- Write out your opening lines—know what you are going to say for the first 30 seconds, so you can get off the ground and over your initial sense of terror
  - "Good morning. May it please the Court."
  - Introduce yourself and who you represent
  - Focus immediately on what is most important about your case

PREPARING FOR ORAL ARGUMENT

- ***Focus immediately on what is important:***
  - "I would like to make two brief points this morning. First, ... Second, ..." [list your bullet points], or
  - "Your honors, I would like to get right to the heart of the matter. What matters most in this case is . . . ." or

PREPARING FOR ORAL ARGUMENT

- ***Focus immediately on what is important:***
  - Your theme: "This case is about shortcuts—shortcuts in procedure, shortcuts in applying the rules of evidence, shortcuts in making the required findings" or
  - Tell them the most egregious thing that happened and why it merits reversal, or
  - Give them a quote from the record that illustrates your theme, or

PREPARING FOR ORAL ARGUMENT

- ***Focus immediately on what is important:***
  - Give them a short quote from a case that illustrates your theme, *e.g.*,:
    - "Cross-examination is not just the 'Hail Mary pass' of a desperate attorney; it is a recognized method of challenging adverse witnesses, one protected by fundamental notions of due process of law and fundamental fairness." *David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 775.

PREPARING FOR ORAL ARGUMENT

- Draft a short conclusion so you just don't fade away at the end of your argument—go out on a high point, reiterating/restating your theme:
  - Have a 15-second sound bite that sums up your arguments and tell the court what you want.
    - Many attorneys never tell the court what they want the court to do.

PREPARING FOR ORAL ARGUMENT

- *Never* go to the podium without notes--but don't bring the whole record
  - Make a "podium binder" or folder
    - Opening statement
    - Mantra or theme
    - Bullet points for issues to be covered
    - Timeline/Key facts with record cites
    - Key cases with cites and jump cites to important language
      - Copies?
    - Conclusion

PREPARING FOR ORAL ARGUMENT

- Practice your argument, starting several weeks before OA date, so you have time to make adjustments
  - Colleagues
  - Partner/Friend
  - In front of the mirror

PREPARING FOR ORAL ARGUMENT

- Attend Oral Argument in that court, if you can, to
  - See court in action
  - Understand the check-in procedure
  - Where to sit
  - How time is kept—whether you must provide an estimate of time
  - How to raise or lower podium
  - Acoustics

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CONFIDENTIALITY

- The record in all juvenile proceedings may be inspected only by court personnel, the parties, their attorneys, and other persons designated by the court. Rule 8.401(b)(1)
  - Filed documents that protect anonymity may be inspected by prospective *amici*.
- The court may also limit or prohibit public admission at oral argument. Rule 8.401(c)
  - You should make a written request to exclude the public prior to oral argument if you want the court to do this.

PRACTICE TIPS

- Get there early—traffic, parking, etc.
- Allow yourself to be nervous—it will pass
  - Beta Blockers
- Open with your strong thematic statement

PRACTICE TIPS

- Don't argue!
- Oral "argument" is just an expression.
- Engage the court in a conversation.
  - Ninth Circuit Chief Judge Alex Kozinski: "arguing gains enmity, whereas intelligent respectful discussion gains respect."
    - *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 331.

PRACTICE TIPS

- Engage the court in a conversation.
  - Most justices are bright but don't really understand your case. They are generalists--not dependency experts.
  - Don't assume that they know what you are talking about but don't talk to them like they don't know what you are talking about
    - When talking about the facts: "As the court will recall . . .
    - When talking about the law: "As the decision in *In re X* indicates . . . ."

PRACTICE TIPS

- When the court asks you a question, you *must* respond to it right then and there.
  - Answer "yes" or "no" first and then give your explanation.
  - Don't start with your explanation. The court may never figure out whether your answer was yes or no, especially if your explanation is interrupted by another question
  - Don't say, "I'll get to that later"—the court wants to know *now*.

PRACTICE TIPS

- Answering Questions
  - Don't dance around the answer
  - Concede the point if necessary to retain your credibility but don't concede a point that would tank your case.
    - Think about this in advance and know what is crucial to your case and what is not.
  - If you don't know the answer, say you don't know and offer to provide supplemental briefing on the point

PRACTICE TIPS

- Answering Dumb Questions
  - Don't say, "Perhaps the court did not understand my explanation. I will repeat it."
  - Do say, "I am sorry my explanation was unclear. Please allow me to try again."
    - (Then dumb down your explanation.)

