

Defending Youth in Truancy Proceedings

**A Practice Manual for
Attorneys**



ACLU of Washington Foundation

The American Civil Liberties Union (ACLU) of Washington Foundation is the legal, research and educational arm of the ACLU of Washington, a nonprofit, nonpartisan membership organization devoted to protecting and extending the civil liberties of all people in Washington.

TeamChild

TeamChild is a non-profit civil legal services program serving youth in King, Pierce, Snohomish, Spokane and Yakima counties of Washington State. TeamChild's legal advocacy and community education help youth involved in the juvenile justice system secure the education, health, housing and other support they need to achieve positive outcomes in their lives.

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September 2008, rev. October 2009

This Manual provides information on truancy and education law in Washington State. It is not legal advice and is not in any way intended to be a substitute for legal advice or representation. Also, the laws explained in this Manual may have changed since it was written. Attorneys consulting this Manual should make certain the law is still valid.

Copies of this Manual are available online at www.aclu-wa.org and www.teamchild.org.

Acknowledgements

This Manual was produced by the American Civil Liberties Union (ACLU) of Washington Foundation and TeamChild.

This publication was supported in part by grants from the Washington State Office of Public Defense, the Governor's Juvenile Justice Advisory Committee and the John D. and Catherine T. MacArthur Foundation.

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Special thanks to Equal Justice Works, the Skadden Fellowship Foundation, and Greg Landis and Ann Logerfo.

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INTRODUCTION & OVERVIEW

Children in Washington who are chronically absent from school are subject to the truancy laws of the state. Truancy is a risk factor for poor outcomes, like school failure, dropping out, unemployment or underemployment, and in some cases, criminal involvement. Research has shown that a child's absences are often an indicator of underlying issues that could be addressed with appropriate services. Formal truancy proceedings can motivate changes in the behavior of some children and families and prompt intervention from schools, court or other social service providers. However, in practice, formal truancy actions often only provide court-imposed obligations and the threat of sanction for the child and parent. Often incarceration in a detention facility is the sanction or intervention that courts use to motivate changes in the truant child's behavior.

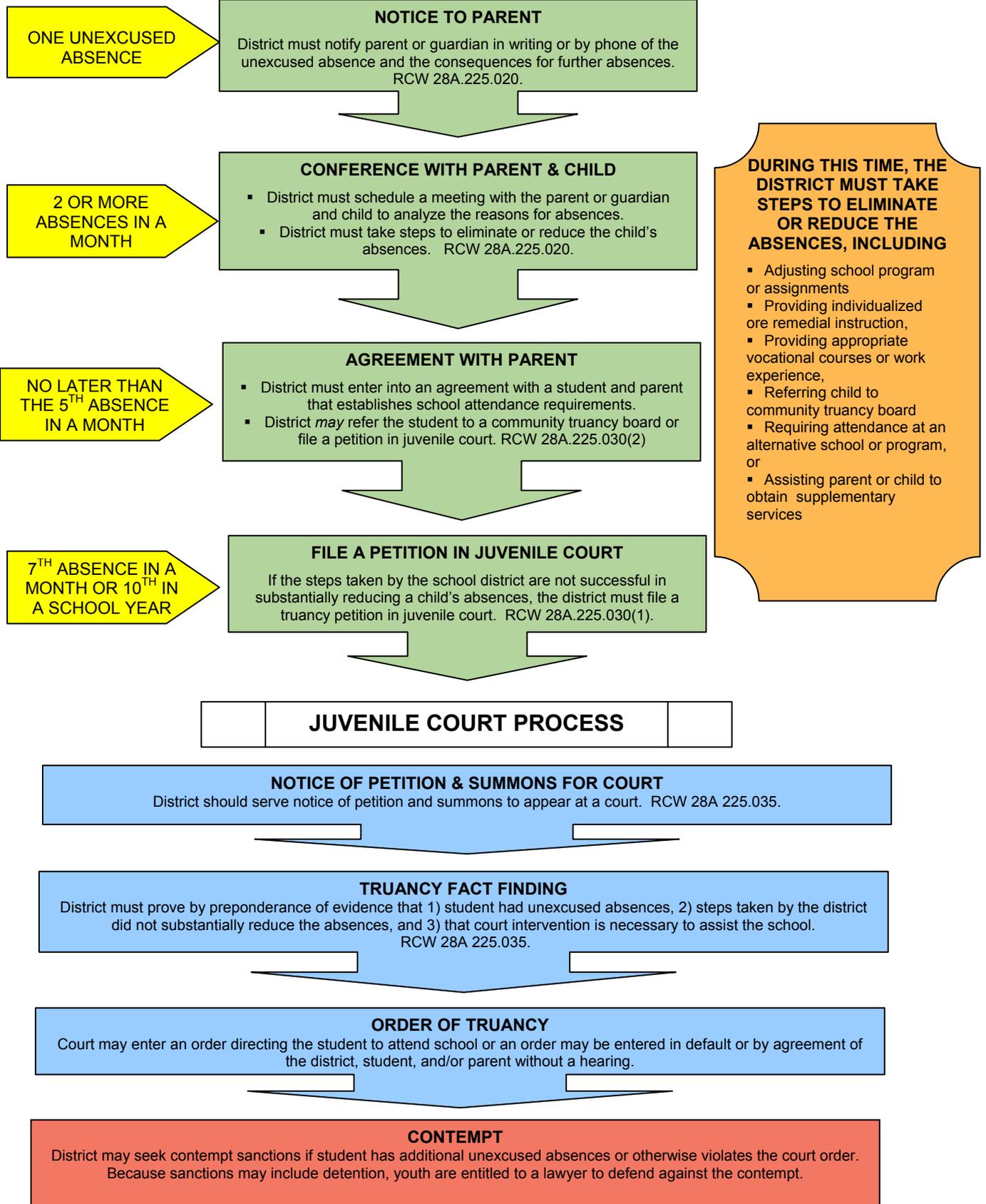
Research and experience of advocates across the state indicate that many of the underlying reasons for a child's absences require solutions and support that are unavailable to families without advocacy. Attorneys play a critical role in identifying issues impacting a child's engagement in school, making the court and schools aware of the child's needs, and holding the systems accountable to meeting those needs. Meaningful and effective advocacy in truancy proceedings can mean the difference between a child reengaging in school with the support needed to be successful.

This manual outlines the relevant rules of law and issues of strategic judgment involved at each stage of the truancy process. It is intended to be a resource for attorneys representing students at any stage of a truancy proceeding, with an emphasis on the issues and procedures that arise in the contempt phase. We hope that the practice manual will also be a resource to build capacity for pro bono and civil legal services attorneys to represent children in education issues and at early stages of a truancy proceeding.

Look for some special features in the manual to help support practice:

- Practice Points** are provided throughout to highlight steps counsel can take to effectively advocate for clients.
- Checklists** are located at the end of chapters for easy reference, removal, copying and carrying.
- Appendices** at the back of the manual include resource lists, statutes, court rules and case law.

TRUANCY PROCESS FLOW CHART



CHAPTER ONE Truancy Statute - Annotated

The following is an annotated outline of the truancy process as set forth in the governing statute, RCW 28A.225, et seq. Implementation of this statute varies widely across the state. Some of the major variations are highlighted in practice points. Attorneys preparing for their first truancy cases should talk with other advocates in the jurisdiction to find out what to expect.

I. Compulsory Attendance: RCW 28A.225.010 and RCW 28A.225.015

A. Children Between the Ages of 8 and 18: RCW 28A.225.010

Regular attendance is mandatory for all children between the **ages 8 and 18**, unless the child meets one of the statutorily defined exceptions.

Children are exempt from the mandatory attendance requirement if:

- Attending an approved private school, or is enrolled in an extension program, RCW 28A.225.010(1)(a);
- Receiving home-based instruction, RCW 28A.225.010(1)(b);
- Attending an education center, RCW 28A.225.010(1)(c);
- Excused by the school district superintendent because the child is physically or mentally unable to attend school, is attending a residential school, is incarcerated, or is temporarily excused on the request of his parents as agreed by the school, RCW 28A.225.010(1)(d); or
- 16 years of age or older and
 - Is regularly and lawfully employed and the parent agrees or the child is emancipated, RCW 28A.225.010(1)(e)(i); or
 - Has already met graduation requirements, RCW 28A.225.010(1)(e)(ii); or
 - Has received a GED, RCW 28A.225.010(1)(e)(iii).

B. Children Ages 6 or 7: RCW 28A.225.015

Children ages 6 or 7 are required to attend school regularly only **if their parent chooses to enroll them**. RCW 28A.225.015(1).

Exceptions to the mandatory attendance requirement for 6 and 7 year olds include:

- Children who are formally removed from enrollment before a petition is filed against the parent;
- Children enrolled in public school part-time to receive ancillary services;
- Children temporarily excused upon the request of the parent with agreement by the school district. RCW 28A.225.015(1).

C. Parents: RCW 28A.225.010 and RCW 28A.225.015

Parents are legally responsible for ensuring that their children, ages 8 to 18, attend school full-time. RCW 28A.225.010(1).

If a parent chooses to enroll a child who is 6 or 7 years old, the parent is obligated to ensure that child's regular attendance. RCW 28A.225.015(1).

D. Definition of "Unexcused Absences": RCW 28A.225.020

An "unexcused absence" means a child "[h]as failed to attend the majority of hours or periods in an average school day or has failed to comply with a more restrictive school district policy;" and "[h]as failed to meet the school district's policy for excused absences." RCW 28A.225.020(2)(a)-(b).

Also, note that if a child transfers during a school year, the receiving school or district "shall include" the unexcused absences accumulated at the previous school. RCW 28A.225.020(3).

Practice Point: District Policies Define Absences



Districts often adopt policies further defining "unexcused absences". Look for these local policies, which may expand the statutory definition by including accumulations of tardiness or missed classes as days of unexcused absences.

School district policies are often available on district websites. More detail may be found in "procedures" which, if not online, should be available upon request at the district office.

Typically schools will excuse absences for participation in school-approved activities, illness, family emergencies, religious occasions, educational opportunities, suspensions, and court appearances. Schools generally require a note or a phone call from the parent to excuse absences and some also require a doctor's note in cases of illness. Many schools will not excuse all absences requested by the parent if in the school's judgment the absence would cause a serious negative effect on the student's educational progress.

Are Cultural and Family Events Excused?

In some districts, definitions of excused and unexcused absences may not account for students' differing cultural and religious backgrounds. Ask your client whether absences are due to participation in traditional holidays, family celebrations or important community gatherings.

II. School's Pre-Petition Legal Obligations: RCW 28A.225.020

A. Notice: RCW 28A.225.020(1)(a)

After 1 unexcused absence in a month, schools must give notice to the custodial parent by phone or in writing, and must inform the parent of potential consequences of additional unexcused absences. RCW 28A.225.020(1)(a).

This notice should be provided in the parent's primary language if it is different than English; if a written translation cannot be provided, the school should offer an oral interpretation.¹

B. Conference: RCW 28A.225.020(1)(b)

After 2 unexcused absences in a month, schools must schedule a conference or conferences with the custodial parent and the child, at a time reasonably convenient for all, for the purpose of analyzing the causes of the child's absences. RCW 28A.225.020(1)(b).

If a regularly scheduled parent/teacher conference will take place within 30 days of the second unexcused absence, the conference may be scheduled on that day. RCW 28A.225.020(1)(b).

If the child's parent does not attend the scheduled conference, the conference may be conducted with the child and the school. In that case, the parent must be notified of the steps that will be taken to eliminate or reduce absences. RCW 28A.225.020(1)(c).

C. Take Steps: RCW 28A.225.020(1)(c)

The school must "take steps to eliminate or reduce the child's absences." RCW 28A.225.020(1)(c).

The purpose of the conference required by RCW 28A.225.020(1)(b) is to determine what steps will be taken. Those steps shall include, "where appropriate:"

- Adjusting the child's school program or school or course assignment;
- Providing more individualized or remedial instruction;
- Providing appropriate vocational courses or work experience;
- Referring the child to a community truancy board, if available;
- Requiring the child to attend an alternative school or program; or
- Assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school.

RCW 28A.225.020(1)(c).

The various school-based intervention steps enumerated in RCW 28A.225.020(1)(c) should not be read as exclusive. There are a number of other steps the school might take,

¹ For more information regarding a school's duty to provide notice in a family's primary language, See *Chapter Two: Absences Relating to Language Barriers*.

in cooperation with the student and parent or guardian, to try to reduce absences. In addition to the steps identified in the truancy statute, schools have affirmative duties to students under other laws, such as the Individuals with Disabilities Education Act (IDEA), the McKinney-Vento Act (addressing rights of homeless students), the No Child Left Behind Act, (NCLB) (requiring schools to provide tutoring in certain circumstances), Title VI of the Civil Rights Act of 1964, Title IX of the Civil Rights Act, and the Washington Law Against Discrimination (prohibiting discrimination in schools), each of which are discussed in Chapter Two: Preparing and Investigating a Truancy Contempt Case.

III. Petition Requirements, Timing and Substance: RCWs 28A.225.030; 28A.225.035

A. When Can a Petition be Filed?: RCW 28A.225.030

“If the actions taken by a school district under RCW 28A.225.020 are not successful in substantially reducing” absences, schools are directed to file a truancy petition if a child reaches **7 unexcused absences in a month or 10 unexcused absences in a school year.** RCW 28A.225.030(1).

Schools may file a petition upon **5 unexcused absences in a month.** At that point, the school must **either**:

- Enter into an agreement with the student and parent establishing student attendance requirements, RCW 28A.225.030(2)(a);
- Refer the student to a community truancy board, if available, RCW 28A.225.030(2)(b); or
- File a petition, RCW 28A.225.030(2)(c).

What is a community truancy board?

A community truancy board may exist within a school, a school district, or through the juvenile court to divert students from having a formal truancy order established against them. There is no set template for what a community truancy board looks like, or how they operate. Check in your local jurisdiction to see whether one exists.

B. Who is the Respondent – Parent, Child or Both?: RCW 28A.225.030(1)

The petition may allege a violation of the truancy statute either: (a) by the parent; (b) by the child; or (c) both. RCW 28A.225.030(1).

Only the parent may be named as the respondent if the child is 6 or 7 years old. RCW 28A.225.015(3).

C. What Type of Service is Required?: RCW 28A.225.030(5)

Truancy petitions may be served by certified mail, return receipt requested. RCW 28A.225.030(5).

If certified mail service is unsuccessful, or return receipt is not signed by the addressee, personal service is required. RCW 28A.225.030(5).

D. What Must be in a Truancy Petition?: RCW 28A.225.035(1)

The petition must allege three things:

- The child has unexcused absences during the school year, RCW 28A.225.035(1)(a);
- Actions taken by the school district have not been successful in substantially reducing the child's absences from school, RCW 28A.225.035(1)(b); and
- Court intervention and supervision are necessary to assist the school district or parent to reduce the child's absences from school, RCW 28A.225.035(1)(c).

The petition must also include:

- Facts supporting each required allegation, RCW 28A.225.035(3);
- A request for relief, RCW 28A.225.035(3);
- The name, date of birth, school, address, gender, race and ethnicity of the child, RCW 28A.225.035(2);
- The names and addresses of the child's parents, RCW 28A.225.035(2)
- Whether the child and parents are fluent in English, RCW 28A.225.035(2); and
- Whether there is an existing individualized education program (IEP), RCW 28A.225.035(2).

IV. Initial Hearings: RCW 28A.225.035

A. When are Hearings Required?: RCW 28A.225.035(4) and (7)(a)

A hearing on the petition should be scheduled by the court unless:

- The court refers the student to a community truancy board, RCW 28A.225.035(4), or
- Other actions by the court would substantially reduce the child's unexcused absences, RCW 28A.225.035(7)(a).

The truancy statute is silent as to when the hearing must occur.

B. What are the Notice Requirements for the Hearing?: RCW 28A.225.035(7)

If a truancy fact-finding hearing is scheduled, the court must:

- Separately notify the child, the parent of the child, and the school district of the hearing, RCW 28A.225.035(7)(a);
- Notify the parent and the child of their rights to present evidence at the hearing, RCW 28A.225.035(7)(a)(ii); and
- Notify the parent and the child of the options and rights available under chapter 13.32A RCW (the Family Reconciliation Act), RCW 28A.225.035(7)(a)(iii).

C. Who is Required to Attend the Hearing?: RCW 28A.225.035(8)

The court may require the child (if aged 8 or older), the child’s parents, and the school district to attend the hearing. RCW 28A.225.035(8).

Due process requires that a child be afforded counsel at the initial fact-finding stage. If the child is not provided counsel, the advisement of rights must take place in court, by means of a colloquy between the court, child and parent. RCW 28A.225.035(7)(b).

D. Who Has the Burden and What is the Standard of Proof at the Initial Truancy Hearing?: RCW 28A.225.035(12)

The school district bears the burden of proof at the initial hearing. RCW 28A.225.035(12).

It must prove by a preponderance of the evidence, RCW 28A.225.035(12), that:

- The child has unexcused absences during the school year, RCW 28A.225.035(1)(a);
- Actions taken by the school district have not been successful in substantially reducing the child’s absences from school, RCW 28A.225.035(1)(b); and
- Court intervention and supervision are necessary to assist the school district or parent to reduce the child’s absences from school, RCW 28A.225.035(1)(c).

E. What is required by the court for a child in a special education program or diagnosed with mental or emotional Disorder?: RCW 28A.225.035(11)

If the child is in a special education program or has a diagnosed mental or emotional disorder, the court shall inquire as to what efforts the school district has made to assist the child in attending school. RCW 28A.225.035(11).

V. Truancy Orders, Conditions and Duration: RCW 28A.225.090

A. What Conditions May Truancy Courts Impose?: RCW 28A.225.090(1)

Truancy orders may require children to:

- Attend their current school, RCW 28A.225.090(1)(a);

- Meet minimum attendance requirements, RCW 28A.225.090(1)(a);
- Avoid suspensions, RCW 28A.225.090(1)(a);
- If space is available, attend another public school, an alternative education program, education center, a skill center, dropout prevention program, or another public educational program, RCW 28A.225.090(1)(b);
- Attend a private school, if certain conditions are met, RCW 28A.225.090(1)(c);
- Be referred to a community truancy board, if available, RCW 28A.225.090(1)(d);
- Submit to drug or alcohol testing if testing is appropriate to the circumstances, RCW 28A.225.090(1)(e);
- Abstain from the unlawful consumption of drugs or alcohol if the testing results indicate use, RCW 28A.225.090(1)(e); and
- Adhere to the recommendations of the drug assessment “at no expense to the school,” RCW 28A.225.090(1)(e).

Agreed Truancy Orders

Most school districts ask students and their parents to sign agreed truancy orders without a hearing. Practice varies, and those orders may be negotiated at the school, in the waiting area at the courthouse, or following a truancy class presented and given to a group of parents and students. Courts will generally sign off on these agreed orders without calling the child or parent into court or questioning whether the district has met its pre-filing obligations. Check with your client about his or her understanding of the agreed order and the process for obtaining agreement. Some circumstances may warrant a challenge to the underlying order. See *Chapter Three: Challenging the Underlying Truancy Order*.

Practice Point: A School’s Continuing Obligations to Address Absences During a Truancy Case



Although the truancy statute is silent regarding schools’ continuing obligations to take steps to reduce or eliminate unexcused absences after filing a truancy petition, on entry of a truancy order a student or parent may ask the court for the school to continue to take steps to address the underlying causes of the student’s absences. Additionally, schools have ongoing, affirmative obligations to provide appropriate educational services to address issues such as special education needs, homelessness, language barriers and remedial education. See *Chapter Two: Issue Spotting* for a summary of these obligations.

B. How Long Do Truancy Orders Remain in Effect?: RCW 28A.225.035(12)

Once issued, truancy court orders remain in effect at least until the end of the school year in which they are entered. RCW 28A.225.035(12).

The court may extend its jurisdiction “for the period of time determined by the court, after considering the facts alleged in the petition and the circumstances of the juvenile, to most likely cause the juvenile to return to and remain in school while the juvenile is subject to this chapter.” RCW 28A.225.035(12) (i.e. until the child’s 18th birthday, or until the child fits within one of exceptions in RCW 28A.225.010(1)(a)-(e)).

VI. Review and Contempt: RCW 28A.225.035 and RCW 28A.225.090

A. Are Review Hearings Required?

Review hearings may be held to monitor compliance with the court order, but they are not required by statute. See RCW 28A.225.035(11) (anticipating “future hearings”).

B. How Does a Court Monitor Compliance with a Truancy Order?: RCW 28A.225.035(13)

If a court assumes jurisdiction over a child, the school district must regularly report any additional unexcused absences or other violations of the order to the court. RCW 28A.225.035(13). A court might also schedule a review hearing to monitor whether the child is in compliance with the court order or order on contempt.

Practice varies on how consistently additional absences are reported and how quick schools are to file contempt motions. If the student’s attendance is improving but not yet perfect, you may be able to convince the school to hold off on filing a contempt motion. Also consider whether the school has been addressing the underlying reasons for the absences when negotiating. See *Winning the Case Between Hearings* in Chapter 3.

C. What are Potential Sanctions on Contempt?: RCW 28A.225.090(2)

If the child violates the court’s order, and there is a finding of contempt, the court may order a child to:

- Be incarcerated in juvenile detention for not more than 7 days with an opportunity to purge contempt;
- Perform meaningful community restitution; or
- Comply with any other remedial sanction that would be effective in coercing the child’s future compliance with the court’s order.

RCW 28A.225.090(2) (incorporating RCW 7.21.030(2)(e)); RCW 7.21.030(2)(d)-(e); *In re the Interests of M.B.*, 101 Wn. App. 425, 446, 3 P.3d 780 (2000). See Chapter 3 for a full discussion of contempt sanctions and purge conditions.

CHAPTER TWO: Preparing & Investigating a Truancy Contempt Case

This Chapter provides an overview of key steps in preparing and investigating a truancy contempt case. It includes checklists for interviewing youth and their parents and collecting relevant records. The interview checklist includes procedural and substantive issues that track the statutory framework and due process expectations. This Chapter also provides an outline to help spot the underlying reasons for a child's absences from school. Many of these reasons could be addressed with additional support. Identifying these issues may not only help you effectively resolve the contempt issue, but also result in your client getting interventions that have a long-term positive impact on their educational experience.

I. Interviewing the Client

The first meeting with your client is critical. It's an opportunity to begin building rapport, identify the critical issues in the case, and obtain releases and other permissions that will facilitate a thorough investigation of the facts. Depending on local practice, your first interview with your client may be a short one, so you may want to focus on immediate next steps, and, if your client is in custody, a plan for his or her release.

For every interview, whether long or short, you will want to be sure you have:

- A private location where you can speak confidentially with your client;
- Parents/guardians' cooperation and participation in the meeting, as appropriate;
- An interpreter if necessary for your client or client's parent.

Getting to the Root of the Problem

Possibly the most difficult task in representing students in truancy matters will be discovering, with your client, what issues are contributing to your client's absences and what solutions exist for addressing them. These issues should be explored in the initial intake interview, but it will likely be necessary to revisit these issues throughout the course of your representation as you build trust with your client.

