**Establishing Ineffective Assistance of Counsel**

To prevail on a claim that counsel's failure to file a [Welf & I C §388](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/388) petition claim fell below an objective standard of reasonableness and resulted in prejudice, a client must show that had the [§388](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/388) petition been filed, it is reasonably probable that it would have been granted.

Unless trial counsel's incompetence is apparent on the face of the record, habeas corpus is the preferred method of obtaining review of a claim of ineffective assistance of counsel. *People v Pope,* 23 C3d at 426 n17.

**Case plan.** Counsel should explain to the parent that the department must have a written case plan for each family it serves ([Welf & I C §16501.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16501.1)) and that the parent has a right to participate in creating this plan. Counsel for the parent should be familiar with the required contents of this document, which are detailed in [§16501.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16501.1).

**11.22            2.  Duty to Investigate**

**Obtain information to support client's case.** Before the parent's attorney can make an informed decision on the best strategy to pursue in the case, they must conduct an independent investigation of the facts and circumstances alleged in the petition. Counsel may want to do some of this investigation personally but should consider hiring an investigator, Counsel will need to get the court's authorization for investigation fees. Counsel may even consider hiring a private social worker to work directly with the parent

**Investigate appropriateness of referrals.** The social worker may begin making service referrals soon after the petition is filed. Counsel should keep informed about the client's participation in any suggested programs. If counsel learns that the client is not doing well in a program or has been put on a waiting list, the attorney should look into the appropriateness of the referrals given to the parent.

**Monitor progress.** A better practice is for the attorney to monitor the parents' progress in their respective programs on a regular basis during reunification and recommend adjustments or further services as needed.

**§11.23            3.  Expert Witnesses**

**Selecting an expert.** When an expert is required, the attorney should select one who is specially trained and qualified to render an opinion.

**Evaluating testimony of department's experts.** After the social worker's expert testifies, the attorney should discuss the testimony with their own expert before cross-examining the opposing expert.

**§11.25            2.  Visitation Plan**

**Importance of visitation.** Ensuring that the parent has adequate visitation with their children is crucial to many aspects of the case. Visitation allows the parent to maintain ties with the child during the reunification program and is generally agreed to be advantageous for both child and parent. See [*In re Nicholas B.* (2001) 88 CA4th 1126](https://research.ceb.com/raw/primary-law/cases/88calapp4th1126), 1138

**Frequency of visitation.** The court must allow visitation as frequently as possible, consistent with the child's well-being. [Welf & I C §362.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/362.1)(a)(1); [Cal Rules of Ct 5.695](http://online.ceb.com/CalCodes/code.asp?code=CRC&section=5.695)(g)(3). See [*In re D.P.*(2020) 44 CA5th 1058](https://research.ceb.com/raw/primary-law/cases/44calapp5th1058), 1070 (monitored visitation ordered due to mother's substance abuse issues)

Although the court can place limitations on visitation (*e.g.,* requiring supervised visitation), unless the court finds that visitation would be detrimental to the child's well-being or jeopardizes the child's safety, visitation will be allowed.

**PRACTICE TIP:**  It is important to make sure that the parent receives the maximum amount of visitation possible. Counsel should check whether the court has a standing order regarding visitation.

**Modifying visitation plan.** The visitation plan may need to be modified if the circumstances of the case change. A petition under [Welf & I C §388](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/388) may be filed to obtain court approval of a modified visitation plan. Note also that the court has discretion to modify the visitation plan at the 6-month review hearing. See [§11.70](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf11.70$t=document-frameset.htm$3.0$p=).

**Sibling visitation.** With all out-of-home placements, the department must make diligent efforts to develop and maintain sibling relationships. [Welf & I C §16002](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16002). When siblings are separated, the case plan must provide for "ongoing and frequent" contact unless the court finds that sibling interaction is contrary to the safety and well-being of any of the siblings. [Welf & I C §§362.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/362.1)(a)(2), [16002](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16002)(b).

**Involve parent in child's education.** Counsel the parent to be actively involved in their children's educational plan. Parents should be encouraged to meet regularly with the school faculty, both the children's classroom teachers and administrators (*i.e.,* the principal and the counselor). See [§§5.19](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf5.19$t=document-frameset.htm$3.0$p=)–[5.20](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf5.20$t=document-frameset.htm$3.0$p=).

**§11.27            4.  Medical Planning**

**Participating in medical planning.** When a child is placed in foster care, the parent's rights to participate in the child's medical planning are not terminated. See [Welf & I C §369](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/369). Counsel should advise the parent to stay involved with the child's medical planning and follow-up care. The parent needs to ask the social worker and the foster parent about any medical treatment necessary for the child, including routine exams and immunizations for school.