PRACTICE TIPS

- Avoid diminishing the credibility of your argument:
  - Don't say, "My client's argument/position is that there is no nexus between her substance abuse and her ability to care for her children."
  - Do say, "There is no nexus between my client's alleged substance abuse and her ability to care for her children."

PRACTICE TIPS

- Avoid diminishing the credibility of your argument:
  - Don't say, "I believe that there was insufficient evidence to . . . ."
    - The court doesn't care what you believe
  - Do say, "There was insufficient evidence to . . . .

PRACTICE TIPS

- Don't speak too fast, too quietly, or in a monotone.
  - Remember you are trying to have a conversation with the court.
- Don't be dramatic, outraged, or bombastic
  - Calm tone and demeanor are more persuasive
- Don't wander from the podium, gesticulate, or grimace

PRACTICE TIPS

- Don't try to make jokes or be funny.
  - Let the justices try to be funny.
  - Laugh at their attempts.
  - Then get back to business.
- Don't interrupt a justice's question or comments
- Don't make an argument that is not in the briefs
- Don't argue facts outside the record

PRACTICE TIPS

- Do keep coming back to your theme
- Do maintain eye contact with the court
  - When answering questions, look at Justice who asked the question.
- Do address Justices by name, unless you are not sure. In that case, "Your Honor."
- Do accept softballs: "Yes, Justice Chin, that is exactly right."

PRACTICE TIPS

- Do stop when your time is up. Sooner if possible.
  - If in the middle of answering a question, ask permission to finish answering the question.
- Do go out on a high point, reiterating your theme or mantra
- Do be aware of your body language when other side is arguing
  - No eye-rolling, head shaking, etc.

AFTER ORAL ARGUMENT

- Everyone looks back and thinks of things that they could have or should have said.
- Don't torture yourself over things you could have or should have done better
- Even if you did a great oral argument, assume that you will lose
  - Winning will then be a fabulous surprise

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WHAT HAPPENS AFTER THE COURT DECIDES?

- ***Submission and decision***
  - "If the writ or order stays or prohibits" something that will happen within seven days or requires action within 7 days proceedings or addresses "any other urgent situation," the reviewing court clerk must make a reasonable effort to notify the juvenile court clerk of the court's decision by telephone. (Some will also call counsel.) Rules 8.452(h)(3)
    - The juvenile court clerk must then notify the judge "or officer most directly concerned."

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WHAT HAPPENS AFTER THE COURT DECIDES?

- ***Finality and further review***
  - A summary denial is final immediately. A petition for review in the California Supreme Court must be filed within 10 days.
  - A decision after the issuance of an order to show cause or alternative writ, is final in 30 days, unless otherwise ordered by the court. Rules 8.452(i), 8.490(b)

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WHAT HAPPENS AFTER THE COURT DECIDES?

- ***Finality and further review***
- A Petition for Rehearing may be filed in the Court of Appeal within 15 days of the date of the decision.
- A Petition for Rehearing (Orange cover) should be filed if you believe the decision makes critical errors of fact, miscited a case, or erred in its legal analysis.

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WHAT HAPPENS AFTER THE COURT DECIDES?

- ***Finality and further review***
- A Petition for Review in the Supreme Court may be filed within 40 days of date of decision, or
- Within 10 days of finality date if court specifies a finality date shorter than 30 days.
  - Rules 8.452(i), 8.490(b)
  - White cover—file original + 13 copies with copy of COA decision attached. Original + 8 if you submit PFR electronically

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REIMITTUR AFTER CASE IS DECIDED OR DISMISSED

- Issued by COA clerk after COA decision is final
  - Decision final as to COA 30 days after decision issues but loser still has 10 days to petition Supreme Court for review
    - No Petition for Review: remittitur issues after 40th day—some courts take 60 days
- If Petition for Review is filed, remittitur does not issue until after review denied (up to 90 days or longer) or until Supreme Court decision becomes final (could be several years.)

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REIMITTUR AFTER CASE IS DECIDED OR DISMISSED

- Issuance of remittitur vests jurisdiction over that order back in the trial court.
- If writ of mandate issued, trial court obligated to take specified action or hold further proceedings consistent with orders of COA.

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QUESTIONS?