II. Topics for Truancy Contempt Intake Interviews

The following outlines important areas that will help you prepare your approach to the contempt case:

A. Did the youth receive notice?

- Did the youth receive proper notice of the contempt hearing?
 - Was there sufficient advance notice to prepare for the hearing?
 - Was notice provided in the client and/or parent's primary language?
- Did the student have notice and an understanding of the underlying truancy order?
 - Was the order issued on default? If so, did the client get a copy of the order?
 - Did the client understand the order and its potential consequences?
 - Is the client able to read and understand English? If not, was the order translated?
 - Does the client have a disability that interferes with his or her ability to understand the order or its consequences?

B. Has there been a violation of the court's order?

- Did the client miss school as alleged by the school?
- If the client missed school, was there a valid reason for the absence?
- Is the alleged violation related to a suspension or expulsion? If so, see Absences Relating to School Discipline in this Chapter for potential defenses.

C. Was the violation of the order willful?

- What were the causes, direct or indirect, for the client's absences?
- Are the absences related to the school's failure to remedy a problem at school (such as harassment, special education needs, language barriers, etc.)?
- Are the absences unexcused because a parent failed to comply with the school's attendance policy (by failing to provide a written excuse or doctor's note)?
- Are the absences due to untreated addiction or other circumstances beyond the client's control?

D. Are there factors that mitigate in favor of a stay, continuance or dismissal of the motion for contempt sanctions?

Do you need more time to prepare and adequately represent your client? In many jurisdictions, courts appoint counsel to represent youth on the same day as the contempt hearing. In other jurisdictions, caseload size does not allow for adequate time to investigate and prepare the case. Consider whether you need more time to collect documents, investigate potential defenses, and prepare for the hearing?

Have there been improvements in attendance? If not, ask your client and family about a variety of areas, such as triggering events that may have lead the client to stop attending, problems with particular classes, reasons for tardiness, patterns in non-attendance or tardiness, needs related to disability, language, or academics.

Are there interventions that should be used to address absences? Consider whether the school has taken steps to address the underlying causes of the absences. The lack of activity may be reason for the court to consider allowing more time before ruling on the contempt issue. Proposing steps that the school could take may help address the causes of the absences may assist the court in making a decision. In addition to school based services, there may be services the client can try to access that may help address the causes of the absences (physical or mental health services, drug treatment, other social services)?

E. What is the student's current school placement?

- When did your client last attend school? Where?
- Is your client able to return to his/her most recent school?
- Are there local options for an alternative school or support for home-schooling?
- If there is not a school placement immediately available, is there a place for your client to be where he/she can get tutoring or mentoring?
- Is there a safe place with appropriate supervision for your client to be during the hours when not in school?

F. Are there other issues warranting a challenge to the underlying truancy order?

If you are able to represent your client at the fact-finding stage or are challenging the underlying truancy order at the contempt hearing you will need to determine the accuracy of the school's attendance reports. A starting point would be to ask your client and parent if they agree with the school's records and whether any of the absences were actually excused. In addition you should check the school's written policy for determining unexcused and excused absences.

In addition to proving unexcused absences, the school district must also prove by a preponderance of the evidence of the following (See RCW 28A.225.035):

- Did the school give notice to parents, in their primary language if appropriate?
- Did the school schedule a conference to discuss the truancy issues?
- Did the school offer any services to address underlying causes of the absences?
- Were those services actually provided?

III. Gathering Documents

Obtaining copies of relevant educational records as early as possible can be very useful in advocating for your client at any stage of a truancy proceeding. School records may reveal inaccuracies in the district's record keeping, highlight the efforts (or lack of efforts) made by the school to address absences, and provide important insight into why your client may be having difficulty attending school, including unaddressed disability needs, academic struggles or disciplinary issues.

Two steps you can take to speed up the process and ensure you will receive relevant records on an ongoing basis are:

- File a notice of appearance and request for discovery in the truancy matter to obtain all documents; and
- Get signed releases from your client and his or her parent to obtain all other necessary records.

In most cases, you should be able to obtain relevant documents simply by requesting them. However, if necessary, once a truancy case has been initiated in the juvenile court, counsel should be able to rely upon the formal discovery rules in the Superior Court Civil Rules, which are applicable in juvenile court proceedings pursuant to JuCR 1.4(a). Discovery in civil matters is governed by Superior Court Civil Rules 26 – 37. The rules permit requests for discovery as soon as a case is initiated.² If necessary, interrogatories may be used to obtain the names of teachers, school counselors, administrators or other staff who may have information about your client's attendance and educational progress, and other information about steps the school has taken to work with your client. Requests for documents can be submitted to get relevant school records.

Practice Point: No Discovery, No Hearing?



If requests for discovery have been made, and discovery is not provided, or is provided in an untimely manner, consider whether it is in your client's best interests to request a continuance of an initial, review or contempt hearing to allow time to receive or review relevant documents. See

Chapter Three: Checklist - Seeking a Continuance.

² A defendant may generally commence discovery from the plaintiff after a summons and complaint are filed and served, or after the complaint is filed, whichever is earlier. See CR 30 (depositions); CR 33 (interrogatories); CR 34 (requests for production of documents).

A. Obtaining School Records

Review of your client's school records, including attendance, discipline, and academic records can help to confirm whether there is factual support for the allegations in the petition or contempt motion. Educational records are also critical to understanding the underlying reasons for absences. Addressing academic problems, special education needs, and discipline history could be important for negotiating a resolution to the case. See the Checklist at the end of this Chapter for a list of educational records that may be helpful in preparing your case.

Record Release with Parents' Signatures: Educational records are protected from release by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (1974). Under FERPA, a parent's signature is generally necessary in order to access education records. Records can be released under a court order. If you have difficulty obtaining consent from your client's parent, consider asking the court to order the release of school records.

Practice Point: RPC 4.2 - Speaking with School Employees



Various school employees may have relevant information about your client that could be helpful in defending against an initial truancy petition and/or contempt sanctions. Before talking directly with school staff, consider whether RPC 4.2 (prohibiting direct communication with a represented party) would apply.³ Although not all school staff are covered by the rule as interpreted by the Washington Supreme Court (*i.e.* those with speaking authority who can bind the district), the District may take a conservative position on who counsel may contact directly. If the Rule applies, you might seek permission from the district's counsel to speak directly with those school staff that may have information about your client's case, or be in a position to assist your client with a plan for re-engaging in school.

B. Obtaining Medical Records

Some students are absent for health reasons. Obtaining records from health care providers may help counsel as well as the court and school district understand and address the underlying reasons for the student's absences.

³ See RPC 4.2, Comment [7]; *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (1984).

Release Forms for Medical Records: Requests for any medical records must comply with HIPAA (Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 160-164 (1996)). If you will be seeking information from health care providers, check to see if the provider requires use of their own disclosure forms. Also, see “Providing Health Care to Minors under Washington Law,” available on Washington Law Help at: www.washingtonlawhelp.org, for information about state laws governing release of mental health and substance abuse treatment records of minors. If the third party resists producing the documents, consider issuing a subpoena *duces tecum*. CR 30(b)(1).

IV. Issue Spotting

Washington’s truancy law confers certain responsibilities on schools, parents and students. In many circumstances, schools have additional obligations to students established by state and federal laws relating to special education, bilingual education, remedial instruction, protection from discrimination, and school discipline. A school’s failure to meet these obligations may be the reason for, or contribute to, a student’s absences.

Claims based on your client’s rights to special education, bilingual education, remedial instruction or other services might be raised:

- In support of a motion to dismiss a truancy petition;
- In support of a motion to stay court proceedings until school-based interventions have been attempted;
- In defense to contempt findings; or
- In support of a reasonable and realistic mitigation plan that will allow your client to avoid negative contempt sanctions and repeated findings of contempt.

This section is intended to help truancy attorneys spot issues that warrant further advocacy or referral and provide strategies for leveraging a student’s rights under related laws in truancy proceedings.

A. Absences Related to Disability and Special Education Needs

A student’s absences may be related to a mental, physical or emotional impairment that interferes with a child’s ability to learn. Districts have a responsibility to address their students’ disability needs through accommodations and special education services. A faulty or poorly implemented plan could contribute to the child missing school. Putting a good plan in place might eliminate the reasons for non-attendance.

Federal and state laws require school districts to provide appropriate special educational services to students with disabilities. Two federal laws – the Individuals with Disabilities Education Act, (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, (“Section 504”), 29 U.S.C. § 794, protect the rights of students with disabilities and afford procedures for enforcing those rights. The IDEA requirements have been adopted in Washington through statute and regulations. See

WAC 392-172A. Students with disabilities may receive accommodations under either Section 504 or the IDEA, or both.

Students with disabilities up to age twenty-one have the right to instruction that is specially designed to meet their needs at no cost to their parent or guardian. More specifically, the laws require schools to:

- Identify students with disabilities;
- Evaluate students for disabilities;
- Develop appropriate individualized education plans (either Individual Education Plans, “IEPs” pursuant to the Individuals with Disabilities Education Act (IDEA),⁴ or “Section 504 plans” pursuant to Section 504 of the rehabilitation Act)⁵;
- Provide appropriate transportation services;
- Review and modify the individual education plans; and
- Re-evaluate students periodically.

If serious problems seem apparent with your client’s special education plan, try to refer your client to an attorney who can assist her with legal advocacy around her provision of services. See *Appendix A: Legal Resources for Youth*.

To determine if special education/disability issues might be relevant in your case:

- Ask your client and his or her parent if he or she is receiving special education services:
 - Does he or she have an “IEP” or “Section 504 plan”?
 - Has he or she ever been evaluated for special education services?
- Ask the school district for:
 - The most recent “IEP” or “Section 504 plan” if one exists;
 - The most recent special education evaluation.

As you review the records, be alert for the following:

- **An out of date IEP.** A student’s IEP must be reviewed and revised once every year.⁶
- **A student has not received a three year re-evaluation.** Students eligible for special education services must be re-evaluated at least once every three years.⁷

⁴ An IEP is a detailed description of the instruction and services a student with disabilities requires in order to receive a meaningful educational program. 20 U.S.C. § 1414(d)(1)(A) and WAC 392-172A-03090 *et. seq.* IEPs are developed by the “IEP team,” which consists of the student’s parents or guardians, special education and general education teacher, school administrators, counselors, or psychologists. 20 U.S.C. § 1414(d)(1)(B), WAC 392-172A-03095.

⁵ 29 U.S.C. § 794

⁶ 20 U.S.C. § 1414 (d)(4)(A)(i), WAC 392-172A-03110(3)(a).

⁷ 20 U.S.C. §1414(a)(2)(ii), WAC 392-172A-03015(2)(b).

- **The IEP team has not addressed the causes of a student’s truancy.** Special education law requires IEP teams to consider functional behavior issues in addition to the academic needs directly related to a child’s disability.
- **The student’s class schedule or placement is inappropriate.** Pursuant to the IDEA, students have a right to receive special education services in the Least Restrictive Environment (LRE).⁸

If you can identify any of these conditions a stay or continuance of a contempt hearing or initial petition hearing might be warranted to allow time to ensure appropriate educational services are being provided.

The following are some example scenarios of how an understanding of special education rights might be used in advocating for youth in truancy proceedings.

Issue Spotting Example: Tardiness related to ADHD

The Youth: Johnny receives special education services because he has been diagnosed with ADHD. He has unexcused absences because he arrives fifteen minutes late to class between periods each day, which counts as an unexcused absence according to school policies. School staff report seeing him wandering around the school during class-time.

Strategies: Johnny’s inability to get to class on time may be related to his ADHD and difficulties he may be experiencing in focusing on task completion. Check to see if Johnny’s IEP team or those who participate in his 504 plan have met to discuss his tardiness or the reports of his wandering around during class time. Suggest that interventions be created through the IEP to help Johnny make it to class on time and reduce his truancy.

Issue Spotting Example: Refusals to Attend School

The Youth: Sarah receives special education services to address behavioral challenges arising from a diagnosis of an anxiety disorder. She tells you that her math teacher is mean to her, and she is afraid of him making fun of her in front of the other students. She has been experiencing panic attacks at the thought of going to math class, and often refuses to go to school.

Strategies: Sarah’s refusal to go to school on days when she has a panic attack may be directly related to her disability. Inquire whether Sarah has told school staff about her anxiety related to the math teacher. You can help Sarah and her parents to request other interventions that might reduce her anxiety, or to schedule an IEP meeting to discuss a schedule change or other interventions to remedy Sarah’s feelings related

⁸ 20 U.S.C. § 1412(a)(5), WAC 392-172A-02050.

to her current math teacher. If necessary, ask for more evaluations to determine other interventions that might reduce her anxiety.

Issue Spotting Example: Addressing Transportation Issues

The Youth: Sam receives special education services because he was diagnosed in elementary school as having a specific learning disability. Sam lives with his mother, who does not own a car. Sam has been missing school because he often misses the county bus, which only comes once every hour. Sam lives only 2.5 miles from school.

Strategies: Students receiving special education services are entitled to transportation provided by the school district. Make a phone call to Sam's special education teacher or someone on his IEP team, or request an IEP meeting to discuss Sam's transportation needs. A meeting can also be held to discuss strategies to help Sam wake up in time to catch his bus.

For more information about where to refer children with disabilities for educational advocacy, see *Appendix A*.

B. Absences Relating to Homelessness

School districts have a duty to assist homeless students in accessing education.⁹ A child is considered homeless if he or she lacks an adequate, regular nighttime residence.¹⁰ Homeless families may be reluctant to disclose their living arrangements to you. To identify whether homelessness may be contributing to your client's absences, interview your client about his or her living situation:

- Is he or she living with someone other than his or her parents?
- Is he or she moving frequently?
- Does he or she have reliable transportation to school from each place?
- Are the frequent moves or unstable living conditions making it harder to complete homework or focus in class?

For students who are covered by the McKinney-Vento Act, school districts are required to:

- Allow the student to stay in his or her school of origin until the end of the school year even if he or she is no longer living within boundaries of district;
- Enroll the student without requiring proof of a legal residence;

⁹ McKinney-Vento Act, 42 U.S.C. § 11431, et seq.; See also RCW 28A.225.215.

¹⁰ 42 U.S.C. § 11434a(2)(A). This definition includes children who live in motels, shelters, temporarily at the homes of extended family or friends, children who are awaiting foster care placement, or who are considered unaccompanied minors (not in the physical custody of a parent or guardian). 42 U.S.C. § 11434a(2)(B)(i)-(iv).

- Provide special transportation to the school of origin even if that transportation is not normally provided by the district;
- Waive barriers to enrollment such as requirements for parental signatures and address verification;
- Provide appropriate resources to enable the student to keep up in school.

If homelessness might be contributing to your client’s absences, this may support a continuance or dismissal of an initial petition or contempt motion to allow time for the school district to provide appropriate services to your client.¹¹

For additional resources on enrollment problems or appropriate services for homeless students, you can contact Northwest Justice Project, Columbia Legal Services or TeamChild. See *Appendix A: Legal Resources for Youth*.

C. Absences Relating to Discrimination, Harassment or Bullying

Students may stop attending school because they feel intimidated, harassed or discriminated against. Schools are obligated to take reasonable steps to protect students from discrimination, harassment or bullying by other students or by school staff.¹² State and federal laws prohibit schools from discriminating against students on the basis of national origin, race, religion, economic status, gender, sexual orientation, pregnancy, marital status, previous arrest, previous incarceration, or a physical, mental or sensory handicap.¹³

When interviewing your client, look for signs of harassment or bullying. Being constantly “picked on”, expressing that a particular student or teacher does not like them and singles them out for criticism or discipline, or feeling unwelcome at school may all indicate a bigger underlying problem. Consider asking for a continuance or dismissal of an initial petition or contempt motion to allow time for you to negotiate with the school to arrange for:

- An appropriate investigation and intervention with the student or staff person who is harassing your client (every district is required to have harassment, intimidation and bullying prevention policies that should include processes for investigating complaints)¹⁴ or to

¹¹ The Office of the Superintendent of Public Instruction (OSPI) has a staff member who administers the McKinney Vento Act across Washington State; resources and information are available at: <http://www.k12.wa.us/HomelessEd/resources.aspx>.

¹² WAC 392-400-215

¹³ See Wash. Const. Art. IX, § 1; Washington Law Against Discrimination (“WLAD”) RCW 49.60.030(1)(b); 49.60.040(10); 49.60.215; WAC 392-400-215(1); RCW 28A.640.010 (prohibiting sex discrimination in schools); see also U.S. Const. Amend. XIV, § 1; Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964, 20 U.S.C. § 1681(a) (prohibiting discrimination on the basis of sex in programs receiving federal funds); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

¹⁴ Washington adopted a bullying statute, see RCW 28A.300.285 (requiring district to have and post policy); RCW 28A.600.480 (requiring reporting incidents of harassment, intimidation or bullying).

- Request a transfer of your client or the harasser to another class.

If your client has already complained to the school about harassment and the problem persists, consider referring your client to an agency, organization or attorney that handles discrimination claims. See *Appendix A: Legal Resources for Youth*.

Practice Point: Identifying Discrimination Due to Immigration Status¹⁵



Schools may not deny students an education on the basis of citizenship or immigration status.¹⁶ This means schools should avoid actions that effectively preclude a student from accessing education, including:

- Denying admission to a student during initial enrollment or at any other time on the basis of undocumented status.
- Requiring students or parents to disclose or document their immigration status.
- Making inquiries of students or parents that may expose their undocumented status.
- Requiring social security numbers from all students, as this may expose undocumented status.

D. Absences Relating to School Discipline

Students who have been excluded from school for misconduct may struggle with school engagement and attendance issues. Returning to school after a period of exclusion may be difficult for the student. Catching up on homework and missing lessons, reconnecting with friends, and recouping credits can be daunting tasks. Students may find it easier to “check out” and stop trying. Consider strategies to mitigate the impact of school exclusion and discuss the student’s needs with the school and court if appropriate.

The intersection of school discipline and truancy can arise in a couple of other ways: In some districts, under certain circumstances students may be disciplined or suspended for missing school. Also, a suspension or expulsion may constitute a violation of a truancy order, subjecting a student to contempt sanctions.

¹⁵ Contact with juvenile court may pose some risk to undocumented youth. Some jurisdictions are allowing immigration officials to investigate and potentially take into custody undocumented youth who are in detention. If you believe your client is at risk, a referral should be made to an immigration attorney. Attorneys may also consult with the Washington Defender Association’s Immigration Project and the Northwest Immigration Rights Project. See Legal Resources in the Appendix to this manual for contact information.

¹⁶ Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

Issue Spotting School Discipline

To identify whether school discipline issues might be relevant in your case:

- Interview your client about whether he or she has:
 - Missed school due to suspension or expulsion; or
 - Been threatened with suspension for any future absences;
 - Been asked to sign a behavior or attendance contract that identifies possible repercussions for further absences or misconduct.
- Ask for and review your client's school records relating to school discipline. Look to see whether:
 - Your client has a history of suspensions or expulsions;
 - School district policies list suspension as a possible consequence for unexcused absences;
 - Your client has signed a behavior or attendance contract that identifies possible repercussions for further absences or misconduct.
- Review the school district's allegations supporting a contempt motion to see if it is based on a suspension or expulsion.

Practice Point: Resources for Representing Students in School Disciplinary Hearings



To protect your client's rights, you may want to refer him or her to an attorney, provide information your client can use to advocate for him or herself, or represent your client yourself in a school disciplinary hearing. Failure to request a hearing within short timelines can result in waiver of the right to appeal disciplinary sanctions. Further, students who receive special education services are entitled to heightened protections when faced with school discipline. Additional information on the legal rights of students in public school discipline matters can be found in the ACLU Parents' Guide to Public School Discipline,¹⁷ and in TeamChild's Education Advocacy Manual.¹⁸ See Legal Resources in *Appendix A*.

1. Disciplinary Sanctions Imposed for Unexcused Absences

Students may be disciplined, but they cannot be suspended or expelled "by reason, in whole or part" for unexcused absences unless the school has taken several prior steps to address the absences. WAC 392-400-245(3); WAC 392-400-260(3); WAC 392-400-275(3). Schools must have first imposed other discipline, and must have:

¹⁷ http://www.aclu-wa.org/issues/subissue.cfm?&issuesubissue_id=91

¹⁸ <http://teamchild.org/manual.html>

- Given the parent notice of the student’s absences in the parent’s primary language. The school must have given notice in writing “and by other means reasonably necessary to achieve notice.” WAC 392-400-245(3)(a); WAC 392-400-260(3)(a); WAC 392-400-275(3)(a).
- Scheduled a conference with the parent, at a time and place reasonably convenient to the parents and school, to discuss the absences and determine whether the student should be evaluated for special education or other special program. WAC 392-400-245(3)(b); WAC 392-400-260(3)(b); WAC 392-400-275(3)(b), and
- Taken appropriate steps to reduce or eliminate absences. WAC 392-400-245(3)(c); WAC 392-400-260(3)(c); WAC 392-400-275(3)(c).

If you learn that your client has been threatened with a disciplinary exclusion for missing school, consider negotiating with the school district representative to avoid any sanction that will result in the loss of additional class-time. School district representatives may be open to alternatives, particularly if your client’s attendance has improved or your client is working on a plan to catch up in school.

2. Suspensions/Expulsions as Violation of a Truancy Order

Courts may order students to avoid school discipline as part of the truancy court order. See RCW 28A.225.090(1)(a). Accordingly, suspensions or expulsions may constitute a violation of the court’s order and expose your client to contempt sanctions.

If your client is alleged to be in contempt of the truancy order because of receiving a suspension or expulsion, possible avenues for advocacy include:

- Investigating whether the discipline was properly imposed, and assisting your client in challenging the proposed punishment if it was not;
- Arguing against further sanctions in the truancy case if the client has already been punished for the infraction of the school rules and it would do further and unnecessary damage to the child’s education to impose truancy sanctions as well.

E. Absences Relating to Language Barriers

Students may stop attending school if they have a difficult time learning and communicating because their native language is not English. Schools are obligated to provide appropriate instruction to English language learner students and to communicate with their parents, in the parents’ primary language, when necessary. More specifically, schools must:

- Provide appropriate language instruction to students whose primary language is not English and whose English language skills are sufficiently deficient to impair learning;¹⁹
- Identify eligible students shortly after enrollment, and annually test their progress;²⁰
- If students' participation in a language remediation program puts them behind in other areas of the curriculum (history, math, social studies, etc.), schools must provide appropriate assistance in those areas to ensure students' "equal participation" in the school's regular program;²¹ and
- Provide information to parents in their primary language in certain circumstances.²²

Notice of Truancy Matters in a Parent's Primary Language:

If the custodial parent or guardian is not fluent in English, the preferred practice is for the school to provide notice in the custodial parents' or guardians' primary language. RCW 28A.225.035(7)(a)(ii). Given the significance of the consequences and consistent with more general and federal state laws addressing language access, it is reasonable to expect that truancy notices should be provided in parents' primary language and interpreters should be made available for truancy related meetings.