**Authorizing care.** When a child is in temporary custody, the social worker, on the recommendation of the attending physician, may authorize medical, surgical, or dental care. [Welf & I C §369](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/369). The social worker must notify the parent before any treatment is provided.

**§11.31            8.  Assessing Social Worker**

Counsel should encourage the client to try to understand the social worker's job as it relates to the case, and remind the parent that the social worker has a duty to investigate and to report.

**PRACTICE TIP:**  Consider encouraging the client to bring complaints about the social worker to you rather than complaining directly to the social worker.

**Removing social worker for conflict of interest.** Inevitably, counsel will represent a parent who is convinced that the social worker is biased. Counsel should make some effort to look into the claim, even if the parent is difficult to get along with. If counsel's investigation of such a claim indicates that the social worker really is biased against the parent, they should consider requesting the social worker's superior to replace the social worker.

**§11.32           9.  Immunity of Social Worker in Civil Proceedings**

 See, *e.g.,* *Keates v Koile* (9th Cir 2017) 883 F3d 1228, 1238 (social worker not entitled to qualified immunity for detaining minor when worker did not undertake reasonable investigation as to whether minor was in imminent danger and worker exceeded scope of any intrusion necessary to protect minor);

**NOTE:**  In 2008, the Ninth Circuit Court of Appeals overruled *Doe v Lebbos, supra,* in *Beltran v Santa Clara County* (9th Cir 2008) 514 F3d 906, 908 (per curiam). In *Beltran,* the court of appeals reversed a district court's ruling of absolute immunity on the part of child protective services workers who allegedly fabricated factual information as part of separate dependency and custody petitions.

**§11.46            2.  Necessity for Detention**

Counsel should hold the department to its burden of showing that reasonable efforts were made to avoid removal and should in an appropriate case remind the court that, under [Welf & I C §319](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/319)(d)(2), if it believes that the child could be maintained at home with the provision of preventive services, it must return the child to the parent and order the department to provide those services.

The fact that the parent is enrolled in such a program is not prima facie evidence of substantial danger, and the court must specify the factual basis for its conclusion on whether or not returning the child to that parent would pose a substantial danger to the health, safety, protection, or physical or emotional well-being of the child. [Welf & I C §319](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/319)(d)(3).

When a child is taken into protective custody, the social worker must give preference to the placement that is the least restrictive family setting that promotes normal childhood experiences and is in close proximity to the parent's home. See [Welf & I C §16501.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16501.1)(d)(1).

**§11.47            3.  Prima Facie Case**

**Challenging the prima facie case.** Counsel must carefully examine the petition at the detention hearing and, if it appears that the petition does not state a prima facie case, should seriously consider whether bringing the insufficiency of the petition to the court's attention would benefit the parent. There are two possible ways to do this, depending on the circumstances.

**§11.48            a.  Request for Rehearing**

If the question is primarily one of fact, for example, if counsel believes the allegations against the parent may be false, counsel may want to request that the court hear evidence on the prima facie case under [Welf & I C §321](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/321). In response to such a request, the court may either set the matter for rehearing within 3 judicial days (with the possibility of one 5-day continuance), or may set the case for trial within 10 days. [Welf & I C §321](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/321).

**§11.49            b.  Objection to Sufficiency of Petition**

If the question is primarily legal, counsel may want to object to the sufficiency of the petition by making a motion "akin to a demurrer." See [*In re Fred J.* (1979) 89 CA3d 168](https://research.ceb.com/raw/primary-law/cases/89calapp3d168), 176. . See [*In re Alysha S.* (1996) 51 CA4th 393](https://research.ceb.com/raw/primary-law/cases/51calapp4th393) (petition fails to state cause of action); *In re Fred J.,* 89 CA3d at 176 (allegations in petition fail to give parent adequate notice). See also [CCP §430.10](https://research.ceb.com/raw/primary-law/statutes/ca/codes/ccp/430.10)(e) (pleading fails to state cause of action)

**§11.50            (1)  Objection for Failure to State Cause of Action**

Unlike failure to provide adequate notice, the failure to allege facts sufficient to state a cause of action may be dispositive of the case if the petition cannot be amended to state sufficient facts to invoke the court's dependency jurisdiction. See, *e.g.,* [*In re Savannah M.* (2005) 131 CA4th 1387](https://research.ceb.com/raw/primary-law/cases/131calapp4th1387)(single incident in which child left with suspicious caretaker was insufficient to support [Welf & I C §300](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/300)(b) petition alleging substantial risk of future serious physical harm)

Counsel should always test the allegations of the petition against the statutory requirements of [Welf & I C §300](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/300)(a)–(j). If the facts alleged in the petition fail to provide a basis for the court to assume jurisdiction, counsel should consider a challenge to the legal sufficiency of the petition.