Unaddressed language barriers contributing to your client's attendance may provide a basis for negotiating with the school district and seeking a continuance of a contempt proceeding or initial hearing to allow time to address the issue. They may also provide a defense to contempt if your client is not "willfully" refusing to attend school but rather is effectively unable to function in his or her current classes without appropriate language instruction.²³

¹⁹ RCW 28A.180; WAC 392-160; Washington Law Against Discrimination, RCW 49.60.030(1)(b); RCW 49.60.215. Equal Educational Opportunities Act, 20 U.S.C. § 1703(f); 34 C.F.R. § 100.3(b)(2). In Washington, schools must provide "transitional bilingual instruction" where feasible. RCW 28A.180.040; WAC 392-160-040.

²⁰ WAC 392-160-015.

²¹ *Castaneda v. Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981).

²² WAC 162-28-040(5); WAC 392-160-010(2). See also e.g., WAC 392-400-265(1)(a); WAC 392-400-280(1)(a); and WAC 392-400-300(1)(a) (Notice of long term suspensions, expulsions and emergency expulsions, must be provided in the parent's predominant language, "to the extent feasible."); WAC 392-172A-05010; WAC 392-172A-05015 (Schools must provide written notices regarding special education matters in a parent's native language, "unless it is clearly not feasible to do so."); WAC 392-172A-03100(7) (Schools must arrange for interpreters, if necessary, for IEP meetings).

²³ If a school refuses to provide any additional language or other instruction for your client, or inappropriately places your client in an ELL program, your client can file a complaint with the U.S. Department of Education Office for Civil Rights ("OCR"). Information about OCR's complaint process is available on their website at: <http://www.ed.gov/about/offices/list/ocr/complaintprocess.html>. See Appendix A.

Practice Point: Securing Interpreters for Court Hearings



In addition to the provisions in the truancy statute cited above, RCW 2.43 RCW requires interpreters be provided for all hearings where a non-English speaking person is a party or is compelled to attend.²⁴ Your client should not be charged costs for the interpreter. For cases initiated by a government agency in which a non-English-speaking person is a party, or is otherwise compelled to appear, the court must secure and fund a court certified interpreter.²⁵ If your client's parents are required by the court to appear for the truancy hearings, they may also be entitled to a court appointed interpreter at no cost.²⁶ Check your local court rules and juvenile court rules for procedures on securing an interpreter.

F. Absences Relating to Academic Issues

A student's academic problems may have led to the initial pattern of absences, and it may be preventing him or her from going back to school even when facing a truancy order.²⁷ When students accrue unexcused absences, schools are required to take appropriate steps to address the underlying causes of those absences. The truancy law recognizes that "providing more individualized or remedial instruction" may be an appropriate step. RCW 28A.225.020.

Talk with your client to determine whether academic issues may be contributing to his or her absences. You may be able to get a continuance of a contempt or initial truancy proceeding to allow time for the school to work with your client on addressing academic issues. A school's failure to adequately address academic issues may be grounds for dismissal of a truancy petition based on failure to comply with pre-filing obligations.

A school counselor, administrator or one of your client's teachers may be able to help identify options for additional academic support. Some programs to ask about if your client is struggling academically include:

- **Supplemental Education Services** are available to students in schools that have not met adequate yearly progress as defined by the No Child Left Behind Act. For more information on Supplemental Education Services, see the Office of

²⁴ RCWs 2.43.020; 2.43.030; 2.43.040.

²⁵ RCW 2.43.040(2).

²⁶ RCW 28A.225.035(9) (court may require parent's appearance at initial truancy hearing); RCW 2.43.040(2).

²⁷ Keep in mind that academic failure and frustration could be caused by unaddressed disability, frequent school moves, exclusions due to misconduct or language barriers. Strategies for addressing academic failure will be more effective if these root causes are identified and addressed.

Superintendent of Public Instruction's information sheet on Adequate Yearly Progress at <http://www.k12.wa.us/ESEA/AdequateYearlyProgress.aspx>.

- **Learning Assistance Program:** Your client's school may have tutoring or after-school services for students in need of extra help²⁸.

G. Absences Relating to Mental or Physical Health Issues

A child may miss school because of emergency or chronic health issues. Truancy actions may be filed even after parents have communicated these circumstances clearly to schools. Schools might not always understand or see that chronic health issues like depression, anxiety, sleep disorders, may be the reason for nonattendance. Raising unaddressed health concerns and a plan for treatment and support may be helpful in negotiating a stay or dismissal of the case.

If you are assisting your client in accessing health care, a helpful review of laws addressing age of consent for various health services, titled "Providing Health Care to Minors under Washington Law," is available on Washington Law Help at: www.washingtonlawhelp.org.

H. Absences Relating to Conflict in the Home

Your client may indicate that conflict at home is making it difficult for him or her to get to school regularly or on time. Family counseling or other support services or a safe and stable placement may help the situation. Your client may ask you for help securing family counseling, support services or a safe and stable place to live. For example, relatives and friends may be available for respite and short term placement that could improve the situation. Obtaining parental permission for your client to live outside the home may reduce the conflict in the home. Family reconciliation services through the Department of Social and Health Services (DSHS) include referral to services for suicide prevention, psychiatric or other medical care, psychological, mental health, drug or alcohol treatment, welfare, legal, educational, or other social services, as appropriate to the needs of the child and the family, training in parenting, conflict management, and dispute resolution skills, and family counseling or functional family therapy. RCW 13.32A.040.

If the conflict in the home requires more intervention, consider advising your client about filing a Child in Need of Services (CHINS) petition. RCW 13.32A.150. Through the CHINS process, the youth can ask for out of home placement and court supervision for a short period of time.

²⁸ OSPI Title I (No Child Left Behind). <http://www.k12.wa.us/TitleI/requirements.aspx>.

Practice Point: Working with Native American Students - Tribal Court Proceedings



If you are working with a Native American youth, your client may be able to access resources through the school or the Tribe. Your client may also be subject to truancy proceedings in a Tribal Court.

Effective advocacy for Native students may include:

- Seeking dismissal of a case if a truancy case is also pending in Tribal Court ;
- Seeking transfer of the case to Tribal Court pursuant to CR 82.5(b).²⁹
- Connecting the client to available resources at the school or with the client's Tribe.

School districts serving Native American students may maintain an Indian Education Department and employ either an Indian Education Director or an Indian Education Coordinator. These individuals may be able to connect Native youth with resources available in the school or in the tribal community. Additionally, Tribal governments may operate Education Departments which may provide resources for students, including tutoring, credit retrieval and after-school programs.³⁰

Additional information about the rights of Native students may be found at the Advocate Resource Center website's library under Indian Education. See www.advocateresourcecenter.org.

I. Strategies Related to Alternative Education Options

The state is obligated to provide students under the age of 21 with educational services free of cost at a regular or alternative high school, a GED program, or alternative high school diploma program at a community college, online program, or social services agency. RCW 28A.150.220(3).

If your client's current school placement is not working out, whether because of academic, social, transportation or other reasons, or if your client is not currently enrolled in any program, consider whether one of the following alternative education programs

²⁹ Several Tribes in Washington have enacted attendance codes and enforce those codes in their courts. For example, the Nisqually, Lummi and Tulalip Tribes have attendance codes which can be accessed online at: <http://www.narf.org/nill/triballaw/onlinedocs.htm>. A directory of tribal courts is available at: http://www.courts.wa.gov/court_dir/orgs/134.html.

³⁰ A directory of tribes located within Washington State is available at the Governors Office of Indian Affairs website: <http://www.goia.wa.gov/>.

might be an option. A school counselor or administrator may be aware of options available in the area and able to help match your client with an appropriate placement.

- **General Education Development (GED) Test**

Completion of a GED after age sixteen exempts the minor from Washington compulsory education laws. RCW 28A.225.010(e)(iii). If your client is actively working toward a GED, this might support negotiations for dismissal of a petition or to avoid a contempt sanction.

- **Alternative High School Programs**

Alternative High School Programs may help accommodate the unique needs of students. Evening classes, child care programs, or abbreviated credit requirements for graduation may be better options for some students. Alternative high school programs are listed as an appropriate remedial measure under section 28A.225.020(1)(c). If your client is successfully enrolled in an alternative program, you can try to negotiate a dismissal at the fact finding or contempt stage prior to a hearing.

- **Private Schools**

Students enrolled in an approved private school program under RCW 28A.195.010 are exempt from Washington's compulsory education laws. RCW 28A.225.010. If your client has enrolled in an approved private school program, a truancy petition and order may be subject to dismissal based on lack of jurisdiction.³¹

- **Home-based Instruction / Home Schooling**

RCW 28A.225.010(1)(b) and (4) describe the conditions under which a child may be excused from state compulsory education laws when receiving home-based instruction, otherwise known as home schooling. If your client is now receiving home based instruction, check to ensure that the home-schooling fits the criteria mandated in RCW 28A.225.010(4).³² If the requirements appear to be met, a truancy petition or order may be subject to dismissal based on a lack of jurisdiction. If your client and his or her family are currently undergoing the process of certification for home-based instruction, this might be grounds for a continuance of an initial or contempt hearing pending certification of the home-based instruction.

- **Education Centers**

An Education Center is a private school designated to specifically serve public school drop-outs ages twelve to twenty. The focus of an Education Center is the teaching of basic skills. RCW 28A.225.010(1)(c) provides an exception to the compulsory education law for

³¹ The Office of the Superintendent of Public Instruction (OSPI) maintains a list of approved private schools which can be found at <http://www.k12.wa.us/PrivateEd/default.aspx>

³² OSPI's website provides more information about the requirements for home-based instruction. <http://www.k12.wa.us/privateed/homebaseded/regulations.aspx>

children who attend education centers as described in RCW 28A.205.³³ If your client enrolls in an “education center,” a truancy petition or order may be subject to dismissal due to lack of jurisdiction.

- **Job Corps**

Job Corps is a federal program that provides vocational and educational services for students in a residential setting. Each Job Corps site offers different career opportunities, and provides instruction for students to work toward their high school diploma or GED. Students age sixteen and older may apply for Job Corps. Students who receive special education or Section 504 accommodations may continue to receive those accommodations through the Job Corps program.³⁴

³³ The Office of Public Instruction (OSPI) maintains a list on its website of programs certified as education centers which can be found at <http://www.k12.wa.us/PrivateEd/EdCenters/sites.aspx>

³⁴ More information about Job Corps can be found at <http://jobcorps.dol.gov/>.

Checklist: Records Requests

COURT RECORDS

Look in the court file for:

- All petitions, including the one that initiated the current action and any supporting documents filed with the petition;
- The service of process affidavit for the petition;
- Court orders, including:
 - the initial court order issued on the most recent petition;
 - all subsequent orders, including any granting or denying motions to stay, continue or dismiss;
 - any orders on contempt motions;
- The docket sheet showing dates of the initial hearing and any subsequent review or contempt hearings;
- Motions and/or orders to show cause on contempt;
- Copies of any bench warrants and service of process affidavits showing proper notice of hearings;
- Evidence of completion of any prior purge conditions if there have been prior findings of contempt.

SCHOOL RECORDS

Request the following school records for your client. Be sure to get signed releases from a parent or an order from court:

- Attendance records for the current school year and the year in which the petition was established;
- Discipline records for at least the current school year (usually with the principal or vice principal);
- Academic records, including transcripts, academic progress reports, and a student learning plan identifying progress toward graduation;
- Special education records, including the latest Individualized Education Plan or Section 504 plan (typically held in the District's special education department);
- Letters from the school to parents regarding attendance, and notes from parents excusing absences;
- Records of the steps taken to reduce or eliminate absences, which must be kept pursuant to RCW 28A.225.151(2)(b).

These additional records from the district may be helpful in investigating your case; Some may be readily available online at the District's website.

- School board policies and procedures pertaining to truancy and attendance (may include policies regarding excused, unexcused absences; compulsory attendance; and truancy);
- School board policies and procedures pertaining to school discipline;
- Any school-based handbooks or procedures;
- Any truancy checklist or compliance manual created for district staff; and
- Copy of the current student handbook.

MEDICAL RECORDS

If health issues are factoring into the reasons for non attendance, ask your client for copies of:

- Mental health records
 - Diagnoses;
 - Treatment records;
 - Treatment recommendations;
 - List of prescribed medications.
- Drug/alcohol treatment records
 - Evaluations;
 - Treatment records;
 - Treatment recommendations.
- Other health records
 - Documentation related to an illness, disability, injury or chronic health condition;
 - Lists of prescribed medications

CHAPTER THREE: Contempt & Challenging the Validity of Orders

Counsel representing students in truancy contempt proceedings are tasked with defending against the contempt allegations, and if a finding of contempt is made, ensuring that any sanctions imposed are the least restrictive and are in fact designed to result in the student returning to school.

Required Reading: *In Re M.B.*

The leading case guiding truancy contempt defense is *In re M.B.*, 101 Wash.App. 425, 3 P.3d 780 (2000). This case discusses criminal and civil sanctions in contempt cases and the significance of purge requirements as they operate in truancy contempt cases. Also read *In re J.L.*, 140 Wash.App. 438, 166 P.3d 776 (2007) for additional clarity on the purge requirement for civil contempt.

I. Negotiations with the District

Negotiation with the district may yield quicker and better results for your client than would be achieved at a contempt hearing.

At meetings with the school representative or prosecutor, be prepared to present a factual history of the case, the current issues that are affecting your client's attendance at school, any recent improvements or changes, and possible solutions.

Goals of negotiation will generally include:

- **Problem-solving** to resolve any issues leading to attendance problems;
- **Agreement on the pending motion**, either for:
 - Creative solutions that avoid a finding of contempt;
 - A continuance to obtain further discovery or to conduct more investigation; See *Checklist: Seeking a Continuance* at the end of this Chapter.
 - A review hearing at a later date to provide the court with an opportunity to check on a student's progress in school or increased attendance in school;
 - A constructive sanction and purge condition that will help the student work toward greater attendance and engagement at school;
 - An agreement to strike the contempt hearing; or

- **Agreement on ultimate resolution** of the case, including an agreement to dismiss the truancy petition or court order after a reasonable time.

Counsel might also use pre-hearing negotiations to:

- Clarify points of disagreement,
- Narrow the issues,
- Identify possible witnesses or other evidence for a hearing, and
- Present a complete picture of the client’s situation for the school representative and/or parent.

Points for negotiation may be identified as counsel goes through the issue spotting process to determine what factors might be contributing to the student’s absences. Review *Chapter Two: Issue Spotting* for potential points for negotiation.

II. Defenses to Contempt

To find a student in contempt, the court must find:

- that there was a valid court order;
- that the student had notice of the order and the consequences of violating it; and
- that the student intentionally violated the order.

Counsel representing the student may raise various deficiencies in the order, in the proof of violation, or in the evidence of intentional violation to defend against the contempt.

A. Deficiencies in the Notice or Service of Order to Show Cause

The first thing the school must prove before a student can be held in contempt is that the student had proper notice of the possibility of contempt sanctions and of the contempt hearing. Without proper notice, there can be no valid finding of contempt. Proper notice requires each of the following:

Parents’ Sanctions & Defenses

Some school districts file petitions and seek sanctions against both parents and students. Parents face fines of up to \$25 per day for each day of a child’s unexcused absence from school if the parent is found to be in violation of the truancy law. RCW 28A.225.090(3). Parents may defend against the petition by showing that they “exercised reasonable diligence” in attempting to cause the child to attend school or that the school did not perform its required pre-filing duties. RCW 28A.225.090(3). See *Working with Parents* in Chapter Five for discussion on how to negotiate potential ethical and practical conflicts between your client and a parent arising out of parents’ possible liability and defenses.

1. Notice that Failure to Comply with the Truancy Order Could Result in Contempt Charges, Incarceration

The youth must be on notice that failure to comply with the truancy order could be contempt of court and could result in incarceration.³⁵

If the student is alleged to be in violation of a truancy order entered in default, counsel may be able to demonstrate that the student never received proper notice of the court's order, and never received notice that failure to comply with the order could subject the student to contempt sanctions, including incarceration.

Alternatively, a student's inability to understand the truancy order or potential consequences for its violation due to disability, minority or a language barrier, may demonstrate a lack of proper notice of the possibility of contempt sanctions.

2. Notice of Alleged Violation

The show cause order must specify the nature of the alleged violation(s) of the court's prior order.³⁶ The notice must adequately inform the student of:

- Which specific term of the truancy order he or she has allegedly violated; and
- What sanctions may be imposed at the contempt hearing.

If there is any ambiguity about what act the alleged violation is based upon, counsel may also argue that the notice should specify whether it is an unexcused absence, a disciplinary suspension or some other failure to comply with a truancy order that the contempt motion is premised upon.

3. Actual Notice of the Contempt Hearing

The student must receive actual notice of the contempt hearing. The notice must be given sufficiently in advance of the hearing to allow the student an adequate opportunity to be heard.³⁷

If a student does not get actual notice of the contempt hearing, the result may be a failure to appear. In that case, a court might be inclined to issue a bench warrant rather than make a finding of contempt in the client's absence. Bench warrants should not be issued without proof of actual notice and warning of potential consequences for failure to appear. See *Chapter Four* for a discussion of bench warrants.

³⁵ Smith v. Whatcom County Dist. Court, 147 Wn.2d 98, 112-113, 52 P.3d 485 (2002) (adult criminal offender contempt case).

³⁶ In re Marriage of Maxfield, 47 Wn. App. 699, 706, 737 P.2d 671 (1987) (party cannot be sanctioned for contempt upon show cause order that failed to identify violation of specific order and warn of possible contempt sanctions).

³⁷ See Id. at 704-705.

B. Insufficient Evidence of Contempt

1. Failure to Meet Burden of Proof: Preponderance

The burden of proving a student's violation of a truancy order rests on the school (or county prosecutor) seeking contempt sanctions,³⁸ and must be proven by a preponderance of the evidence.³⁹ The evidence must be admissible.⁴⁰ Reliance on hearsay or unsworn testimony in the contempt hearing violates the student's right to due process.⁴¹

If an intentional violation is proven, it is the alleged student's burden to establish he or she was unable to comply with the order.

If the case goes to a hearing, it is important to make all relevant objections on the record for purposes of revision or appeal.

Motions for Continuance at Contempt

If counsel is appointed just minutes before a scheduled contempt hearing, it may be necessary to seek a continuance to allow counsel to conduct an interview and gather discovery. See Checklist for Seeking a Continuance in this Chapter. Because students in truancy contempt proceedings face immediate threat of incarceration, motions for continuance of a contempt hearing might be brought pursuant to both civil and juvenile offender rules, CR 40 and JuCR 7.8(f). Review local court rules for specific procedures regarding continuances and other motions. When seeking a continuance, be ready to explain (1) your prior due diligence and (2) that witnesses or evidence sought will be material and not merely cumulative. Continuances should be granted if necessary to protect the youth's right to effective assistance of counsel; to present evidence in his or her defense; or for fundamental fairness. If the court denies a motion to continue, explain in detail the resulting prejudice to preserve the issue for appeal. For additional discussion about seeking continuances, see the National Juvenile Defender Center's Juvenile Defender Delinquency Notebook, available at www.njdc.info/pdf/delinquency_notebook.pdf.

³⁸ *Glo-Klen Co. v. Far W. Chem. Prods.*, 53 Wn.2d 9, 11, 330 P.2d 180 (1958) (discussing this point in connection with contempt proceedings in a civil lawsuit).

³⁹ *State v. Boren*, 44 Wn.2d 69, 73, 265 P.2d 254 (1954) (discussing contempt for violating an injunction).

⁴⁰ The rules of evidence apply in truancy contempt proceedings. *In re the Interests of M.B.*, 101 Wn. App. at 469, n.114; see also JuCR 1.4(c); ER 1101(c)(3).

⁴¹ *In re the Interests of M.B.*, 101 Wn. App. at 472 (vacating contempt finding based on unsworn testimony); *Id.* at 470 (finding hearsay should not have been admitted, but finding no prejudice),

2. Plain Violation of the Order

If there is doubt as to whether a student's actions actually constitute a violation of the truancy order, there should be no finding of contempt.

Because the results of a court's finding of contempt are severe, "strict construction" of the court's order is required; in other words, "[t]he facts found must constitute a plain violation of the order."⁴²

For example, if a student has had additional absences, but there is a real dispute as to whether the absences were excused or unexcused, the school may not be able to prove a "plain violation" of the order. Alternatively, if a student is alleged to be in contempt because he or she has been suspended for alleged misbehavior, the school may not be able to prove a plain violation of the order if the student has a viable basis for contesting the suspension.

C. Violation Not Intentional

If a student did not intentionally violate the truancy order, there should be no finding of contempt.

Contempt of court means "intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b). Thus, a student can avoid a finding of civil contempt by showing that he or she was unable to comply with the court's order, or that failure to comply was not intentional. Courts have generally held that "[t]he burden of showing one's inability to comply with a court's order is on the one alleging it."⁴³

Circumstances where a contempt finding may be challenged on the basis that the child's violation of the truancy order was not intentional or willful may include situations where:

- Absences are due to the school's failure to remedy a problem at school that is contributing to the absences (such as discrimination or harassment) and/or provide services necessary for the student to attend school (such as academic, language or special education services).
- Failure to excuse absences rests with parent, not child (for example, if a parent has been unable to, or has forgotten to provide a written excuse or a doctor's note for absences due to illness).
- Absences are due to untreated addiction (either drug or alcohol addiction), and the child has been unable to obtain treatment services.
- Absences are due to other circumstances beyond the child's control (for example, if mental health issues are contributing to a child's absences, a pregnant or

⁴² See *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982) (citing *State v. Int'l Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); and 17 C.J.S. Contempt § 12 (1963)).

⁴³ *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 92, 507 P.2d 1165 (1973); *In re King*, 110 Wn.2d 793, 804, 756 P.2d 1303 (1998).

parenting teen needs a flexible schedule to meet medical and other needs, or a child is unable to secure regular and reliable transportation).

1. Present Ability to Comply with the Order

No finding of civil contempt is appropriate if it is not presently within the ability of the student to comply with the court's truancy order. A civil/remedial sanction is "a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is *yet in the person's power to perform.*" RCW 7.21.010(3) (emphasis added). Thus the lack of present ability to comply with the court's order should be considered a complete defense to civil contempt sanctions, regardless of past violations.⁴⁴

A student may be unable to comply with a truancy order if, for example:

- The youth has been expelled from school, denied readmission and denied admission to other programs (he or she then is not legally able to attend school regularly);
- The youth has some limiting disability that prevents attendance or compliance with the order;
- The youth has no available means of transportation to school; or
- A situation at school prevents the youth's return (i.e. a real threat or harassment or bullying by another student; a racially hostile environment).

2. The Court Must Make a Finding of Ability to Comply

Generally, the courts hold in contempt cases that it is the alleged contemnor's burden to prove his or her present inability to comply by credible evidence.⁴⁵ Before imposing civil contempt sanctions, however, the court must make a finding that the contemnor still has it within his or her power to perform the act ordered.⁴⁶ A court's failure to find that there is a present ability to comply warrants reversal.⁴⁷

⁴⁴ For guidance see *Snook v. Snook*, 110 Wash. 310, 314, 188 P. 502 (1920); see also *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-934, 113 P.3d 1041 (2005), rev. denied, 156 Wn.2d 1032 (2006) (coercive incarceration loses its coercive character and becomes punitive where the contemnor is not presently able to purge the contempt by complying with the court's order); *In re the Interests of M.B.*, 101 Wn. App. at 439-40 (same).

⁴⁵ *In re King*, 110 Wn.2d at 804.

⁴⁶ *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. at 933-934 (quoting RCW 7.21.030(2)).

⁴⁷ *Smith v. Whatcom County Dist. Court*, 147 Wn.2d at 111 (civil contempt sanction reversed where court did not consider whether failure to pay fine was willful); *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. at 930-32 (same).

D. Civil/Remedial Sanction No Longer Justified: Improved Attendance

The purpose of civil/remedial contempt sanctions is to coerce future compliance with a court's order, not to punish past violations.⁴⁸ If your client is attending school regularly at the time of the contempt hearing, then arguably no civil/remedial contempt sanction is needed to coerce attendance.⁴⁹ Any sanctions imposed when the child is in compliance would essentially be punishment for past violations, in which case, they are criminal or punitive and may be imposed only after criminal due process protections are provided.⁵⁰

Argue Reasonable Doubt Standard if Sanction is Punitive

Remedial sanctions may be imposed upon a preponderance of the evidence of the violation. However, punitive or criminal sanctions may only be imposed after affording full criminal due process protections, including the filing of an information and the requirement of proof beyond a reasonable doubt. See *In re A.K.*, 162 Wn.2d at 646 and *In re King*, 110 Wn.2d at 800.

Contempt hearings in truancy cases may come many weeks, or months, after a student's alleged violation of a truancy order. If your client's attendance has improved in that time, evidence of that improvement may provide a defense against any contempt sanction. A sanction may also be inappropriate when a child's promise to continue attending school in the future is not demonstrably unreliable, as shown by evidence of the child's current attendance.⁵¹

A sanction is punitive when:

- The court finds only a past – not a continuing – violation of its order; or
- The court fails to include a purge condition that the client is presently capable of complying with.

⁴⁸ *Id.*

⁴⁹ *In re Dependency of A.K.* 162 Wn.2d at 645; *In re King*, 110 Wn.2d at 800; *In re the Interests of M.B.*, 101 Wn. App. at 438, 450.

⁵⁰ *In re Dependency of A.K.*, 162 Wn.2d at 645; *In re King*, 110 Wn.2d at 800; see also *State v. Breazeale*, 144 Wn.2d 829, 842-843, 31 P.3d 1155 (2001) (civil coercive contempt sanction no longer justified if act the court intended to coerce is no longer required by court order).

⁵¹ See *In re the Interests of M.B.*, 101 Wn. App. at 450 (2000) (“a child contemnor's promise to comply with the court's original order will purge an initial contempt” unless the “promise is demonstrably unreliable.”).

III. Challenging the Underlying Truancy Order

In advance of any contempt proceedings, review the underlying court order and any available record of the prior hearings. If no record is available, interview your client about the circumstances under which the order was issued.

Because students are almost always unrepresented at the initial stages of truancy proceedings, truancy orders may often be entered in error and be subject to challenge. Invalidating the underlying order can relieve a client of the threat of contempt sanctions.

A. Challenging Truancy Orders Generally

If you enter a case after a truancy order has already been issued, or if an order is issued improperly after a hearing, consider moving to revise, appealing or seeking relief from judgment. The following reasons may justify challenging a truancy order:

- Court oversight is unnecessary to address the student's truancy;
- An established petition increases the threat of future court sanctions, including detention;
- The order does not reflect the need for further school interventions or remedial measures;
- The court did not uphold due process or other statutory protections when establishing the order; or
- The client requests it.

The grounds that can be raised in post-hearing motions or appeals challenging truancy orders will be as varied as the facts of each case. The following is a short list of issues that might be raised in post-hearing motions or on appeal:

- Errors of law
 - Application of an incorrect standard of evidence;
 - Improper admission or exclusion of evidence;
 - Impermissible conditions in the order; or
 - Failure to provide adequate procedural protections See *Appendix C* for a discussion regarding Right to Counsel at the Initial Truancy Hearing.
- Sufficiency of the evidence
 - No proof of the three requisite allegations: that the child had the necessary number of unexcused absences; that steps taken by the school were not successful in reducing absences; and that court intervention is necessary to assist the school.
- Challenges to jurisdiction

- If the order was entered against a student who is exempt from the compulsory attendance law due to age or other circumstances.

B. Procedures for Challenging a Truancy Order

The following are a list of ways in which an initial truancy order might be challenged.

1. Revision

If the order was entered by a court commissioner, consider seeking revision by the Superior Court as provided in RCW 2.24.050; RCW 28A.225.095. Motions for revision must be filed with the clerk of the superior court within 10 days after the entry of the order. RCW 2.24.050.

2. Motion for Reconsideration

Motions for reconsideration are made pursuant to CR 59. They must be filed not later than 10 days after the entry of the order. CR 59(b). They may be granted for irregularity in the proceedings, errors of law that were objected to below, and newly discovered evidence. CR 59(a). Consider a motion for reconsideration if there is new evidence that was not discoverable prior to the order or additional legal authority to add weight to an objection made before the order was entered.

3. Appeal

If a motion for revision is not filed within the ten day period, the commissioner's order becomes the final order of the Superior Court, and appeal may be sought in the same manner as appeal of orders entered by a judge. RCW 2.24.050. See Practice Point below. Generally, a notice of appeal must be filed within thirty days after entry of the decision being appealed. RAP 5.1; 5.2. Review the Rules of Appellate Procedure for notice, deadlines, filing, cost and other requirements.

Practice Point: Appealability of Truancy Orders

Although truancy orders are not specifically mentioned in RAP 2.2(a)(5), which identifies certain appealable juvenile court orders, arguably they should be appealable as final orders. In truancy matters, the court retains jurisdiction after issuing its order solely for the purposes of ensuring compliance with the order. No review hearings are required by statute. The



only subsequent proceedings anticipated by statute are contempt hearings to coerce compliance with the order.⁵² Because the ability to challenge the underlying order at contempt is limited, fairness dictates that the orders be appealable to permit the student to challenge legally erroneous orders. However, in one case where an appeal was noted from a truancy order, Division III of the Court of Appeals stated that it was not an appeal of right and directed counsel to file a motion for discretionary review, pursuant to RAP 2.3. Because the case subsequently settled, there is no published or unpublished case law directly addressing the issue.

4. Motion for Relief from Judgment – CR 60(b)

If the time lines for reconsideration, revision and appeal have run, a truancy order may still be subject to challenge through a motion for relief from judgment pursuant to CR 60(b). A CR 60(b) motion must be made “within a reasonable time.” The motion must be made not more than one year after the order was entered if it is based on mistake, inadvertence, surprise, excusable neglect or irregularity, erroneous proceedings against a minor or person of unsound mind, or newly discovered evidence. The motion must state the grounds upon which relief is sought, and must be supported by an affidavit setting forth a statement of facts or errors upon which it is based, and facts constituting a defense to the action. CR 60(e)(1).

C. Challenging Agreed Truancy Orders

Consider challenging the validity of the agreement and asking that it not be enforced if there is evidence that your client agreed to a truancy order:

- Without a hearing;
- Without understanding its meaning or without adequate colloquy by the court to determine if the client was capable of understanding the agreement and the court process and did in fact fully understand it and its consequences;
- Without having adequate opportunity to ask for clarification and receive answers;
- Without understanding that the law requires the school district to meet certain obligations regarding truancy;
 - In reliance on misrepresentations; and/or
 - Under threat of sanctions.

If no record was made at the entry of the agreed order, ask your client and parents about how the agreement was offered and what information was provided about hearings and

⁵² See [RCW 28A.225.090](#); see also *In re Dependency of Chubb*, 112 Wn.2d 719, 723-24, 773 P.2d 851 (1989) (explaining that order issued upon initial finding of dependency is the final, appealable judgment even though dependency review hearings are required by statute; the review hearings are to determine whether court supervision should continue).

potential sanctions. Whether the challenge is made at a contempt hearing as a defense to contempt, or by post-judgment motion, be sure to make a record of the deficiencies in the initial proceedings and the reasons for questioning the validity of the order, to preserve those issues for appeal. Even if the order is not stricken, presentation of the evidence supporting the motion may convince the court to delay imposing any sanctions on your client until the school has taken appropriate steps to help reduce absences.

D. Challenging Default Truancy Orders

Default truancy orders may be deficient if your client:

- Did not receive proper notice of the truancy petition or hearing; or
- Had a good reason for failing to attend the hearing; and
- Has a meritorious defense to the truancy petition.

If the deadline for appealing the default order has passed, counsel can consider bringing a CR 60(b) motion to vacate the default order. The grounds specified by CR 60(b) are applicable, as are the procedures and time limits specified by the rule.

Default judgments are a drastic action and are disfavored in the law.⁵³ Civil cases generally hold that where there is a prima facie defense to the claim and the failure to appear was due to mistake, inadvertence, surprise or excusable neglect, the order on default should generally be vacated.⁵⁴ Where there is strong evidence of a valid defense, the court may give less weight to the reason for the failure to appear. If evidence of a defense is weaker, the court will look more closely at the reason for failure to timely appear, the timeliness of the motion and the potential hardship on the opposing party.⁵⁵

E. Jurisdictional Defects in the Underlying Order

Civil cases generally recognize that no person may be held in contempt for violating an order that is void for lack of jurisdiction. When a person is charged with contempt for violating a court's order, principles of *res judicata* prevent the alleged contemnor from challenging the validity of the underlying order at the contempt hearing. An exception exists for orders that are void for lack of jurisdiction. A person may not be held in contempt of an order where there is “an absence of jurisdiction to issue the type of order, to address the subject matter, or to bind the defendant ...”⁵⁶

⁵³ For guidance in civil cases, see *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986).

⁵⁴ *Griggs*, 92 Wn.2d at 581-82; *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968).

⁵⁵ *White v. Holm*, 73 Wn.2d at 352-53.

⁵⁶ *State v. Coe*, 101 Wn.2d 364, 370, 679 P.2d 353 (1984), quoting *Mead Sch. Dist. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 278, 284, 534 P.2d 561 (1975).

Subject matter jurisdiction can be challenged *at any time*. Counsel appointed at contempt can defend against contempt and seek dismissal of the underlying order.

1. Personal Jurisdiction Defect – Insufficient Notice of Petition or Hearing

If a child does not receive sufficient notice of an initial truancy petition, or of the hearing, and fails to appear, the defense of lack of personal jurisdiction might be raised at the contempt stage.

A defense of lack of personal jurisdiction may be raised at the contempt stage, but will be subject to waiver if not raised at the first opportunity. In *State v. Norlund*, the court rejected a defense of personal jurisdiction based on insufficiency of initial notice, noting that the child had made a number of appearances in the matter, usually represented by counsel.⁵⁷ Even if the child appeared at the first hearing, there may be a viable argument that the child could not have raised the defense of lack of personal jurisdiction given the absence of counsel, and should be able to raise it at the first contempt hearing.⁵⁸

2. Subject Matter Jurisdiction Defect - Failure to Comply with Statutory Prerequisites

If a truancy order has been issued without any allegation or evidence that the school complied with its pre-filing obligations, (give notice, schedule a conference, take appropriate steps), an argument may be made that the order is void for lack of subject matter jurisdiction.

Statutes and case law establish the bounds of court's jurisdiction over youth. In truancy matters, courts must look to RCW 28A.225, *et seq.* to determine the scope of their jurisdiction.⁵⁹ Washington's truancy statute gives courts jurisdiction to intervene where a student between the ages of 8 to 18, who is not within one of the statutory exceptions, has unexcused absences from school and actions taken by the school have not been successful in reducing those absences and court intervention is necessary to assist the school. RCW 28A.225.020; RCW 28A.225.035(1). If these circumstances are not present, a court arguably lacks jurisdiction over the student.⁶⁰ Note that the lack of subject matter jurisdiction must be distinguished from errors of law.⁶¹ If the school has provided some – but legally insufficient – evidence in support of each of the statutory pleading requirements, the order may be in error, but not without jurisdiction. If, however, the school has failed entirely to comply with pre-filing obligations, the order may subject to attack on grounds it is void for lack of jurisdiction.

⁵⁷ *State v. Norlund*, 31 Wn. App. 725, 726, 644 P.2d 724 (1982); CR 12(h)(1).

⁵⁸ *See id.*

⁵⁹ *See State v. Turner*, 98 Wn.2d 731, 738-39, 658 P.2d 658 (1983) (vacating contempt sanctions against youth not covered by the then-current statute on grounds of lack of jurisdiction).

⁶⁰ *Id. Cf. In re Detention of Broer*, 93 Wn. App. 852, 860, 957 P.2d 281 (1998) (refusing to vacate contempt sanctions where state amended initially deficient petition prior to entry of challenged order).

⁶¹ *Coe*, 101 Wn.2d at 369-70.

Note: The authors are not aware of any published or unpublished case law addressing this issue under the current version of the truancy statute.

Practice Point: Six and Seven Year Olds Not Subject to Contempt



Children aged 6 and 7 are not subject to court order or detention for violations of the compulsory attendance law. RCW 28A.225.015; RCW 28A.225.090(5). If a child is facing contempt sanctions for violation of an order that was entered against the child when he or she was less than 8 years old, the contempt charge may be challenged and the underlying order dismissed on the basis that the underlying order is void for lack of subject matter jurisdiction.

IV. Limits on Civil Contempt Sanctions and Purge Conditions

If a finding of contempt is made, and a contempt sanction will be imposed, counsel's task is to advocate for an appropriate sanction and purge condition that are the least restrictive available and are actually designed to help the client get back into school.

The truancy statute, referencing the civil contempt statute, provides that upon a finding of contempt in a truancy case, a court may order a child:

- To perform community restitution,⁶²
- To be incarcerated in juvenile detention for not more than 7 days with an opportunity to purge contempt, or
- To comply with any other remedial sanction that would be effective in coercing the child's future compliance with the court's order.

RCW 28A.225.090(2) (incorporating RCW 7.21.030(2)(e) (emphasis added)); RCW 7.21.030(2)(d), (e).

A. Sanctions Must Be Civil/Remedial

Students in truancy contempt cases should face only remedial – not punitive – contempt sanctions. “A remedial sanction is imposed for the purpose of coercing performance when the contempt consists of failure to perform an act that is yet in the person's power to perform.”⁶³

⁶² “Community restitution” is not defined by the compulsory attendance law. It is defined by the Juvenile Justice Act of 1977, as amended, to mean “compulsory service, without compensation, performed for the benefit of the community by the offender as punishment for committing an offense. Community restitution may be performed through public or private organizations or through work crews,” RCW 13.40.020(3); see also JuCR 1.3 (applying definitions in RCW 13.40.020 to Juvenile Court Rules).

⁶³ *In re the Interests of M.B.*, 101 Wn. App. at 438.

B. Incarceration May Be Imposed Only as a Last Resort – Courts Must Consider Alternatives

“Only under the most egregious circumstances should the juvenile court exercise its contempt power to incarcerate a status offender in a secure facility. If such action is necessary, the record should demonstrate that all less restrictive alternatives have failed.”⁶⁴

Before incarcerating a student, the court should consider whether responding to a student’s needs for special education, mental health or other services would more likely resolve the problems leading to contempt.⁶⁵ If detention is imposed as a sanction in a first contempt, the record should reflect why other less restrictive alternatives were not available.⁶⁶

Commingling with Juvenile Offenders

If the detention center commingles criminal and civil offenders, the harmful effects of commingling may weigh against detention in your case. Status offender youth, including youth in detention for contempt of a truancy order, should not be housed in the same location as youth in detention on juvenile offender matters. The federal Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. § 5601, *et seq.*, promotes a de-institutionalization policy for status offenders and requires states that do incarcerate status offenders to keep them separate from juveniles accused of crimes. Juvenile status offenders should never be housed with adults. 42 U.S.C. § 5633(a)(13).

If counsel can show that time in detention will not, or has not, had the effect of coercing the student’s compliance with the court’s order, the justification for detention disappears.⁶⁷ A court may order alternatives to detention, such as community restitution (community service). RCW 28A.225.090(2). Alternatively, the court can impose a new order “designed to ensure compliance with a prior order.” RCW 7.21.030(2)(c), (e).

Because the purpose of the truancy court process is to compel school attendance, whenever possible, sanctions imposed for violations of truancy court orders should be crafted so as to allow the client to be in school during school hours and serve the sanction during the lunch hour, before or after school, or on weekends.

If a court insists on imposing detention, consider asking that the court provide that the time in detention be served during non-school hours.

⁶⁴ *In re Dependency of A.K.*, 162 Wn.2d 636, 647, 174 P.3d 11 (2007) (quoting *Norlund*, 31 Wn. App. at 729, *review denied*, 98 Wn.2d 1013 (1982)).

⁶⁵ *Id.* at 654-55 (Madsen, J., concurring).

⁶⁶ *In re the Interests of M.B.*, 101 Wn. App. at 456.

⁶⁷ *Id.* at 440; see *In re Dependency of A.K.*, 162 Wn.2d at 656 (Madsen, J., concurring).

Practice Point: Individualized and Systemic Arguments against Detention



When arguing against detention, counsel can give the court information about why detention is inappropriate for a particular child, for example:

- Your client has begun a new school or counseling program;
- Parents/guardians are able and willing to monitor attendance and behavior;
- Your client is getting involved in extra-curricular activities, or a community program; or
- Your client has special needs that cannot be met in detention;
- Information about the negative consequences of detention on youth.

Counsel can also provide the court with information, studies and case law documenting the negative effects of detention on all youth.⁶⁸

See *Appendix B* for additional resources regarding the harms of detention.

Electronic Home Monitoring - Detention

Electronic home monitoring (EHM), offered as an alternative to detention in many jurisdictions, requires a student to remain in the home at all times unless he or she is previously given clearance by the probation department to leave to attend certain places, such as school, church, or medical appointments. EHM requires a student's family to have a land based phone line to allow the EHM agency to make regular and periodic checks to ensure the student is at home. The Juvenile Justice Act of 1977, RCW 13.40.020(9) defines "Detention Facility" to include "county group homes, inpatient substance abuse programs, juvenile basic training camps, and electronic monitoring." When arguing against detention, counsel should be clear that detention encompasses electronic home monitoring.

⁶⁸ See *In re Dependency of A.K.*, 162 Wn.2d at 655 (Madsen, J., concurring) (citing studies documenting negative effect of detention on runaway youth); JOANNA ZORN HEILBRUNN, NATIONAL CENTER FOR SCHOOL ENGAGEMENT, *DETENTION DOESN'T WORK*, available at: www.schoolengagement.org. (explaining that detention cannot solve the problems of students who face serious impediments to school attendance, such as unmet mental or physical health care needs or fear of violence on campus. As for the deterrent effect, "[t]he less detention is actually used, the greater its deterrent effect is likely to be."); see also AMERICAN COUNCIL OF CHIEF DEFENDERS & NATIONAL JUVENILE DEFENDER CENTER, *TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS* (2005), http://www.njdc.info/pdf/10_Principles.pdf.

C. The Court Must Set a Purge Condition

A contempt sanction involving imprisonment remains remedial if the party subject to contempt is able to purge the contempt by performing the acts required in the original order.⁶⁹ The party subject to contempt must “carr[y] the keys of his prison in his own pocket” and be able to “let himself out simply by obeying the court order.”⁷⁰ Where, as in truancy cases, the student cannot “retroactively comply” with the court order (i.e. go to school yesterday), Division One of the Court of Appeals has held that the sanction and purge condition must be only what is appropriate to assure the court of the student’s *future compliance* with the order, and must remain remedial.⁷¹

The purge condition must meet three requirements:

- It must be designed to serve remedial aims; that is, it must be ***directed at obtaining future compliance***;
- The condition must be ***within the power of the child to fulfill***; and
- The condition must ***be reasonably related to the cause or nature of the child's contempt***.⁷²

The court must consider the child’s abilities in setting the purge requirements.⁷³

1. A Promise to Comply Must be Accepted Unless Demonstrably Unreliable

Before any sanction is imposed, the child should be afforded the opportunity to promise future compliance.⁷⁴ Only if a contemnor’s promise of compliance is “demonstrably unreliable,” can the court insist on more than mere words to purge contempt.⁷⁵ Where a court determines the child’s promise is demonstrably unreliable, the court may impose the statutory sanction with a purge condition designed to reassure the court of future compliance.⁷⁶

2. Compliance Must be Possible in the Reasonably Immediate Future

“[F]uture compliance must be contemplated in reasonably immediate terms, which in the case of a child is a somewhat limited time frame.”⁷⁷ In *M.B.*, the Court of Appeals held that a sanction was not remedial and violated due process because imposing detention in June was unlikely to coerce a child to return to school in September.⁷⁸

⁶⁹ *In re the Interests of M.B.*, 101 Wn. App. at 439, 447.

⁷⁰ *Id.* at 439.

⁷¹ *Id.* at 448.

⁷² *Id.* at 450 (paragraphs and emphasis added); see also *In re Interest of J.L.*, 140 Wn. App. at 446.

⁷³ *In re the Interests of M.B.*, 101 Wn. App. at 456.

⁷⁴ *Id.* at 450.

⁷⁵ *Id.* at 448; *In re Interest of J.L.*, 140 Wn. App. at 445.

⁷⁶ *Id.* at 445-46.

⁷⁷ *In re the Interests of M.B.*, 101 Wn. App. at 457; *In re Interest of J.L.*, 140 Wn. App. at 445 (sanction remains coercive only if “contemnor has the immediate opportunity to purge.”)

⁷⁸ *Id.*

3. The Purge Condition Must Not be Dependent Upon Actions of a Third Party

The purge condition must be entirely within the child's ability to complete; it may not be dependent upon the actions of a third party.⁷⁹ The Court, in *M.B.* held that a purge condition requiring students to "enroll in and be accepted by a treatment program" was inappropriate.⁸⁰ Also, conditioning release from detention upon DSHS's ability to find a placement would violate due process in the absence of a proper alternative purge condition.⁸¹

4. The Purge Condition Must be Within the Court's Authority

The purge condition must be within the court's authority. For example, a court may recognize a child's voluntary participation in inpatient mental health or substance abuse treatment as a purge of contempt, but the court cannot require it.⁸² If the court gives notice that a child's voluntary efforts will be deemed a purge, it "must also provide a purge condition that is within the court's authority; otherwise the voluntary condition has become mandatory."⁸³

5. The Child Must be Promptly Afforded the Means and Opportunity to Purge

The child must be promptly afforded the means by which he or she can purge contempt, including a paper and pencil if the purge requires a writing.⁸⁴ "A detained contemnor should have opportunity to fulfill a purge condition by the next available hearing day, so as to present a request for release to the court at the earliest time."⁸⁵ Where a youth "did not receive paper and pencil until almost 24 hours after he was detained," the sanction was impermissibly punitive.⁸⁶

The court must make itself available in a "reasonably prompt manner" to review the child's compliance with the purge condition.⁸⁷ A child would not have an opportunity to achieve release in a "reasonably prompt manner" where a commissioner is only available once a week.⁸⁸ "Upon performance of the condition, the child must be released."⁸⁹

⁷⁹ *In re the Interests of M.B.*, 101 Wn. App. at 460.