**Factors to consider in deciding whether to object to sufficiency of petition.** The most important question to consider in deciding whether to object to an inadequate petition is whether the petition's insufficiency stems from a dearth of facts to support dependency or from poor drafting. If counsel's assessment of the case suggests that the facts supporting removal of the child or court supervision of the family are weak, demurring to the petition may result in an early and favorable resolution of the matter.

In both civil and criminal cases, the demurrer is an alternative to an answer or a plea. See [CCP §430.40](https://research.ceb.com/raw/primary-law/statutes/ca/codes/ccp/430.40); [Pen C §1004](https://research.ceb.com/raw/primary-law/statutes/ca/codes/penc/1004). Thus, the analogous motion in a dependency case should be made before the parent admits or denies the allegations of the petition. Failure to challenge the sufficiency of the pleading before admitting or denying the allegations may waive the issue. See [CCP §430.80](https://research.ceb.com/raw/primary-law/statutes/ca/codes/ccp/430.80); [Pen C §1012](https://research.ceb.com/raw/primary-law/statutes/ca/codes/penc/1012).

. If counsel has doubts about the sufficiency of the allegations, perhaps also to request a schedule for submitting a written motion and points and authorities and a hearing date for argument on the motion.

**§11.52            (3)  Waiver by Failure to Object**

the petition must be challenged before appeal. See [*In re Christopher C.* (2010) 182 CA4th 73](https://research.ceb.com/raw/primary-law/cases/182calapp4th73), 82; [*In re James C.* (2002) 104 CA4th 470, superseded by statute on other grounds as stated in *In re Christopher C.*(2010) 182 CA4th 73](https://research.ceb.com/raw/primary-law/cases/104calapp4th470), 82; [*In re S. O.* (2002) 103 CA4th 453](https://research.ceb.com/raw/primary-law/cases/103calapp4th453), 459. See [§3.65](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf3.65$t=document-frameset.htm$3.0$p=).

Although dependency cases are special proceedings, governed by their own rules of procedure (see [Cal Rules of Ct 5.500](http://online.ceb.com/CalCodes/code.asp?code=CRC&section=5.500)–[5.906](http://online.ceb.com/CalCodes/code.asp?code=CRC&section=5.906)). As long as the parent had adequate notice of the allegations, the court should have discretion to permit the petitioner to amend the petition to conform to proof. Counsel should object to its sufficiency before the parent admits or denies the allegations of the petition. Failure to make such a challenge may constitute ineffective assistance of counsel

**§11.53            (4)  Waiver by Admission of Allegations**

Any objection to the sufficiency of the petition will be deemed waived if the parent admits the allegations, pleads "no contest," or submits the case on the recommendations in the social study. In [*In re Troy Z.* (1992) 3 C4th 1170](https://research.ceb.com/raw/primary-law/cases/3cal4th1170), the California Supreme Court held that parents who pleaded no contest to the allegations of the petition had waived their right to contest the sufficiency of those allegations on appeal.

**C. Jurisdictional Phase**

**§11.55            2.  Admitting Allegations, Pleading No Contest, or Submitting Determination to Court**

**WARNING:**  When the parent admits the allegations of the petition or pleads no contest, counsel must explain in terms the parent can understand the rights they will be giving up by making the admission, including the possibility that the court may not order any family reunification services. [*In re S.G.* (2003) 112 CA4th 1254](https://research.ceb.com/raw/primary-law/cases/112calapp4th1254).

Evidence of past conduct is relevant only as it bears on present circumstances. See [*In re Corrigan*(1955) 134 CA2d 751](https://research.ceb.com/raw/primary-law/cases/134calapp2d751), 757. See also [*In re Terry D.* (1978) 83 CA3d 890](https://research.ceb.com/raw/primary-law/cases/83calapp3d890), 900. The "at the time of the hearing" rule may not be subverted by parents seeking dismissal of a petition for lack of sufficient evidence of current risk when the evidence is lacking because that parent absconded with the children, wrongfully preventing the department from monitoring their welfare. [*In re J.M.* (2019) 40 CA5th 913](https://research.ceb.com/raw/primary-law/cases/40calapp5th913), 921.