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.* at 466.

⁸² *Id.* at 459-60.

⁸³ *Id.* at 460.

⁸⁴ *Id.* at 461-462.

⁸⁵ *In re the Interests of M.B.*, 101 Wn. App. at 462 (emphasis added).

⁸⁶ *Id.* at 468.

⁸⁷ *Id.* at 466.

⁸⁸ *Id.*

⁸⁹ *Id.* at 451.

6. An “Ongoing” Finding of Contempt Is Inappropriate

Maintaining a threat of detention through an “ongoing” finding of contempt is inappropriate. “The contemnor must be able to purge the contempt (and the threat of a detention sanction) within some definite time frame.”⁹⁰

7. The Court Must Believe the Sanction and Purge will be Effective

“A coercive sanction is justified only on the theory that it will induce a specific act that the court has the right to coerce.”⁹¹ If it is clear that incarceration or any other sanction will not in fact coerce the child to return to school, “the justification for the civil sanction disappears.”⁹² Also, “[i]f the court believes a contemnor will not be able to satisfy the purge condition, detention becomes punitive rather than coercive and violates due process.”⁹³

⁹⁰ *Id.* at 466.

⁹¹ *In re the Interests of M.B.*, 101 Wn. App. at 440.

⁹² *Id.*

⁹³ *Id.* at 467 (emphasis added).

Practice Point: Challenging Purge Essays and Homework Assignments



If a court directs your client to complete an essay or a homework packet in order to purge contempt, review the requirement with your client to be sure:

- The length is reasonable given your particular client’s abilities (note that a writing requirement may be unreasonable for some students);
- The topic is clear and related to your client’s act that gave rise to the contempt;
- Your client will have access to all tools and materials necessary to complete the condition; and
- The court will ensure prompt review once your client has completed the purge condition.

8. Repeated Use of Detention without Evidence of Improvement is Improper

A series of contempt findings that result in detention without improvements in attendance is inappropriate. “[I]f there is no basis for believing that continued detention will produce the desired result, then the justification for detention as a civil remedy has disappeared.”⁹⁴

9. Suspended Sentences Are Not Permitted

“Suspended” sentences are not remedial contempt sanctions.⁹⁵ “To be valid, a purge condition must be within the contemnor’s capacity to complete at the time the sanction is imposed.”⁹⁶ Suspending sanctions on the condition that a youth complies with the court’s order in the future cannot satisfy the requirement of a valid purge condition.⁹⁷

Regardless of the maximum amount of time specified in a coercive sanction, “[o]nce the contemnor purges, the sanction is lifted, including all the remaining days potentially available if the contemnor had remained resistant.”⁹⁸

⁹⁴ *Id.*

⁹⁵ *In re Interest of J.L.*, 140 Wn. App. at 446; *In re the Interests of M.B.*, 101 Wn. App. at 455-456.

⁹⁶ *In re Interest of J.L.*, 140 Wn. App. at 447.

⁹⁷ *Id.*

⁹⁸ *In re the Interests of M.B.*, 101 Wn. App. at 456.

10. Purge Conditions May Not be Modified

“The purge condition is not subject to ongoing modification and increasing onerousness.”⁹⁹ The purge condition requirements must be clearly stated, and when reviewing whether the child has satisfied the purge condition, the court may not impose additional requirements.¹⁰⁰

Practice Point: The Case Continues After Contempt is Purged



In most jurisdictions, counsel is appointed to represent students only at the contempt stage of a truancy case. When contempt is purged, the child’s counsel is typically discharged by the court. However, the child remains under the jurisdiction of the court and subject to the conditions in the initial truancy order. Subsequent violations may lead to subsequent contempt proceedings.

V. Contempt: Civil or Criminal Sanctions/Statutory or Inherent Authority

A clear understanding of the distinctions between civil (remedial) and criminal (punitive) contempt and the scope of courts’ statutory and inherent authority is important to protecting the rights of students in truancy proceedings. Counsel should be prepared to object to imposition of any criminal sanction in the absence of full criminal due process protections.

Generally, litigants know from the outset of a case whether they are being charged with a civil infraction or a crime. In contempt cases it is not always that straight-forward. The legislature has made clear that students should not be charged with crimes for violations of truancy orders. However, because it is the nature of the *sanction imposed* that determines whether contempt is civil or criminal, it may not be apparent until after a court has made a finding of contempt and crafted a sanction, that the client has been subjected to criminal rather than civil contempt.

A. Civil and Criminal Contempt Serve Distinct Purposes

The purpose of civil contempt is to coerce future compliance with a court order, not to punish past violations.¹⁰¹ Rules governing civil contempt sanctions flow from this purpose.

- The sanctions must be designed so they are likely to actually coerce compliance with the court’s order.

⁹⁹ *Id.* at 462.

¹⁰⁰ *Id.*

¹⁰¹ *In re Dependency of A.K.*, 162 Wn.2d at 646; *In re King*, 110 Wn.2d at 800.

- Because the only goal of civil contempt is to coerce compliance, once the person complies with the order, the justification for sanctions is eliminated, and any sanction must be lifted.
- The court must give the contemnor an opportunity to lift the sanction by “purging” contempt.
- Compliance with the court’s original order is generally the only proper purge condition that may be imposed.

The purpose of criminal contempt is to punish past violations of a court’s order.¹⁰² Even when the underlying order has been lifted, making future compliance redundant, the person can still face criminal contempt sanctions for past violation.¹⁰³

B. Civil/Remedial v. Criminal/Punitive Sanction Determines What Due Process Protections Are Required

Criminal or punitive sanctions may be imposed only if the person is afforded the same “constitutional safeguards extended to other criminal defendants.”¹⁰⁴ This is true regardless of whether the court invokes its inherent or statutory authority to impose the criminal sanction.¹⁰⁵

C. Statutory v. Inherent Authority

The Washington Supreme Court’s decision in *In re Dependency of A.K.* confirms that courts possess the inherent authority to impose contempt sanctions when statutory remedies prove inadequate.¹⁰⁶ While each of the three opinions in the case agreed on this point, it left unclear the issue of *when* a court may invoke its inherent authority. The concurring opinions could not agree on what constitutes “inadequate” statutory remedies. The plurality concluded that courts must find all statutory contempt remedies inadequate, including those in the criminal contempt statute, before resorting to its inherent authority.¹⁰⁷

¹⁰² *Id.*

¹⁰³ *Mead*, 85 Wn.2d at 286 (punitive contempt sanction survives regardless of settlement of underlying dispute).

¹⁰⁴ *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2006); *United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833-34, 114 S.Ct. 2552 (1994).

¹⁰⁵ *In re King*, 110 Wn.2d at 800; see *In re Dependency of A.K.*, 162 Wn.2d at 645; *In re the Interests of M.B.*, 101 Wn. App. at 453, *review denied*, 142 Wn.2d 1027 (2001).

¹⁰⁶ *In re Dependency of A.K.*, 162 Wn.2d at 647 (plurality).

¹⁰⁷ *Id.* at 651-52 (plurality).

Checklist: Seeking a Continuance

In order to adequately represent clients in truancy proceedings, it may be necessary to seek a continuance of a contempt or review hearing.

A continuance may be necessary in order to:

- Have time to thoroughly interview and advise your client;
- Gather and review relevant documents;
- Interview witnesses;
- Prepare defenses and written motions; or
- Negotiate with the school district.

There are several factors that may weigh against seeking a continuance, including:

- If the client is in custody and the court will not release him or her in the absence of a determination on the truancy petition or motion for contempt;
- If a parent/guardian or other important witness will not be available at a subsequent hearing date;
- If the school's petition or motion for contempt is clearly deficient and quick resolution is possible;
- If the case has already been delayed and the client requests a prompt resolution; or
- If the client's current school placement is causing the client harm (e.g., through failure to accommodate a disability; persistent and severe harassment from students or staff) and counsel plans to seek assistance from the court in securing an alternative placement or temporary excuse from attendance.

Counsel may be able to obtain a reasonable continuance by:

- Reaching agreement with the school and the court on a schedule for discovery, motions and hearings;
- Making an oral motion in support of a continuance, stating for the record the reason the continuance is necessary in spite of counsel's diligence in pursuing discovery;
- Filing a written motion for continuance pursuant to local court rule or CR 40, with a supporting affidavit describing:
 - Evidence that will be obtained during the continuance
 - The materiality of that evidence, and
 - The diligence that has been used to obtain it.

Checklist: Contempt Hearings

If the case proceeds to a hearing, the following are points to review in order to be prepared to raise defenses, present evidence and object to the district's evidence.

Service of Order to Show Cause/Notice of Hearing

- Did the school properly serve the Order to Show Cause and the Notice of Hearing? (CR 6)
- Did your client have adequate opportunity to prepare for the hearing?

Gathering and Reviewing Evidence – Calling Witnesses

- Has the school responded to requests for documents or other evidence?
- Have you had a reasonable opportunity to obtain evidence from other sources?
- Have you had the opportunity to review the school's evidence?
- Have you collected appropriate documents to submit as evidence?
- Are you able to call witnesses or submit affidavits in lieu of live testimony?

Procedural Protections

- Is there a certified interpreter available for your client or parent, if necessary? (RCW 2.43.040)
- Is the hearing being recorded?

Rules of Evidence

- Do the school's witnesses have direct, personal knowledge of the facts?
- Are witnesses relying on hearsay?
- Has the proper foundation been laid for documents submitted by the school? Are they properly authenticated by a records custodian? (ER 901)

Burden of Proof – Evidence of Willful Violation

- Has the school proven that your client willfully violated the court's order? (RCW 7.21.030)
- Is there evidence that your client was not able to comply with the order due to a school's failure to provide appropriate services or other matters outside the client's control?

Contempt Sanction and Purge Condition

- Do the proposed sanction and purge condition satisfy requirements and limitations for proper remedial sanctions? See Purge Conditions Checklist.

Checklist: Purge Conditions

- For a first violation, a court must generally accept a promise of future compliance. *In re the Interests of M.B.*, 101 Wn. App. at 450.
- Only if a contemnor's promise of compliance is "demonstrably unreliable," can the court insist on more than mere words to purge contempt. *Id.* at 448.
- Purge conditions must be reasonably related to the cause or nature of the child's contempt. *In re Interest of J.L.*, 140 Wn. App. at 446; *In re the Interests of M.B.*, 101 Wn. App. at 450.
- Purge conditions must be directed at obtaining future compliance. *In re the Interests of M.B.*, 101 Wn. App. at 450.
- Purge conditions must be within the power of the child to fulfill. *Id.*
- Future compliance with the order must be contemplated in reasonably immediate terms (three months is too long). *Id.* at 457.
- The court must consider the child's abilities (and disabilities) in setting the purge requirements. *Id.* at 456.
- The purge condition must be entirely within the child's ability to complete; it may not be dependent upon the actions of a third party. *Id.* at 460.
- The purge condition must be within the court's authority. If the court gives notice that a child's voluntary efforts will be deemed a purge, it must also provide a purge condition that is within the court's authority to order. *Id.*
- The child must be promptly afforded the means by which he or she can purge contempt, including a paper and pencil if the purge requires a writing. *Id.* at 461-62.
- A youth should have the opportunity to fulfill a purge condition immediately. *In re Interest of J.L.*, 140 Wn. App. at 445; *In re the Interests of M.B.*, 101 Wn. App. at 457.
- Upon performance of the condition, the child must be released. *Id.* at 451.
- The court must make itself available in a "reasonably prompt manner" to review the child's compliance with the purge condition (one week delay would not be reasonably prompt). *Id.* at 466.
- Maintaining a threat of detention through an "ongoing" finding of contempt is inappropriate. *Id.*
- A youth must be able to purge the contempt within some definite time frame. *Id.*
- The court must believe that the child will in fact be able to satisfy the purge condition. *Id.* at 467.

- Repeated use of detention as a sanction is inappropriate without evidence that it has improved attendance. *Id.*
- Suspended sentences are inappropriate - once the youth purges, the sanction must be lifted, including all the remaining days potentially available if the contemnor had remained resistant. *In re Interest of J.L.*, 140 Wn. App. at 447.
- The purge condition is not subject to ongoing modification and increasing onerousness. *In re the Interests of M.B.*, 101 Wn. App. at 462.
- The purge condition requirements must be clearly stated. *Id.*
- Children aged 6 and 7 are not subject to court order or sanctions of any kind, including detention. RCW 28A.225.015; 28A.225.090(5).

CHAPTER FOUR: Bench Warrants

In some jurisdictions, a student's failure to appear for truancy hearings has resulted in the issuance of bench warrants, leading to arrest and incarceration of the student.

If a client fails to appear for a truancy hearing, consider:

- Objecting to a warrant issued if the child did not receive actual notice of the hearing and notice of the threat of arrest for failure to appear;
- Proposing alternative means of ensuring the client's appearance for a re-scheduled hearing; and
- If a warrant is issued, request that limits on detention time be established.

I. Objecting to Warrants Issued on Inadequate Notice

The truancy statute does not specify what type of service is required for the order to show cause setting a contempt hearing in truancy cases.¹⁰⁸ Counties differ widely in practice ranging from requiring notice by personal service to allowing notice by regular mail. If your county issues bench warrants without requiring proof of personal service, you may wish to challenge the basis for the warrant.¹⁰⁹

Consult local court rules to determine whether, and on what conditions, bench warrants are authorized in civil contempt proceedings.

II. Seek a Continuance

If your client fails to appear in court for a truancy hearing, consider seeking a continuance of the hearing to give you time to contact your client and ensure his or her appearance for a later date and time. A continuance may be particularly appropriate if the court has no proof that your client received actual notice of the hearing or if there is a legitimate reason for your client's failure to appear.¹¹⁰

¹⁰⁸ The statute does specify that the initial truancy petition requires service by certified mail, return receipt requested, and if such service is unsuccessful, or the return receipt is not signed by the addressee, personal service is required. RCW 28A.225.030(5)

¹⁰⁹ In analogous civil contempt proceedings, personal service of a show cause order, or service in the manner provided in the civil rules or applicable statute, is required before a bench warrant may be issued. See RCW 26.18.050(3) (support or spousal maintenance orders). These requirements also ensure that a bench warrant may only be ordered if it is proven that the respondent was served with a show cause order which included a warning that an arrest warrant could issue. *Id.* Further, under RCW 4.28.080(11) governing service of summonses, personal service of a minor requires personally serving the minor and his or her parent or guardian. If the person cannot be found after "reasonable diligence," service may be effected by leaving a copy at the person's usual mailing address and by mailing a copy to that address. See also RCW 4.28.080(16); see also *Wright v. B & L Props., Inc.*, 113 Wn. App. 450, 458, 53 P.3d 1041 (2002) (discussing what constitutes "reasonable diligence"); *Brennan v. Hurt*, 59 Wn. App. 315, 317, 796 P.2d 786 (1990), *review denied*, 116 Wn.2d 1002, 803 P.2d 1310 (1991) (same)

¹¹⁰ See *State v. Klinker*, 85 Wn.2d 509, 523, 537 P.2d 268 (1975).

III. Ask for Appropriate Limits on Detention Time

Even if bench warrants can be issued given the silence of the truancy statute, it may not be reasonable to detain the student for an extended period prior to the next court hearing. Other proceedings under the Becca statute place limits on the use of detention. If a student is arrested and incarcerated on a bench warrant, the time limits set for hearings in CHINS and ARY proceedings should be argued as applicable by analogy. Consult RCW 13.32A.065, which requires:

- A detention review hearing within 24 hours when a child is in custody. RCW 13.32A.065(1).
- The child must be released after 24 hours (excluding weekends and holidays) unless:
 - a contempt motion has been filed and
 - the court believes the child would not appear for the contempt hearing. RCW 13.32A.065(1)(a)-(b).
- If the child is held pending the contempt hearing, the hearing must be held within 72 hours (excluding weekends and holidays). RCW 13.32A.065(2).

Counsel in truancy cases should advocate that students picked up on warrants in truancy proceedings should be afforded these same protections, at a minimum.

CHAPTER FIVE: Working Effectively with Students, Parents & School Representatives

This Chapter provides tips for establishing and maintaining effective attorney/client relationships with children and youth. It also raises issues to consider when communicating with parents and school district representatives.¹¹¹

I. Strategies for Contacting Your Client and Staying in Touch

Keep in mind that some of the underlying causes of a student's chronic absenteeism may also make it challenging to establish and maintain good communication with your client. Students involved in juvenile court may experience frequent moves between households, phone numbers may change, cell phones may run out of minutes, or messages may never be given to the him or her once they get home.

Even if you are able to make contact with your client, her or she may not want to talk with anyone who wants to discuss problems going on at school, much less deal with any bad news involving a court hearing. As a result, try to make a connection with your client as soon as possible after your initial meeting. Instead of being just another adult voice on the phone, your early efforts to ensure that your client understands your role and sees you as his or her advocate will help you be more effective during the course of your representation.

Children and youth use a wide variety of methods of communication. Don't assume that youth have access to a phone, mail or the Internet. As early as possible, try to establish an understanding between about how you will get in touch with him or her during the course of your representation. When you first meet with your client, ask for all contact information and for ways to contact him or her other than calling a home number. Ask if your client has a cell phone or email address, and if he or she is willing to receive calls, emails or text messages as a way of communication.

Points to keep in mind in order to protect your client's confidences and privacy when leaving messages include:

- Be careful about relaying confidential information when leaving a message.
- Always ask for your client's permission before calling any phone number.
- Ask how your client would like you to identify yourself when leaving a message with another person, on voicemail, or on email.

¹¹¹ See Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, ABA CENTER ON CHILDREN AND THE LAW, (2d ed.1999).

Practice Point: Give Clients Appointment Reminders on the Back of Your Business Card



To help make sure your client will appear for hearings and complete court assignments, carry extra copies of your business cards. Write down important dates and conditions on the back of your card and give it to your client. Also, whenever possible, call the night before to remind your client of hearing dates and confirm he or she will be able to appear.

II. Strategies for Building Rapport and Successful Interviewing

If a student is involved in truancy court, chances are there are many things about school that are not going well. Yet your client may be very reluctant to talk about these issues. As part of establishing rapport with your client, it is important to understand how to communicate with him or her about what is going on at school and at home. The American Bar Association Juvenile Justice Center, Juvenile Law Center and Youth Law Center co-authored a Juvenile Court Training Curriculum with a module on *Talking to Teens in the Justice System*. This *Guide* is an excellent guide for developing techniques to work effectively with youth. A copy of the *Guide* is available at www.njdc.info.

The following outline of strategies for successful interviewing is excerpted directly from the *Talking to Teens in the Justice System* guide.

A. Assess the youth's abilities and tailor interview techniques accordingly

- What is the youth's level of development?
- Are there any disturbances in the youth's normal development?
- What is the impact of the current situation on the youth's ability to communicate in the interview?

B. Build rapport

- Don't confuse good intentions with rapport building.
- Start conversation with non-threatening, less serious topics.
- Follow the adolescent's lead.
- Recognize the juvenile's strengths.
- Find common interests and let the juvenile talk about them.
- Don't take the youth's behavior personally.
- Use a technique known as pacing.
- Match predicates with those being used by the interviewee.
- Invite the youth to ask questions during the interview.

- Work on building and maintaining rapport throughout the interview process.
- Don't confuse rapport-building with saying anything just to be liked.

C. Adapt Interview to Language and Information Processing Abilities of Youth

The *Talking to Teens Guide* strongly recommends that before attempting to acquire information from youth, one must gauge the youth's use of language. This could happen while establishing rapport with the youth. Assessing the youth's skills will help to shape questions. *Talking to Teens* further recommends that interviewers:

- Avoid long questions with a lot of information loaded in them.
- Avoid giving more than one option in a question.
- Use visual props to facilitate conversation.
- Avoid asking for abstract thinking.
- Avoid analogies.
- Ask open-ended questions.
- Avoid questions that can be answered with a yes, no, okay, or shrug.
- Ask questions when you do not understand the youth's response.
- Don't start questions with "why" or "how could you."
- Don't move too quickly into inquiring about violations or misconduct.
- Generally avoid having two adult interviewers with one youth.

For examples and more information on how to successfully interview youth, consult the *Talking to Teens Guide* which is available at www.njdc.info.

D. Explain Your Role and Responsibilities

Counsel should not assume that children know what a lawyer is or does. The truancy proceeding may be the child's first encounter with court and lawyers. Taking time to explain your role and the process will help to build your relationship with your client. Below are some concepts that regularly come up in truancy representation. Consider how you might explain the following to a child with varying levels of cognitive and developmental abilities.

Confidentiality: Including the operation of the attorney-client privilege, the child's choice to involve a parent in the conversation, and the implications of doing so in terms of the confidentiality rules.

You might tell your client that what he or she tells you is private, that you cannot repeat what your client tells you to a parent, the court, the school representative, or anyone else unless you have your client's permission. Explain that confidentiality includes things your client tells you about cutting school or getting in trouble. The limited circumstances under which a lawyer must and may disclose confidential information are spelled out in RPC 1.6, requiring disclosure when it is necessary to prevent reasonably certain death or substantial bodily harm, and permitting disclosure to prevent the client from committing a

crime. You might also explain the attorney-client privilege, by explaining to the client that “nobody can force you or me to tell them anything we discuss in these meetings, or in things we write or say to each other.”

In regard to the parent’s involvement, you might remind your client, “I’m your attorney.” “In order to protect your secrets, I need to talk with you alone. We can discuss whether you want to invite your parent to join us after that.”

Duty to zealously advocate for the child’s expressed interests: Including the lawyer's duty to provide candid and well-informed advice, the child's right to loyal, independent legal representation, and the child's right to make key decisions and define the objectives of the representation.

Scope of representation: Including the roles and responsibilities of the attorney and client, and the term and duration of the representation. Specifically, if the client is involved in other juvenile court matters, school discipline proceedings, special education meetings or other related proceedings, address whether you will provide representation in those ancillary proceedings or assist the client in obtaining representation.

You might acknowledge there are many things happening: “I understand you have many things going on in addition to this case; I am only able to represent you on the truancy case, but I will try to help you find other resources when I cannot help you.”

Client’s legal obligations under the compulsory attendance laws: Explain the client’s legal obligation to attend school regularly. If the client’s current school placement is not appropriate, explain the different exceptions to required attendance at a regular public school.

You can acknowledge the reasons why your client may not want to, or be able to attend school, but still make clear the law requires regular attendance: “The law does require you to be in school, every day and on-time unless you have a valid excuse, so we need to figure out how to make that happen.” If alternative options appear more appropriate, you might explain those options: “Regular public school is not for everybody. There might be a better option for you. Let’s talk about what you want from school and see if we can figure out a good match.”

Meaning and impact of contempt findings and sanctions: Including the possibility of incarceration upon a finding of contempt, and the client’s right to ask for alternatives to incarceration that would be effective in getting the client back into school.

Even if incarceration is unlikely, your client should be fully informed of the potential consequences in truancy proceedings. You can explain: “One of the things that can happen if you miss more school after the court order is that the court can require you to spend up to 7 days in juvenile detention.” Explain the possibility of spending more than 7 days in juvenile detention under inherent contempt if it might arise in your jurisdiction.

Practice Point: Communicating with Clients with Disabilities



If your client has a cognitive disability, it is important to take time to gauge his or her level of understanding. If appropriate, use visuals or write out important dates and conditions the court has imposed. Use repetition, and simpler language and concepts to convey information. Have your client explain concepts back to you in your own words.

Depending on the nature of your client's disability, you may want to include a parent or guardian in discussions with your client. See RPC 1.14(a) (working with clients with diminished capacity). Even if a family member participates, you "must keep the client's interests foremost and [with narrow exception] . . . must look to the client, and not family members, to make decisions on the client's behalf." RPC 1.14, Comment [3].

E. Understanding Adolescence

Recent research on adolescent brain development and the impact of trauma on decision-making and communication skills provides a helpful lens through which you may understand a youth's behavior and needs.¹¹² By understanding the motivations behind your client's actions, you can more successfully identify responses that will lead your client to better outcomes.

A variety of resources are available that explain the findings of psychological and neurological studies. One place to start is with the Brief of the American Medical Association, et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), available at 2004 WL 1633549, or at: <http://www.abanet.org/crimjust/juvjus/simmons/simmonsamicus.html>.

III. Working with Parents or Guardians

Parents are an important primary source of information about the child and their school experiences. They have information about their communication with school representatives and interventions that may have been attempted. Parents are also key to following through with tasks that are necessary to put services and other support in place. Attorneys representing children in truancies can and should collaborate with

¹¹² For a detailed discussion on the relationship between normal development, disabilities and trauma on youth and their behaviors, see Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel* in GUILD PRACTITIONER, 58(2) (2001).

parents to the extent possible, all the while keeping in mind the potential practical and legal ethical conflicts that could arise during the course of the case. This section outlines some issues to keep in mind regarding your interactions with your client's parents in truancy court proceedings, including:

- Parents' statutory rights, obligations, sanctions and defenses
- Whether, when and how to include parents in client communications
- Communicating with parents as unrepresented parties
- Negotiating potential legal and practical conflicts

A Checklist at the end of this Chapter includes ideas for involving parents while protecting confidentiality.

A. Parents' Statutory Rights, Obligations, Sanctions and Defenses

In truancy proceedings, a "parent" means a "parent, guardian, or person having legal custody of a child." RCW 28A.225.010(2). Parents or legal guardians are required to send their child to school under Washington's compulsory education laws. RCW 28A.225.010. Parents can be fined up to \$25 per day of their child's unexcused absence if they are found to have violated the truancy statute. RCW 28A.225.090(3). The court can order community restitution in lieu of a fine. *Id.*¹¹³ Any fine may be suspended upon the condition that the parent participate with the school and the child in a supervised plan for the child's attendance, or attends a conference or conferences with the school for the purpose of analyzing the causes of the child's absences. *Id.*

Parents can defend against a truancy petition by showing that they "exercised reasonable diligence" in attempting to cause their child to attend school, or by showing that the school did not perform its duties required by RCW 28A.225.020. *Id.*

B. Preserving Attorney/Client Privilege and Client Secrets

The attorney-client privilege applies only to confidential communications between an attorney and client. Generally, the presence of a third party will invalidate the privilege unless the third party's presence is "necessary" to the communication.¹¹⁴ Whether a parent will be considered necessary to the communication will depend on the

¹¹³ "Community restitution" is not defined by the compulsory attendance law. It is defined by the Juvenile Justice Act of 1977, as amended, to mean "compulsory service, without compensation, performed for the benefit of the community by the offender as punishment for committing an offense. Community restitution may be performed through public or private organizations or through work crews," RCW 13.40.020(3); see also JuCR 1.3 (applying definitions in RCW 13.40.020 to Juvenile Court Rules). It is similarly defined by the Sentencing Reform Act of 1981, as amended, to mean "compulsory service, without compensation, performed for the benefit of the community by the offender." RCW 9.94A.030(9).

¹¹⁴ See *Dietz v. Doe*, 131 Wn.2d 835, 850, 935 P.2d 611 (1997).

circumstances.¹¹⁵ Since this is a legal question, it is the attorney's responsibility to determine when it is "necessary" for the parent to be involved.

In addition to protecting the confidentiality of attorney-client communications, counsel is obligated to maintain the secrets of the client. RPC 1.6. The duty of confidentiality in Rule 1.6 is considerably broader than the attorney-client privilege.¹¹⁶ RPC 1.6 prohibits disclosure of a client's secrets, which include information that the client asks you not to disclose or information you believe could be embarrassing or detrimental to the client if it were disclosed.¹¹⁷

Some factors to consider in determining whether to include a parent in your client communications include:

- What is my client's preference?
- Will the parent's presence vitiate the attorney/client privilege?
- Is the parent a named party in the truancy case?
- Does the parent have conflicting legal or financial interests?
- Will my client feel more comfortable talking with me with a parent or guardian present?
- Is my client, either because of young age or mental impairment, unable to communicate with me without the assistance of a parent or guardian?

The question of whether and when to involve a parent in your client communications will depend on the particular circumstances in each case. Because ultimately the decision should be based on the preference of your client, you should review all of the factors with your client before involving the parent in confidential client communications.

C. Communicating with Parents or Guardians as Potentially Unrepresented Parties

A parent or guardian named on a truancy petition is a party. Ethical obligations regarding communications with a represented or unrepresented party would apply. RPC 4.2; RPC 4.3. If the parent is represented, remember to obtain the consent of the parent's lawyer before communicating directly with the parent about the truancy case. RPC 4.2. From the outset, and throughout the course of the matter, regularly clarify your role as the youth's attorney and if necessary, remind the parent that you have not been appointed to represent or protect the parent's interests.

¹¹⁵ See RPC 1.14 (regarding working with client of diminished capacity); *State v. Aquino-Cervantes*, 88 Wn. App. 699, 707, 945 P.2d 767 (1997) (translator is within privilege); see also *United States v. Kovel*, 296 F.2d 918, 921-22 (2d Cir. 1961) (accountant helping to "translate" business records is within privilege).

¹¹⁶ *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 534, 688 P.2d 506 (1984).

¹¹⁷ RPC 1.6, Comment [19].

D. Negotiating Potential Legal and Practical Conflicts Between Child and Parent

Pressures leading up to, during and after a truancy case can create legal and situational conflicts between your client and his or her parents. Anticipating and addressing these issues can go a long way in helping your client. Some pressure points include:

- Parents' actions or inactions contributing to absences;
- Youth/client's reluctance to take a position in conflict with parents;
- Parents are charged with fees or court fines;
- Parent forced to miss work because of the child's truancy;
- Parents with language barriers, disability or other factors that limit their ability to advocate for their children.

IV. Working with School Representatives

The Becca Bill permits non-lawyer school district employees to file truancy petitions and appear at truancy hearings without counsel. RCW 28A.225.030(3). It requires courts to permit the district to be represented by a non-attorney at hearings subsequent to the initial fact-finding hearing. RCW 28A.225.035(11).¹¹⁸ In some jurisdictions, county prosecutors get involved in truancy cases on behalf of the school district if a contempt motion is filed or an order to show cause is set. In most jurisdictions in Washington, school districts typically choose a non-lawyer district employee to represent the district at every stage of a truancy case.

Demand or Collection of Attorney's Fees from Parents

There is nothing in the truancy statute authorizing courts to charge parents with the costs of counsel; however some jurisdictions may try to seek reimbursement from parents. This practice may lead to inappropriate waivers of counsel and may hinder counsel's ability to work effectively with the child and parents. If the court in your jurisdiction regularly tries to collect attorney fees from parents, consider whether there is a means to ensure this does not inappropriately cause students to be denied counsel.

The involvement of a non-lawyer representative in truancy court proceedings raises several issues that should be considered during the representation of your client.

¹¹⁸ Public defenders representing youth in truancy proceedings have challenged these provisions on grounds that they violate the separation of powers doctrine.

A. Communications with a Non-lawyer District Representative

Although most school districts send non-attorney representatives to represent them in truancy matters, large school districts may have counsel on retainer, and smaller school districts may retain counsel for particular matters. The Rules of Professional Conduct prohibit communications about the subject of the representation with a person the lawyer knows to be represented in the matter, without consent of the other lawyer or legal authorization. RPC 4.2.

Ways to confirm whether a school district has retained counsel for truancy matters include,

- Contacting the school district’s general counsel office;
- If there is no general counsel, contacting the district or superintendent’s office;
- Inquiring whether the district is generally represented by counsel on truancy matters;
- Requesting that the district notify you if counsel is retained for a particular case; or
- Putting on the record that the district is unrepresented by counsel.

1. District Representatives’ Communications with your Clients and the Court

When Washington courts have permitted a non-attorney to engage in the practice of law in cases outside the truancy context, they have also held that the non-attorney must “abide[s] by and uphold[s] the same rules of professional conduct as members of the Washington State Bar Association.”¹¹⁹ The argument that these rules should apply equally in the truancy context has been successfully raised in a few superior courts; accordingly, it can be argued that school district representatives should follow RPC 4.2 when determining whether they may speak directly with your client about the truancy case.

School district representatives should also avoid *ex parte* communications with the court regarding your client’s case, unless authorized by law or court order. RPC 3.5(b).

Practice Point: Limiting Direct Communications Between School Representatives and Your Clients



To avoid the risk of your client receiving conflicting messages regarding his or her legal duties or options, advise your client to not speak with the district representative unless you are present or with your express permission. If the school district representative is also the school principal or other school employee, he or she will likely have a legitimate need to talk directly with your client

¹¹⁹ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 308, 45 P.3d 1068 (2002); *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 106, 969 P.2d 93 (1999); *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 631, 694 P.2d 630 (1985); *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984 (1981).

about other issues, as well as about efforts being taken to reduce absences. In this case, you may want to tell your client to refrain from talking with the school representative until you are available to meet. In addition to safeguarding your client's interests, your presence at these discussions may help to advance negotiations and settlement of the truancy matter. Finally, remind your client not to sign any orders or agreements without consulting you first¹²⁰.

B. General Considerations in Truancy Negotiations

The ability to effectively negotiate with a school district representative will often be the most powerful advocacy tool a lawyer can use when representing students in truancy proceedings. Your ability to inform the school representative of both the legal and non-legal issues in the case may help you negotiate better settlement outcomes, obtain dismissals or continuances, or secure more constructive sanctions for your client on contempt. Consider the following points when negotiating with non-lawyer school district representatives.

1. Varying Levels of Legal Training

The professional experience and background of school district representatives varies widely. School district representatives may be former or current teachers, administrators or other educational professionals. Each district's representative may have different levels of understanding of the truancy law and court rules. In some counties, training or guidance materials may be provided by the court or county prosecutor; in others, training may come from the district. Where resources are particularly limited, school representatives may be tasked with learning on the job. If there are several school districts bringing truancy cases in the same jurisdiction, knowledge of the law, policies, and practices of each school district may vary greatly.

To avoid misunderstandings, consider:

- Asking about the school district representative's background and current role in the district;
- When discussing a case, do not assume the school representative has been trained on all relevant legal points;
- Be ready to explain relevant rules or laws and how you believe they apply to your client's case. Questions may arise about:
 - ♦ The compulsory attendance law, RCW 28A.225;
 - ♦ Court rules;
 - ♦ Special education laws;
 - ♦ School discipline regulations; or
 - ♦ Enrollment policies.
- If a disagreement or misunderstanding arises about the application of the law, reserve the issue for a hearing or briefing before the court.

¹²⁰ If a problem arises, consider seeking assistance from the court in explaining and clarifying the application of RPC 4.2.

Practice Point: Review Orders Thoroughly to Ensure Accuracy



School district representatives may be delegated the task of drafting the contempt order after negotiations with defense counsel or the court hearing. Be sure to carefully look over all drafts of orders to ensure they are accurate before signing them to submit to the court. Since the order will be used to determine whether your client is in compliance, it is imperative that the order reflects the agreement you made with the school district, or the terms that were decided by the court.

2. Scope of District Representatives' Negotiating Authority

The school district employees who represent their districts in truancy court proceedings may also serve in a number of different capacities within their respective districts or schools. In large districts, truancy representatives may be assigned full-time to that job, and may rely on representatives from each school or a central district office to approve agreements and/or provide information about your client's situation. In smaller districts, the representative may also be a school principal or other school administrator who may be familiar with your client and responsible for making a number of decisions on related issues.

Because school district representatives may hold different positions within a school or district, each may have differing negotiating authority. High school principals may have authority to commit to scheduling special education meetings, or reducing sanctions in disciplinary matters. District-wide representatives, on the other hand, may need to obtain such authority from your client's principal before agreeing to it in a truancy order or mitigation plan. A checklist at the end of this Chapter provides suggestions regarding which school officials typically handle the issues that might arise in truancy negotiations.

3. Benefits of a Collaborative Approach

Often, truancy proceedings result from a lack of good communication between the family and the school. You can play a role in facilitating communication, ensuring everyone is aware of relevant facts, and working collaboratively and creatively to identify and eliminate any obstacles to attendance. If you and your client can effectively communicate these shared goals to the district representative, you may have more success in negotiating specific agreements to reach those goals.

Common concerns that district representatives may bring to the negotiating table include limited financial and staffing resources; a desire to remain consistent in all cases; and a desire to send a "clear message" to students regarding consequences for truancy. Try to anticipate these concerns when you propose specific steps that are designed not just to keep your client out of detention or postpone a finding of contempt, but are likely to help your client get to school regularly and succeed.

Checklist: Tips for Successful Interviews with Young Clients

The following general tips can help in developing rapport with young clients and having successful interviews.

- Start the initial interview with non-threatening, less serious topics.
- Structure questions and use a tone of voice that shows the client that you are not judging him or her.
- Follow the client's lead, let your client tell his or her story, use reflective/active listening, and be an attentive listener.
- Acknowledge your client's strengths.
- Use "framing:" Ask questions about different subtopics, and let your client know what subject you are asking about and why you are asking about it.
- Use simple words and phrases, use names and places instead of pronouns, avoid long, complicated questions and limit the number of ideas in your questions and sentences.
- Use different examples to clarify a complex point.
- Do not expect that your client will tell you if he or she does not understand something. For critical concepts, check for understanding by asking your client to explain them to you in his or her own words.
- Do not assume that a client is being uncooperative or non-responsive on purpose. Youth may have difficulty communicating with adults, and may be intimidated by the situation.
- After asking a question, pause for 5 or 6 seconds to give the client time to think; a delayed response does not necessarily mean that the client did not understand your question.
- Youth may better understand and retain written information; try using written timelines, diagrams or calendars to explain what happened previously and to chart a plan going forward. Carry a white board to sketch out the case plan.
- Youth tend to focus on the present, so even when time is limited, try to address the client's immediate concerns in order to keep an interview on track. Help the client understand the connection between the information you are seeking and the client's interests. Realize that sometimes getting off-track can help you understand a client better, help your client feel more comfortable with you or lead to another topic that will prove useful.
- Never ask your client to read anything out loud. You should read all forms out loud and have your client read along.

As the case continues, the following tips can help to continue building and maintaining a good rapport with your client:

- **As with any client, regularly update the student on the status of the case.** Consult with the client about goals, and give the client the opportunity to ask questions.
- **Distinguish yourself from other adults in the process.** Young people may be unsure of your role and responsibilities. Explain when and why you will speak with other adults, either with or without your client present, including school representatives, parents, and the court. Explain your role as negotiator with school representatives. Assure your client that you will not agree to anything without his or her permission and that you will not disclose information without permission. Be sure to follow through on these assurances.
- **Help the client develop a list of alternatives at each stage of the case.** Engage the client in a discussion of the advantages and disadvantages of each alternative, and help the child clarify personal goals and objectives. Engage the client's family when appropriate. Encourage the client to identify other adults who may provide additional information or offer an alternative perspective or support on a plan for getting the client back in school and caught up in classes.

There are steps that can make an interview more successful even when time is limited, but it is generally impossible to develop a successful attorney-client relationship in 10 minutes or less. Setting aside at least an hour to get to know the client.¹²¹

¹²¹ See Recommendations of the UNLV Conference on Representing Children in Families in SPECIAL ISSUE ON LEGAL REPRESENTATION OF CHILDREN: PROCEEDINGS OF THE UNLV CONFERENCE ON REPRESENTING CHILDREN IN FAMILIES: CHILDREN'S ADVOCACY AND JUSTICE TEN YEARS AFTER FORDHAM: RECOMMENDATIONS OF THE CONFERENCE, 6 Nev. L.J. 592, 595-596 (Spring 2006).

Checklist: Ideas for Involving Parents while Protecting Confidentiality

The following steps can help create a strong working relationship with your client's parent or guardian while preserving your client's confidences and secrets:

- Introduce yourself to the parent and your client together. Explain your role as attorney for the child and that you will need to speak with the child individually.
- When meeting the client or parent for the first time, talk with both together for few minutes to get a sense of how they interact, and whether there appears to be conflict in the family. Use body language to show that you are interested in what your client says, and that you are there to represent the child, not the parent.
- Take a few minutes to explain the ethical rules that might limit parental involvement in the attorney-client relationship and your obligation to protect your client's confidences and secrets.
- Limit attorney-parent and parent-child communications to an explanation of basic legal issues, a description of the truancy court process, and an exploration of alternative resolutions unless you obtain client permission to have the parent be involved in more substantive conversations.
- Get your client's permission before disclosing details of the case or your client's confidences to a parent or guardian.
- Be considerate of the parent's time when scheduling meetings with your client.
- Be patient. The more the parent understands about the process, the more likely it is that the parent can reinforce information which you are providing directly to the child. Listen carefully and don't be afraid to say "I don't know" or "I can't answer that".

Checklist: School Administrators with Decision-Making Authority

Depending on your client's needs, you may want to ask that the school district representative include one or more additional district employees in negotiations, either in person or by phone. The roles and responsibilities for administrators may differ by district and school, so be sure to check with the district or school office to find out who would be the most appropriate person to include in negotiations. You might start by asking for the involvement of the following individuals.

If you want to seek a commitment from the school to:	Ask to speak with:
<input type="checkbox"/> Postpone or avoid school discipline sanctions	→ Principal/Vice Principal
<input type="checkbox"/> Reverse a disciplinary sanction already imposed	→ Superintendent; principal
<input type="checkbox"/> Agree to a readmission plan	→ Superintendent; principal
<input type="checkbox"/> Revise a special education plan	→ Special education director
<input type="checkbox"/> Improve or provide English language instruction	→ Bilingual education director
<input type="checkbox"/> Provide credit retrieval options	→ Principal; Counselor
<input type="checkbox"/> Permit transfer to a different school	→ Superintendent; Principal
<input type="checkbox"/> Correct attendance records	→ Attendance officer; Principal
<input type="checkbox"/> Remedy a harassment or bullying problem	→ Principal; Counselor; Teacher

CHAPTER SIX: Fact-Finding: Pre-Hearing Motions, Negotiations & Contested Hearings

This Chapter outlines strategy ideas for attorneys who are able to represent a student at the initial truancy hearing or in negotiations after a petition has been filed. Since the first edition of this Truancy Practice Manual, the Court of Appeals ruled in *Bellevue School Dist. v. E.S.*, 148 Wn.App.205, 199 P.3d 1010 (2009) that children must be represented by counsel at the initial stages of a truancy proceeding. The case is currently set for review by the Washington Supreme Court.

I. Pre-Hearing Motions and Pleadings

School districts are required by statute to file a truancy petition when a child reaches a threshold number of unexcused absences (seven (7) in one month or ten (10) in a school year). However, the statute also requires that schools address the underlying reasons for absences prior to filing. Unfortunately, many students are brought into court before meaningful steps are taken to identify or address causes for their absences. In those cases, challenging a truancy petition can assist the client in:

- Obtaining more individualized assistance at school before the truancy court process advances;
- Avoiding the ramifications of juvenile court involvement in the future;
- Eliminating the threat of sanctions, including incarceration;
- Taking advantage of available legal defenses (many of which cannot be raised later at the contempt stage).



Practice Point: Who is the Client?

Attorneys may be contacted by parents asking for help in assisting their child with truancy matters. Be sure to clarify at the outset whether you are representing the child or the parents. Keep in mind Rules of Professional Conduct that address client confidentiality (RPC 1.6), conflicts of interest (RPC 1.7), and maintaining independent judgment when receiving payment for representation from a third party (RPC 5.4).

A. Grounds for Dismissal of Truancy Petitions

Motions to dismiss may be most successful where counsel can show either:

- The compulsory attendance law does not apply to the client and the court lacks jurisdiction; or
- The school has failed to comply with pre-filing obligations and thus cannot satisfy the statutory pleading requirements necessary to state a claim against the student.

1. Lack of Jurisdiction

Because children aged 6 and 7 are not themselves directly subject to the compulsory attendance law, RCW 28A.225.015; RCW28A.225.090(5), a petition filed against a 6 or 7 year old child would be subject to dismissal for lack of jurisdiction pursuant to CR 12(b)(1); see *State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983).

A petition may be subject to dismissal for lack of jurisdiction if the **student is otherwise exempt from the compulsory attendance requirements**. See Truancy Statute Annotated, outlining the statutory exceptions listed in RCW 28A.225.010. If the question of whether your client meets one of the exceptions is a disputed factual issue, counsel may alternatively raise this as a defense in an answer to the petition or at the hearing.

2. Failure to Satisfy Pleading Requirements

If a school has failed to allege that it complied with each of its pre-filing obligations, the petition may be deficient on its face and subject to dismissal pursuant to CR 12(b)(6). See further explanation in *Appendix B*.

The truancy statute requires schools to plead that:

- a) The child has unexcused absences;
- b) Actions taken by the school have not been successful in substantially reducing absences; and
- c) Court intervention and supervision are necessary to assist the school in reducing absences.

RCW 28A.225.035(1)(a)-(c). In addition to making these assertions, the petition must set forth facts supporting the allegations and generally request relief. RCW 28A.225.035(3). These requisite allegations incorporate the pre-filing obligations (notice, conference, take steps) detailed in RCW 28A.225.020.

Practice Point: The Legislature Intended Court Intervention to be a Last Resort



When the legislature passed the Becca Bill in 1995, amending various parts of the truancy statute as well as CHINS and ARY procedures, it expressed its intent that courts be used only as a last resort. The legislative history dealing specifically with the truancy part of the Becca Bill is sparse, but the legislative intent section codified at RCW 13.32A.010, states clearly that “courts be used as a last resort.”

B. Procedures for Motion to Dismiss

Motions to dismiss may be brought pursuant to CR 12(b):

CR12(b) motion:	To be argued when, for example:
Lack of subject matter jurisdiction, CR 12(b)(1) NOTE: CAN BE RAISED AT ANY TIME!	Petition filed against youth who is exempted from compulsory attendance requirements, RCW 28A.225.010; RCW 28A.225.015, e.g. a youth who: <ul style="list-style-type: none"> • Is 6 or 7 years old; • Is 16 and has obtained a GED; • Attends private school or is homeschooled. School has failed entirely to comply with one or more statutory pre-filing obligations.
Lack of personal jurisdiction, CR 12(b)(2)*	School failed to perfect service of the truancy petition.
Improper venue, CR 12(b)(3)*	The child does not live in the county in which petition was filed.
Insufficiency of process, CR 12(b)(4); insufficiency of service of process, CR 12(b)(5)*	School failed to perfect service by certified mail or personal service, RCW 28A.225.030(5).
Failure to state a claim, CR 12(b)(6)	Allegations in the petition are insufficient to satisfy statutory pleading requirements, RCW 28A.225.035(1).
Failure to join a party, CR 12(b)(7)	In some cases, counsel may want to argue that a parent/guardian should have been joined as a party (such as when it is the parent not the child who is causing the absences).