**§11.57            b.  Evidence of Parental Fault or Inability to Care for Child**

Counsel for the parent should not forget that a dependency case—in most instances—is not a "no fault" proceeding. See *[Santosky v Kramer](https://research.ceb.com/raw/primary-law/cases/455us745%22%20%5Ct%20%22_blank)*[(1982) 455 US 745, 760 n10, 102 S Ct 1388](https://research.ceb.com/raw/primary-law/cases/455us745%22%20%5Ct%20%22_blank). The parent's attorney should hold the petitioner to its burden of establishing not just that the child suffered harm, but that the parent was culpably involved in the harm.

**§11.58            c.  Admissibility of Social Study and Contents**

The parent may object to the admissibility of specific hearsay in the social study by written motion filed a reasonable amount of time before the hearing. [Welf & I C §355](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/355)(c)(2). Parent's counsel should review the social study far enough in advance of the hearing date to preserve any hearsay objection the parent may have to its contents.

**PRACTICE TIP:**  Parent's counsel must file objections to *any* report that may be presented as evidence at a jurisdictional hearing, not just the report prepared in advance of the jurisdictional hearing, because the petitioner may seek to introduce a prior detention report. If counsel is uncertain which reports the county will seek to introduce, parent's counsel should obtain a designation by the county, either through written representations or a motion in limine.

**§11.62            2.  Removal From Parental Custody**

Counsel should remind the court that the clear and convincing evidence standard is a high hurdle, that the evidence required to order removal must be substantially more convincing than for assuming jurisdiction, and that the code requires a good faith effort at in-home services

**§11.63            3.  Reunification**

**Reunification plan must be appropriate for family.** Ensuring that the reunification plan is tailored to the family's needs is one of the most important functions of the parent's attorney at the dispositional hearing. Counsel can point out any daycare, work, scheduling, or transportation problems that need to be addressed and solved in the plan. See, *e.g.,* [*In re Alvin R., Jr.* (2003) 108 CA4th 962](https://research.ceb.com/raw/primary-law/cases/108calapp4th962); [*In re Jasmin C.* (2003) 106 CA4th 177](https://research.ceb.com/raw/primary-law/cases/106calapp4th177).

**PRACTICE TIP:**  Counsel should know the essential components of the proposed reunification plan well before the dispositional hearing, perhaps as early as the detention hearing. Counsel should discuss the plan with the client, and ascertain their willingness to participate in the recommended service plan. Counsel's efforts should be focused on negotiating an appropriate reunification plan that the parent can adhere to. Mediation before disposition may be appropriate if the parent and the department cannot reach agreement on the essential components of the plan.

Counsel should advise the parent that, once services are ordered, the parent's failure to cooperate with the services may be detrimental. The failure to comply can be used at subsequent hearings. [Welf & I C §16501.1](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/16501.1)(g)(12)(B).

**E. Review Hearings**

**§11.68            1.  Burden Remains on Petitioner to Demonstrate Continued Need for Placement**

"the return of the child … would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child"). When the department is recommending against return, despite the parent's good-faith efforts to comply with reunification requirements, counsel should remind the court that the burden is on the department, not on the parent

**§11.69            2.  Adequacy of Reunification Services**

Counsel for the parent should not allow the petitioner to use the difficulty of providing adequate services to excuse its failure to provide services that give the parent a meaningful opportunity to reunify. See [§11.22](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf11.22$t=document-frameset.htm$3.0$p=).

If the department opposes increased visitation, or is requesting less frequent visitation, counsel should be prepared to support the request with evidence, including expert testimony. Counsel should not take such assertions at face value. If the petitioner opposes what appears to counsel to be a reasonable visitation schedule despite the parent's belief that visitation is going well, it may be prudent to ask the court to appoint an expert to assess the situation. See [§11.25](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf11.25$t=document-frameset.htm$3.0$p=).

Counsel should be aware that visitation should not cease if the court terminates reunification efforts, and should request the court to order adequate visitation to enable the parent to continue to have a relationship with the child.

**§11.72            F.  Petition for Modification**

. In such a situation counsel for the parent should seriously consider filing a petition for modification under [Welf & I C §388](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/388). Modification petitions are discussed in [§§7.22](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf7.22$t=document-frameset.htm$3.0$p=)–[7.42](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf7.42$t=document-frameset.htm$3.0$p=).

In drafting the petition, counsel must be careful to allege facts showing both changed circumstances or new evidence that support modifying a previous juvenile court order and that the proposed modification is in the child's best interests. See [Welf & I C §388](https://research.ceb.com/raw/primary-law/statutes/ca/codes/welfic/388).

. For cases illustrating allegations found sufficient to warrant an evidentiary hearing, see [§7.34](https://onlaw.ceb.com/onlaw/gateway.dll?f=id$id=bf7.34$t=document-frameset.htm$3.0$p=).