* NOTE: MAY BE WAIVED IF NOT RAISED IN INITIAL RESPONSIVE PLEADING

C. Timing and Form of Motions

CR 12(b) motions generally must be served not later than 5 days before the time for the hearing, unless local rules or court order specify otherwise. CR 6(d). Be sure to review the record and consider all available motions and defenses before filing any responsive pleading, whether an answer or motion, because some defenses may be deemed waived unless raised at the first opportunity.¹²²

II. Motions to Continue Proceedings

If a school insists on filing a petition after unexcused absences have accrued, but before there has been sufficient time for your client and the school to identify and implement appropriate steps to reduce absences, a motion to continue proceedings can be filed to allow time for those steps to be taken. Schools may be willing to agree to a stay or agree to a request for a continuance at the same time a petition is filed. If the school will not agree, consider filing a motion setting forth the steps you believe should be taken before a petition is granted.

Always remember to check your local rules!

The civil rules state that defenses must generally be asserted in a responsive pleading, but only if one is required. CR 12(b); JuCr. 1.4(a) (civil rules apply where not inconsistent). There is no mention in the truancy statute or state juvenile court rules of any required responsive pleadings. Where the respondent is not required to serve a responsive pleading, “he may assert at the trial any defense in law or fact to that claim for relief.” CR 12(b). Be sure to check local court rules for any variations in practice. *Even if not required, filing written motions ensures the issues are clearly preserved on the record for appeal.* If necessary, ask the court for additional time to brief an issue or conduct necessary discovery.

Practice Point: Be Sure You Are Always On the Record



Whenever you raise issues before the court, be sure a record is being made of the entire proceeding, either by an audio recording or live reporter typing notes. Depending on local practice, a hearing might not be recorded unless counsel specifically requests it. In order to preserve a record for appeal, counsel should confirm that some recording is being made whenever issues are raised before the court.

¹²² These include: lack of personal jurisdiction, improper venue, insufficiency of process or insufficiency of service of process. CR 12(h).

III. Negotiating an Agreed Truancy Order

In many cases, a client's interests may be best served through a negotiated resolution to a truancy petition. You may be able to negotiate an agreement that will not only relieve your client of the risk of possible negative consequences, but will also set your client up for future success in school. Your negotiation strategy and goals may differ depending on what defenses you might be able to raise at a hearing and what commitments you might want to seek from the school.

If the school has not met its legal obligations under the truancy statute, counsel might:

- Ask the school to dismiss the truancy petition;
- Ask for an agreement that the school will not file a truancy petition again until it meets its pre-filing obligations; and
- Ask the school to remove references to the petition from the client's records.

If you and your client believe there are steps the school could take to help your client get to school regularly, counsel might:

- Ask the school to agree to a stay until after those steps have been taken; and
- Ask the school to agree separately, in writing, to take specific steps to help reduce your client's absences.

If the school is unwilling to agree to dismissal of the petition or a stay of the proceedings, counsel might be able to negotiate additions or modifications to the court's standard form truancy order. Counsel can seek additional and/or amended terms to include:

- Specific steps the school will take to assist your client in reducing absences; and
- A reasonable date for expiration of the court's order.

Review *Chapter Two: Issue Spotting* for possible points for negotiation depending on your client's circumstances.

IV. Advocating at an Initial Truancy Hearing

There is little specific guidance in the truancy statute regarding the procedures for truancy hearings. The statute does provide, however, that student and parents are entitled to present evidence. RCW 28A.225.035(7)(a)(ii). Generally applicable rules and case law support the argument that youth have the right to formal due process protections at truancy fact-finding hearings, including the right to be represented by retained counsel, the application of the rules of evidence, and the application of the Superior Court Civil Rules except to the extent inconsistent with the juvenile court rules or truancy statute.¹²³

¹²³ JuCR 9.2(a) and 1.4(a) and (c); *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (“[D]ue process requires, at a minimum, that absent a countervailing state interest of

A. Notice of Hearing Date

If a hearing is noted, the court must notify the student and parent of the hearing date. The statute provides that when a hearing is held, “the court shall”:

- separately notify the child, parent and school district of the hearing
- notify the parent and the child of their rights to present evidence at the hearing and
- notify the parent and the child of the options and rights under the Family Reconciliation Act, chapter 13.32A RCW.

RCW 28A.225.035(7)(a)(ii). In some counties, courts may direct the petitioning party – usually the school – to give the requisite notice.

All notices of court hearings should be in a language the client and parents can understand, and interpreters should be provided for all hearings. RCWs 2.43.020; 2.43.040.

Notice requirements for truancy cases are not expressly addressed in the Juvenile Court Rules. By analogy to CHINS and ARY proceedings, notice of a fact-finding hearing in a truancy proceeding should be given in accordance with JuCR 11.2, which in turn provides that “notice may be given by any means reasonably certain of notifying the party, including, but not limited to, notice in open court, mail, personal service, telephone, and telegraph.” JuCR 11.2(c); see *also* JuCR 5.3; 5A.3. The same rule might apply in truancy cases.

However, default orders are discouraged in any event. If your client does not receive actual notice of a truancy fact-finding hearing, and the court issues a default order, consider filing a motion for relief from the order, pursuant to CR 60(b).

B. Timing of the Hearing Date

The statute does not establish a time period in which the initial hearing must be scheduled in truancy cases. Due to court schedules, there may be a considerable delay between the filing of a petition and the hearing date. Check local practice. Consider working with your client on mitigating the harm while waiting for a hearing.

C. Required Attendance at Court Hearings: Risk of Warrants

The court may require attendance in court of the child (if aged 8 or older), the child’s parents, and the school district at the initial truancy hearing. RCW 28A.225.035(9).

If your client fails to appear for a truancy hearing, he or she may face a default order. Also, in some counties, courts have issued bench warrants for failures to appear at initial hearings. See *Chapter Four* for discussion of challenging bench warrants.

overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”).

D. Evidentiary Issues

As a general matter, rules of evidence should apply in truancy fact-finding hearings.¹²⁴ However, counsel might also argue that evidence brought by the child or parent should be accepted even if it does not strictly comply with the evidentiary rules because the truancy statute recognizes the right of the parent and child to present evidence. RCW 28A.225.035(7)(a)(ii). In a truancy hearing the *school*, not the student, bears the burden of proving that the student has been absent without excuse, that it has taken actions to reduce absences and those actions have been unsuccessful, making court intervention necessary to assist the school. RCW 28A.225.035(1), (12). Accordingly, schools should be required to meet this burden through evidence admissible pursuant to the rules.

Evidentiary issues that may arise in truancy proceedings include:

- School attendance records
 - Are they properly authenticated as public or business records?¹²⁵
- Hearsay v. personal knowledge of witnesses
 - Do school witnesses have actual personal knowledge of facts?
- Authenticating notes from your client's parent or doctor
 - Will the school stipulate to their authenticity?
- Securing witness testimony
 - Counsel may issue a subpoena pursuant to CR 45
 - Unrepresented parties may request that the court issue a subpoena
 - Any party may request that the court accept a written declaration.

As in any case, you may want to ask the school district representative to stipulate in advance to the admissibility of documentary evidence. Before stipulating to admissibility of the school's evidence, consider whether you might have valid evidentiary objections, and whether your client's interests would be prejudiced by the stipulation.

Counsel should have the opportunity to review and object to any documents the school seeks to admit as evidence (including attendance records, attendance agreements, discipline records, academic transcripts, etc.). If you did not receive them prior to the date of the hearing, consider asking for a continuance to allow enough time review them.

See Chapter Three: Checklist - Seeking a Continuance.

¹²⁴ JuCR 1.4(c) (generally requiring application of rules of evidence); ER 1101(c)(3) (noting that rules of evidence need not be applied in certain enumerated miscellaneous proceedings, not including truancy hearings); see *In re the Interests of M.B.*, 101 Wn. App. at 469, (noting that rules of evidence apply in truancy contempt proceedings).

¹²⁵ Chapters 5.44, 5.45 and 5.46 RCW.

E. Burden of Proof at Fact-Finding – Preponderance

The school must prove each of the requisite allegations by a preponderance of the evidence. RCW 28A.225.035(12).

As stated in RCW 28A.225.035(1), the school should present evidence to support each allegation, including:

- proof of the unexcused absences during the current school year;
- proof of actions taken by the school district have not been successful in substantially reducing the student's absences from school; and
- a showing that court intervention and supervision are necessary to assist the school district or parent to reduce the student's absences from school.

If a court grants a truancy petition and issues an order on insufficient evidence, consider whether revision or appeal is warranted.

Checklist: Can the District Prove the Legally Required Number of the Client's Unexcused Absences?

- Do I have a copy of each of the following?
 - The school district's attendance policies and procedures;
 - The student handbook for my client's school;
 - Any other documents or guidance materials created or distributed by the district regarding truancy (i.e., staff manual, guidance memo);
 - My client's full attendance record for the current and preceding school years; and
 - A statement from the district stating the number and dates of unexcused absences alleged.

IF NOT:

- Submit a Notice of Appearance/Discovery Request to obtain as discovery;
 - Obtain signed releases from the client and his/her parent and request your client's records; or
 - Search district websites for policies and procedures.
- Do the number and dates of unexcused absences alleged by the district match the client's attendance record?
 - Was each absence recorded properly as excused or unexcused?
 - Is the district's calculation of unexcused absences consistent with the district's written attendance policies and procedures? (Note, some district practices may not match the official policies approved by the school board).
 - If a petition has been filed, has the client accrued at least 5 or 7 unexcused absences in a month or 10 in a year?

IF NOT:

- Negotiate with the school for dismissal or stay of the petition and seek appropriate school-based interventions in the meantime.
- Consider challenges to the petition based on statutory requirements.

Checklist: Has the School Met Its Pre-filing Obligations?

- Did my client's parent or guardian get notice of each unexcused absence?
 - How was notice given (by automated telephone message system, in person, by form letter)?
 - Was the notice adequate (understandable, in the proper language, timely)?
 - Did the notice inform the parent or guardian of potential consequences for additional unexcused absences?
- Did the school contact my client's parent or guardian to schedule a conference?
 - Did the school explain the reason for the conference?
 - Did the school offer to hold the conference at a time reasonably convenient for my client's parent or guardian?
 - Did the school hold a conference with my client if my client's parent or guardian was unable to attend?
 - Did the school discuss with my client and his or her parent or guardian the reasons for the unexcused absences and possible steps to reduce absences?
- Did the school consider what steps might be appropriate to help reduce my client's absences and then take those steps?
 - If my client proposed particular steps, did the school agree to try them?
 - Were there other steps that might have been (or might still be) appropriate to help reduce my client's absences, including evaluations to determine what services, if any, might be appropriate?

IF NOT:

- Negotiate with the school to dismiss or stay proceedings to allow time for the school to meet with the client and parent, identify possible causes for the client's absences and implement appropriate measures designed to address those causes;
- Consider filing a motion to dismiss the petition based on the insufficiency of the petition.
- If an order has already been entered, consider filing a CR 60(b) motion seeking relief from the order.

Checklist: Building a Record at the Fact-Finding Hearing

Service of Petition/Notice of Hearing

- Did the school properly serve the petition and notice of hearing?
- Did your client receive proper notice of the hearing?

Adequacy of the Petition

- Did the school include the requisite allegations in the petition and include facts supporting those allegations?

Gathering and Reviewing Evidence

- Has the school responded to requests for documents or other evidence?
- Have you had a reasonable opportunity to obtain evidence from other sources?
- Have you had the opportunity to review the school's evidence?

Procedural Protections

- Is there a certified interpreter available for your client or parent, if necessary?
- Is appointment of counsel necessary to provide an adequate accommodation or protect your client's right to due process?

Rules of Evidence

- Do witnesses have direct, personal knowledge of the facts?
- Are witnesses relying on hearsay?
- Has the proper foundation been laid for documents submitted by the school?
- Were you able to present evidence on behalf of your client?
 - Your client's testimony regarding why he or she missed school and what things would make it easier to get to school regularly in the future.
 - Medical records, or doctor's notes explaining reasons for absences
 - Parent's notes excusing absences, requesting a conference or asking for clarification of school policies
 - Testimony from a teacher, counselor, parent or doctor regarding reasons for your client's absences or steps that could be taken to address them.

Burden of Proof

- Has the school met its burden of proof on each of the requisite allegations?
 - If the school alleges that the student has failed to comply with a more restrictive school district policy regarding “unexcused absences” than the basic definition of that term in RCW 28A.225.020(2), did it prove the existence of such a policy by competent evidence ?¹²⁶
 - Did it prove your client did not have valid excuses for absences?
 - Did it prove that it notified your client’s parents of absences, scheduled a conference and took steps to reduce absences?
 - Did it prove that its actions were unsuccessful in reducing your client’s absences?
 - Did it prove that the court’s intervention and supervision are necessary to assist the school in requiring your client’s attendance?

¹²⁶ As municipal corporations, school districts make policy through ordinances enacted by their Board of Directors. RCW 28A.320.015. Such enactments may be pled and proven as stated in CR 9(i) and RCW 5.44.080. A district’s *ad hoc* decision or informal practice of requiring doctor’s notes from an individual student or parent, without proving a written policy adopted by its Board either requiring such notes from all students or authorizing school officials to require them in certain circumstances, should not be treated by the court as a more restrictive policy regarding unexcused absences under RCW 28A.225.020(2).

Appendix A - Resources for Youth

I. Legal Resources

ACLU of Washington Foundation

www.aclu-wa.org

705 Second Ave, Suite 300
Seattle, WA 98104
Tel: 206-624-2184
Complaint line: 206-624-2180

Area of Law: Defends the civil liberties and civil rights of people statewide.

CLEAR

Northwest Justice Project's Coordinated Legal Education Advice and Referral Service

For low-income people with non-criminal legal problems:

Outside of King County: 1-888-201-1014

In King County: 211

Age 60 and over, regardless of county, call CLEAR*Sr at 1-888-387-7111.

TTY - 1-888-201-9737

Columbia Legal Services (CLS)

www.columbialegal.org

Central Administrative Office
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(206) 464-1122

Other Offices include: CLS Seattle, Institutions Project, Olympia, Tri-Cities, Wenatchee and Yakima

Area of Law: Defends the legal and human rights of low-income people.

Disability Rights Washington

www.disabilityrightswa.org

315 - 5th Avenue South, Suite 850
Seattle, WA 98104
Tel (206) 324-1521 or in WA State: (800) 562-2702
TTY (206) 957-0728 or in WA State: (800) 905-0209

Area of Law: Protects the rights of people with disabilities statewide.

Northwest Immigrant Rights Project

<http://www.nwirp.org>

Western Washington Office
615 2nd Avenue, Suite 400
Seattle, WA 98104
206.587.4009 or 800.445.5771

Eastern Washington Office
121 Sunnyside Avenue, 2nd Floor
P.O. Box 270
Granger, WA 98932
509.854.2100 or 888.756.3641

Area of Law: Provides immigration legal services and community education for low-income immigrants and refugees.

Northwest Justice Project

www.nwjustice.org

Main Office
401 Second Avenue S, Suite 407
Seattle, WA 98104
(206) 464-1519
1-888-201-1012
Fax: (206) 624-7501
1-888-201-9737 (TDD)
e-mail: njp@nwjustice.org

For a list of regional offices, see website.

Area of Law: Provides free civil legal services to low-income people statewide

TeamChild

www.teamchild.org

King County (Main) Office
1225 S. Weller, Ste 420
Seattle, Washington 98144
(206) 322-2444
(206) 381-1742 Fax

Regional Offices: King, Pierce, Snohomish, Yakima and Spokane Counties

Area of Law: Provides civil legal services for youth in Washington State who are involved, or in risk of involvement in the juvenile justice system.

The Washington Defender Association (WDA)'s Immigration Project
<http://www.defensenet.org/immigration/wdaip-new>.

Ann Benson, Directing Attorney
Email: defendimmigrants@aol.com tel: 360-385-2538

Jonathan Moore, Immigration Specialist
Email: jonathan@defensenet.org tel: 206-623-4321

110 Prefontaine Pl. S, Suite 610
Seattle, WA 98104
Fax: (206) 623-5420

Area of law: provides case-by-case technical assistance and policy advocacy to criminal defenders representing noncitizen clients. Assistance is free of charge.

National Organizations

American Bar Association Center on Children and the Law
<http://www.abanet.org/child/>

National Association of Counsel for Children (NACC)
www.naccchildlaw.org

National Center for School Engagement (NCSE)
<http://truancyprevention.org/>

National Juvenile Defender Center (NJDC)
www.njdc.info

Office of Juvenile Justice and Delinquency Prevention (OJJDP)
<http://ojjdp.ncjrs.org/>

II. Education Advocates

Seattle Education Access
www.seattleeducationaccess.org

Anthon Smith, Program Director
anthon@seattleeducationaccess.org
Phone: 206.683.5536

Provides case management for homeless youth and youth in foster care.

Treehouse

www.treehouse4kids.org

2100 24th Avenue S., Suite 200
Seattle, WA 98144-4632
Tel: (206) 767-7000
Fax: (206) 767-7773

Provides education advocacy for youth in foster care.

Washington PAVE

www.washingtonpave.com

Tacoma (MAIN) Office
6316 S 12th Street
Tacoma, WA 98465-1900
Phone: (253) 565-2266 (v/tty) or 1-800-5-PARENT (572-7368) (v/tty)
Fax: (253) 566-8052
E-mail: wapave9@washingtonpave.com

Provides resources for families and individuals with disabilities.

III. State and Federal Education/Enforcement Agencies

1. Office of the Education Ombudsman (OEO)

The Office of the Education Ombudsman (established by the Governor) accepts complaints from parents, guardians and students regarding alleged failures of a school or district to respond, or respond appropriately, to complaints, or failures to follow federal or state law or school policy. Information is available at: www.waparentslearn.org

2. Office of Superintendent of Public Instruction (OSPI)

The Washington State Office of Superintendent of Public Instruction (OSPI) provides information on various school programs and enrollment and assessment data for each district and school in the state. See <http://www.k12.wa.us/>. It also is charged with enforcing the state law against sex discrimination. Procedures for filing complaints of sex discrimination are set forth in WACs 392-190-065 through 392-190-080.

3. The Office of Civil Rights (OCR) of the U.S. Department of Education

The Office of Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcement of Title VI (prohibiting discrimination on the basis of race, color or national origin) and Title IX (prohibiting discrimination on the basis of sex). Information about OCR's

complaint process is available at their website:
<http://www.ed.gov/about/offices/list/ocr/complaintprocess.html>.

4. Washington State Human Rights Commission (HRC)

The Washington State Human Rights Commission has jurisdiction to investigate complaints of alleged discrimination in public accommodations, including schools.
For information, visit: <http://www.hum.wa.gov/complaintProcess/index.htm>.

IV. Websites with Sample Truancy Forms

King County Prosecuting Attorney's Office

<http://www.metrokc.gov/proatty/truancy/forms.htm>

Yakima County Superior Court – Juvenile Truancy

<http://www.co.yakima.wa.us/truancy/>

Appendix B - Resources for Attorneys

I. Practice Manual and Guides

A. Education Advocacy Guides

TeamChild's Education Advocacy Manual

Make a Difference in a Child's Life: A Manual for Helping Children and Youth Get What They Need in School, available at: <http://www.teamchild.org/manual.html>.

ACLU Parent/Student Rights Guides

All guides are available at www.aclu-wa.org under Student/Youth Rights: Publications.

[Parents' Guide to Truancy in Washington](#)

[Guía Familiar de Absentismo Escolar \(The Spanish Language Parents' Guide to Truancy\)](#)

[Know Your Rights: A Guide for Public School Students in Washington](#)

[Conoce Tus Derechos](#)

[Parents' Guide to Public School Discipline in Washington](#)

[Guía Familiar de Disciplina Escolar en Washington](#)

[Parents' Guide to School Board Advocacy in Washington](#)

[Guía Familiar de Representación con las Mesas Directivas Escolares en Washington](#)

B. Juvenile Defender Guides

Juvenile Defender Delinquency Notebook

Available at: www.njdc.info/pdf/delinquency_notebook.pdf.

SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM (Joseph B. Tulman & Joyce A. McGee eds., 1998), available at:

http://www.law.udc.edu/programs/juvenile/pdf/special_ed_manual_complete.pdf

C. Articles and Studies on Harms of Incarceration

ELIZABETH CALVIN, NATIONAL JUVENILE DEFENDER CENTER, LEGAL STRATEGIES TO REDUCE THE UNNECESSARY DETENTION OF CHILDREN 55-80 (2004), available at http://www.njdc.info/pdf/detention_guide.pdf.

Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for all Youth through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415 (2006).

BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), available at: <http://juliel.mm-tools.us/justicepolicyinstitute/index.php>.

Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165 (2004).

Frank E. Vandervort & William E. Ladd, *The Worst of All Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. DET. MERCY L. REV. 203 (2001).

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II. Statutes and Case Law

A. Compulsory Attendance Law Chapter 28A.225 RCW

RCW 28A.225.010 Attendance mandatory – Age – Exceptions.

(1) All parents in this state of any child eight years of age and under eighteen years of age shall cause such child to attend the public school of the district in which the child resides and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session unless:

(a) The child is attending an approved private school for the same time or is enrolled in an extension program as provided in RCW 28A.195.010(4);

(b) The child is receiving home-based instruction as provided in subsection (4) of this section;

(c) The child is attending an education center as provided in chapter 28A.205 RCW;

(d) The school district superintendent of the district in which the child resides shall have excused such child from attendance because the child is physically or mentally unable to attend school, is attending a residential school operated by the department of social and health services, is incarcerated in an adult correctional facility, or has been temporarily excused upon the request of his or her parents for purposes agreed upon by the school authorities and the parent: PROVIDED, That such excused absences shall not be permitted if deemed to cause a serious adverse effect upon the student's educational progress: PROVIDED FURTHER, That students excused for such temporary absences may be claimed as full time equivalent students to the extent they would otherwise have been so claimed for the purposes of RCW 28A.150.250 and 28A.150.260 and shall not affect school district compliance with the provisions of RCW 28A.150.220; or

(e) The child is sixteen years of age or older and:

(i) The child is regularly and lawfully employed and either the parent agrees that the child should not be required to attend school or the child is emancipated in accordance with chapter 13.64 RCW;

(ii) The child has already met graduation requirements in accordance with state board of education rules and regulations; or

(iii) The child has received a certificate of educational competence under rules and regulations established by the state board of education under RCW 28A.305.190.

(2) A parent for the purpose of this chapter means a parent, guardian, or person having legal custody of a child.

(3) An approved private school for the purposes of this chapter and chapter 28A.200 RCW shall be one approved under regulations established by the state board of education pursuant to RCW 28A.305.130.

(4) For the purposes of this chapter and chapter 28A.200 RCW, instruction shall be home-based if it consists of planned and supervised instructional and related educational activities, including a curriculum and instruction in the basic skills of occupational education, science, mathematics, language, social studies, history, health, reading, writing, spelling, and the development of an appreciation of art and music, provided for a number of hours equivalent to the total annual program hours per grade level established for approved private schools under RCW 28A.195.010 and 28A.195.040 and if such activities are:

(a) Provided by a parent who is instructing his or her child only and are supervised by a certificated person. A certificated person for purposes of this chapter and chapter 28A.200 RCW shall be a person certified under chapter 28A.410 RCW. For purposes of this section, "supervised by a certificated person" means: The planning by the certificated person and the parent of objectives consistent with this subsection; a minimum each month of an average of one contact hour per week with the child being supervised by the certificated person; and evaluation of such child's progress by the certificated person. The number of children supervised by the certificated person shall not exceed thirty for purposes of this subsection; or

(b) Provided by a parent who is instructing his or her child only and who has either earned forty-five college level quarter credit hours or its equivalent in semester hours or has completed a course in home based instruction at a postsecondary institution or a vocational-technical institute; or (c) Provided by a parent who is deemed sufficiently qualified to provide home-based instruction by the superintendent of the local school district in which the child resides.

(5) The legislature recognizes that home-based instruction is less structured and more experiential than the instruction normally provided in a classroom setting. Therefore, the provisions of subsection (4) of this section relating to the nature and quantity of instructional and related educational activities shall be liberally construed.

RCW 28A.225.015 Attendance mandatory – Six or seven year olds – Unexcused absences – Petition.

(1) If a parent enrolls a child who is six or seven years of age in a public school, the child is required to attend and that parent has the responsibility to ensure the child attends for the full time that school is in session. An exception shall be made to this requirement for children whose parents formally remove them from enrollment if the child is less than eight years old and a petition has not been filed against the parent under subsection (3) of this section. The requirement to attend school under this subsection does not apply to a child enrolled in a public school part-time for the purpose of receiving ancillary services. A child required to attend school under this subsection may be temporarily excused upon the request of his or her parent for purposes agreed upon by the school district and parent.

(2) If a six or seven year-old child is required to attend public school under subsection (1) of this section and that child has unexcused absences, the public school in which the child is enrolled shall:

(a) Inform the child's custodial parent, parents, or guardian by a notice in writing or by telephone whenever the child has failed to attend school after one unexcused absence within any month during the current school year;

(b) Request a conference or conferences with the custodial parent, parents, or guardian and child at a time reasonably convenient for all persons included for the purpose of analyzing the causes of the child's absences after two unexcused absences within any month during the current school year. If a regularly scheduled parent-teacher conference day is to take place within thirty days of the second unexcused absence, then the school district may schedule this conference on that day; and

(c) Take steps to eliminate or reduce the child's absences. These steps shall include, where appropriate, adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction, offering assistance in enrolling the child in available alternative schools or programs, or assisting the parent or child to obtain supplementary services that may help eliminate or ameliorate the cause or causes for the absence from school.

(3) If a child required to attend public school under subsection (1) of this section has seven unexcused absences in a month or ten unexcused absences in a school year, the school district shall file a petition for civil action as provided in RCW 28A.225.035 against the parent of the child.

(4) This section does not require a six or seven year old child to enroll in a public or private school or to receive home-based instruction. This section only applies to six or seven year old children whose parents enroll them full time in public school and do not formally remove them from enrollment as provided in subsection (1) of this section.

[1999 c 319 § 6.]

RCW 28A.225.020 School's duties upon child's failure to attend school.

(1) If a child required to attend school under RCW 28A.225.010 fails to attend school without valid justification, the public school in which the child is enrolled shall:

(a) Inform the child's custodial parent, parents, or guardian by a notice in writing or by telephone whenever the child has failed to attend school after one unexcused absence within any month during the current school year. School officials shall inform the parent of the potential consequences of additional unexcused absences;

(b) Schedule a conference or conferences with the custodial parent, parents, or guardian and child at a time reasonably convenient for all persons included for the purpose of analyzing the causes of the child's absences after two unexcused absences within any month during the current school year. If a regularly scheduled parent-teacher conference day is to take place within thirty days of the second unexcused absence, then the school district may schedule this conference on that day; and

(c) Take steps to eliminate or reduce the child's absences. These steps shall include, where appropriate, adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction, providing appropriate vocational courses or work experience, referring the child to a community truancy board, if available, requiring the child to attend an alternative school or program, or assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school. If the child's parent does not attend the scheduled conference, the conference may be conducted with the student and school official. However, the parent shall be notified of the steps to be taken to eliminate or reduce the child's absence.

(2) For purposes of this chapter, an "unexcused absence" means that a child:

(a) Has failed to attend the majority of hours or periods in an average school day or has failed to comply with a more restrictive school district policy; and

(b) Has failed to meet the school district's policy for excused absences.

(3) If a child transfers from one school district to another during the school year, the receiving school or school district shall include the unexcused absences accumulated at the previous school or from the previous school district for purposes of this section, RCW 28A.225.030, and 28A.225.015.

RCW 28A.225.025 Community truancy boards.

For purposes of this chapter, "community truancy board" means a board composed of members of the local community in which the child attends school. Juvenile courts may establish and operate community truancy boards. If the juvenile court and the school district agree, a school district may establish and operate a community truancy board under the jurisdiction of the juvenile court. Juvenile courts may create a community truancy board or may use other entities that exist or are created, such as diversion units. However, a diversion unit or other existing entity must agree before it is used as a truancy board. Duties of a community truancy board shall include, but not be limited to, recommending methods for improving school attendance such as assisting the parent or the child to obtain supplementary services that might eliminate or ameliorate the causes for the absences or suggesting to the school district that the child enroll in another school, an alternative education program, an education center, a skill center, a dropout prevention program, or another public or private educational program.

RCW 28A.225.030 Petition to juvenile court for violations by a parent or child – School district responsibilities.

(1) If a child is required to attend school under RCW 28A.225.010 and if the actions taken by a school district under RCW 28A.225.020 are not successful in substantially reducing an enrolled student's absences from public school, not later than the seventh unexcused absence by a child within any month during the current school year or not later than the tenth unexcused absence during the current school year the school district

shall file a petition and supporting affidavit for a civil action with the juvenile court alleging a violation of RCW 28A.225.010: (a) By the parent; (b) by the child; or (c) by the parent and the child. Except as provided in this subsection, no additional documents need be filed with the petition.

(2) The district shall not later than the fifth unexcused absence in a month:

(a) Enter into an agreement with a student and parent that establishes school attendance requirements;

(b) Refer a student to a community truancy board, if available, as defined in RCW 28A.225.025. The community truancy board shall enter into an agreement with the student and parent that establishes school attendance requirements and take other appropriate actions to reduce the child's absences; or

(c) File a petition under subsection (1) of this section.

(3) The petition may be filed by a school district employee who is not an attorney.

(4) If the school district fails to file a petition under this section, the parent of a child with five or more unexcused absences in any month during the current school year or upon the tenth unexcused absence during the current school year may file a petition with the juvenile court alleging a violation of RCW 28A.225.010.

(5) Petitions filed under this section may be served by certified mail, return receipt requested. If such service is unsuccessful, or the return receipt is not signed by the addressee, personal service is required.

RCW 28A.225.031 Alcohol or controlled substances testing – Authority to order.

The authority of a court to issue an order for testing to determine whether the child has consumed or used alcohol or controlled substances applies to all persons subject to a petition under RCW 28A.225.030 regardless of whether the petition was filed before July 27, 1997.

RCW 28A.225.035 Petition to juvenile court – Contents – Court action – Referral to community truancy board – Transfer of jurisdiction upon relocation.

(1) A petition for a civil action under RCW 28A.225.030 or 28A.225.015 shall consist of a written notification to the court alleging that:

(a) The child has unexcused absences during the current school year;

(b) Actions taken by the school district have not been successful in substantially reducing the child's absences from school; and

(c) Court intervention and supervision are necessary to assist the school district or parent to reduce the child's absences from school.

(2) The petition shall set forth the name, date of birth, school, address, gender, race, and ethnicity of the child and the names and addresses of the child's parents.

(3) The petition shall set forth facts that support the allegations in this section and shall generally request relief available under this chapter and provide information about what the court might order under RCW 28A.225.090.

(4) When a petition is filed under RCW 28A.225.030 or 28A.225.015, the juvenile court shall schedule a hearing at which the court shall consider the petition, or if the court determines that a referral to an available community truancy board would substantially reduce the child's unexcused absences, the court may refer the case to a community truancy board under the jurisdiction of the juvenile court.

(5) If a referral is made to a community truancy board, the truancy board must meet with the child, a parent, and the school district representative and enter into an agreement with the petitioner and respondent regarding expectations and any actions necessary to address the child's truancy within thirty days of the referral. If the petition is based on RCW 28A.225.015, the child shall not be required to attend and the agreement under this subsection shall be between the truancy board, the school district, and the child's parent. The agreement shall be presented to the juvenile court for its approval.

(6) The court shall approve the agreement by order or schedule a hearing. The court may, if the school district and community truancy board agree, permit the truancy board to provide continued supervision over the student, or parent if the petition is based on RCW 28A.225.015, and report on compliance with the order.

(7) If the truancy board fails to reach an agreement, the truancy board shall return the case to the juvenile court for a hearing.

(8) Notwithstanding the provisions in subsection (4) of this section, a hearing shall not be required if other actions by the court would substantially reduce the child's unexcused absences. When a juvenile court hearing is held, the court shall:

(a) Separately notify the child, the parent of the child, and the school district of the hearing;

(b) Notify the parent and the child of their rights to present evidence at the hearing; and

(c) Notify the parent and the child of the options and rights available under chapter 13.32A RCW.

(9) The court may require the attendance of the child if eight years old or older, the parents, and the school district at any hearing on a petition filed under RCW 28A.225.030.

(10) A school district is responsible for determining who shall represent the school district at hearings on a petition filed under RCW 28A.225.030 or 28A.225.015.

(11) The court may permit the first hearing to be held without requiring that either party be represented by legal counsel, and to be held without a guardian ad litem for the child under RCW 4.08.050. At the request of the school district, the court shall permit a school district representative who is not an attorney to represent the school district at any future hearings.

(12) If the allegations in the petition are established by a preponderance of the evidence, the court shall grant the petition and enter an order assuming jurisdiction to intervene for the period of time determined by the court, after considering the facts alleged in the petition and the circumstances of the juvenile, to most likely cause the juvenile to return to and remain in school while the juvenile is subject to this chapter. In no case may the order expire before the end of the school year in which it is entered.

(13) If the court assumes jurisdiction, the school district shall regularly report to the court any additional unexcused absences by the child.

(14) Community truancy boards and the courts shall coordinate, to the extent possible, proceedings and actions pertaining to children who are subject to truancy petitions and at-risk youth petitions in RCW 13.32A.191 or child in need of services petitions in RCW 13.32A.140.

(15) If after a juvenile court assumes jurisdiction in one county the child relocates to another county, the juvenile court in the receiving county shall, upon the request of a school district or parent, assume jurisdiction of the petition filed in the previous county.

RCW 28A.225.090 Court orders – Penalties – Parents' defense.

(1) A court may order a child subject to a petition under RCW 28A.225.035 to do one or more of the following:

(a) Attend the child's current school, and set forth minimum attendance requirements, including suspensions;

(b) If there is space available and the program can provide educational services appropriate for the child, order the child to attend another public school, an alternative education program, center, a skill center, dropout prevention program, or another public educational program;

(c) Attend a private nonsectarian school or program including an education center. Before ordering a child to attend an approved or certified private nonsectarian school or program, the court shall: (i) Consider the public and private programs available; (ii) find that placement is in the best interest of the child; and (iii) find that the private school or program is willing to accept the child and will not charge any fees in addition to those established by contract with the student's school district. If the court orders the child to enroll in a private school or program, the child's school district shall contract with the school or program to provide educational services for the child. The school district shall not be required to contract for a weekly rate that exceeds the state general apportionment dollars calculated on a weekly basis generated by the child and received by the district. A school district shall not be required to enter into a contract that is longer than the remainder of the school year. A school district shall not be required to enter into or continue a contract if the child is no longer enrolled in the district;

(d) Be referred to a community truancy board, if available; or

(e) Submit to testing for the use of controlled substances or alcohol based on a determination that such testing is appropriate to the circumstances and behavior of the child and will facilitate the child's compliance with the mandatory attendance law and, if any test ordered under this subsection indicates the use of controlled substances or alcohol, order the minor to abstain from the unlawful consumption of controlled substances or alcohol and adhere to the recommendations of the drug assessment at no expense to the school.

(2) If the child fails to comply with the court order, the court may order the child to be subject to detention, as provided in RCW 7.21.030(2)(e), or may impose alternatives to detention such as community restitution. Failure by a child to comply with an order issued under this subsection shall not be subject to detention for a period greater than that permitted pursuant to a civil contempt proceeding against a child under chapter 13.32A RCW.

(3) Any parent violating any of the provisions of either RCW 28A.225.010, 28A.225.015, or 28A.225.080 shall be fined not more than twenty-five dollars for each day of unexcused absence from school. The court shall remit fifty percent of the fine collected under this section to the child's school district. It shall be a defense for a parent charged with violating RCW 28A.225.010 to show that he or she exercised reasonable diligence in attempting to cause a child in his or her custody to attend school or that the child's school did not perform its duties as required in RCW 28A.225.020. The court may order the parent to provide community restitution instead of imposing a fine. Any fine imposed pursuant to this section may be suspended upon the condition that a parent charged with violating RCW 28A.225.010 shall participate with the school and the child in

a supervised plan for the child's attendance at school or upon condition that the parent attend a conference or conferences scheduled by a school for the purpose of analyzing the causes of a child's absence.

(4) If a child continues to be truant after entering into a court-approved order with the truancy board under RCW 28A.225.035, the juvenile court shall find the child in contempt, and the court may order the child to be subject to detention, as provided in RCW 7.21.030(2)(e), or may impose alternatives to detention such as meaningful community restitution. Failure by a child to comply with an order issued under this subsection may not subject a child to detention for a period greater than that permitted under a civil contempt proceeding against a child under chapter 13.32A RCW.

(5) Subsections (1), (2), and (4) of this section shall not apply to a six or seven year-old child required to attend public school under RCW 28A.225.015.

B. Contempt of Court Law Chapter 7.21 RCW

RCW 7.21.030 Remedial sanctions — Payment for losses

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

RCW 7.21.040 Punitive sanctions – Fines

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2) (a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court. A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment in the county jail for not more than one year, or both.

C. Court Rules

CR 12 - Defenses and Objections

(a) When Presented. A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits there from any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

CR 60 - Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1),

(2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished—Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and

order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

GENERAL RULE 33 - Requests for Accommodation by Persons with Disabilities

(a) Definitions. The following definitions shall apply under this rule:

(1) "Accommodation" means measures to make each court service, program, or activity, when viewed in its entirety, readily accessible to and usable by an applicant who is a qualified person with a disability, and may include but is not limited to:

(A) making reasonable modifications in policies, practices, and procedures;

(B) furnishing, at no charge, auxiliary aids and services, including but not limited to equipment, devices, materials in alternative formats, qualified interpreters, or readers; and

(C) as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability.

(2) "Applicant" means any lawyer, party, witness, juror, or any other individual who has a specific interest in or is participating in any proceeding before any court.

(3) "Court" means any court or other agency or body subject to the rulemaking authority of the Supreme Court.

(4) "Person with a disability" means a person covered by the Americans with Disabilities Act of 1990 (§ 42 U.S.C. 12101 et seq.), RCW 49.60 et seq., or other similar local, state, or federal laws. This term includes but is not limited to an individual who has a physical or mental impairment that limits one or more major life activities, has a documented history of such an impairment, or is regarded as having such an impairment.

(5) "Qualified person with a disability" means a person with a disability who is otherwise entitled to participate in any program, service, or activity made available by any court.

(b) Process for Requesting Accommodation.

(1) An application requesting accommodation may be presented ex parte in writing, or orally and reduced to writing, on a form approved by the Administrative Office of the Courts, to the presiding judge or officer of the court or his or her designee.

(2) An application for accommodation shall include a description of the accommodation sought, along with a statement of the impairment necessitating the accommodation. The court may require the applicant to provide additional information about the qualifying impairment to help assess the appropriate accommodation. Medical and other health information shall be submitted under a cover sheet created by the Administrative Office of the Courts for use by applicants designated "SEALED MEDICAL AND HEALTH INFORMATION" and such information shall be sealed automatically. The court may order that such information be sealed if it has not previously automatically been sealed.

(3) An application for accommodation should be made as far in advance as practical of the proceeding for which the accommodation is sought.

(c) Consideration. A request for accommodation shall be considered and acted upon as follows:

(1) In determining whether to grant an accommodation and what accommodation to grant, the court shall:

(A) consider, but not be limited by, the provisions of the Americans with Disabilities Act of 1990 (§ 42 U.S.C. 12101 et seq.), RCW 49.60 et seq., and other similar local, state, and federal laws;

(B) give primary consideration to the accommodation requested by the applicant; and

(C) make its decision on an individual-and case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation.

(2) If an application for accommodation is filed five (5) or more court days prior to the scheduled date of the proceeding for which the accommodation is sought, and if the applicant otherwise is entitled under this rule to the accommodation requested, the accommodation shall be provided unless:

(A) it is impossible for the court to provide the requested accommodation on the date of the proceeding; and

(B) the proceeding cannot be continued without prejudice to a party to the proceeding.

(3) If an application for accommodation is filed fewer than five (5) court days prior to the scheduled date of the proceeding for which the accommodation is requested, and if the applicant otherwise is entitled under this rule to the accommodation requested, the accommodation shall be provided unless:

(A) it is impractical for the court to provide the requested accommodation on the date of the proceeding; and

(B) the proceeding cannot be continued without prejudice to a party to the proceeding.

(4) If a requested accommodation is not provided by the court under subsection (c)(2) or (c)(3) of this rule, the court must offer the applicant an alternative accommodation.

(d) Denial. Except as otherwise set forth in subsection (c)(2) or (c)(3) of this rule, an application for accommodation may be denied only if the court finds that:

(1) the applicant has failed to satisfy the substantive requirements of this rule;

(2) the requested accommodation would create an undue financial or administrative burden;

(3) the requested accommodation would fundamentally alter the nature of the court service, program, or activity; or

(4) permitting the applicant to participate in the proceeding with the requested accommodation would create a direct threat to the safety or wellbeing of the applicant or others.

(e) Order. The court shall issue an order consistent with its decision. If the court denies a requested accommodation pursuant to section (d) of this rule, the order shall specify the

reasons for the denial. If a requested accommodation is not provided by the court under subsection (c)(2) or (c)(3) of this rule, the court's order shall include a description of:

(1) the facts and/or circumstances that make the accommodation impossible under subsection (c)(2) or impractical under subsection (c)(3); and

(2) the reasons why the proceeding cannot be continued without prejudicing a party to the proceeding. The court shall inform the applicant and the court personnel responsible for implementing accommodations that the request for accommodation has been granted or denied, in whole or in part, and the nature of the accommodation to be provided, if any.

(f) Duration of Accommodation. The accommodation ordered shall commence on the date set forth in the order granting the accommodation and shall remain in effect for the period specified in the order, which may be extended as the court deems appropriate. The court may grant an accommodation for an indefinite period or for a particular proceeding or appearance.

D. Washington State Case Law on Incarceration of Status Offenders

Perkins v. State, 93 Wn. App. 590, 595-96, 969 P.2d 1101 (1999).

(Because an initial truancy hearing is civil in nature, and because no significant liberty interest is at stake, litigants are not entitled to appointed counsel at an initial truancy hearing.)

In re J.L., 140 Wn.App. 438, 166 P.3d 776 (2007)

(The juvenile court violated the juvenile's right to due process by punishing her without providing her an opportunity to purge the contempt and avoid incarceration. Since the juvenile could not immediately satisfy the conditions and remained in jeopardy of incarceration, the sanction was punitive, imposed and suspended on conditions and, thus, criminal. The juvenile court could not impose criminal contempt sanctions against the juvenile unless the juvenile was afforded the same due process rights afforded other criminal defendants – filing of charges by the prosecutor, assistance of counsel, privilege against self-incrimination, and proof beyond a reasonable doubt.)

In re Dependency of A.K., 162 Wn.2d 636, 647, 174 P.3d 11 (2007)

(Although the juvenile courts have the inherent authority to impose punitive contempt sanctions for violations of their dependency placement orders, such authority was improperly exercised in these cases where the juvenile courts failed to find that statutory remedies for criminal contempt were inadequate.)

In re the Interests of M.B., 101 Wn. App. 425, 446, 3 P.3d 780 (2000).

Juvenile court can impose detention as a remedial sanction for contempt under [Wash. Rev. Code § 13.32A.250](#). The rules of evidence apply in proceedings under [Wash. Rev. Code § 13.32A.250](#), and witnesses had to testify under oath. Requiring youths to write a paper in order to purge the contempt was an appropriate exercise of discretion. Ordering a youth to participate in a substance abuse program violated [Wash. Rev. Code § 13.32A.196\(3\)](#). Ordering a youth to remain in detention until foster care violated due process.

Appendix C - Systemic Challenges

I. Right to Counsel at the Initial Truancy Hearing

Since the first edition of this Truancy Practice Manual, the Court of Appeals ruled in *Bellevue School Dist. v. E.S.*, 148 Wn.App.205, 199 P.3d 1010 (2009) that children must be represented by counsel at the initial stages of a truancy proceeding. The case is currently set for review by the Washington Supreme Court. Prior to this ruling, many advocates believed in the importance of counsel to assist youth in enforcing the district's obligations under the statute and defending against unsubstantiated truancy findings.

Youth involved in truancy court are generally ill equipped to understand the nature of the proceedings and the charges against them. A child's interest in receiving an appropriate education, including special education, or in being protected from discrimination at school, coupled with a child's inability to present complex legal or factual matters to the court, may mean that a fair result cannot be reached without appointment of counsel. Yet, in 1999, Division One of the Court of Appeals rejected a claim that students are entitled to appointed counsel at the initial truancy hearing. *Perkins v. State*, 93 Wn. App. 590, 595-96, 969 P.2d 1101 (1999). Some developments in case law and court rules since *Perkins* may present an opportunity for reconsideration of the issue.

Under federal due process, the right to counsel generally attaches only where physical liberty is at stake, "unless a different result is necessary under the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." *In re Marriage of King*, 162 Wn.2d 378, 393, 174 P.3d 659 (2007). In truancy cases, where youth are called on to represent themselves against the power of the state, and in some cases against their parents as well, the *Mathews v. Eldridge* factors may require a different result. The U.S. Supreme Court has acknowledged that whenever a person is required to resolve questions of right and obligation in a court of law – as are youth in truancy court – the court must ensure the person's right to due process in those proceedings. *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). The Washington Supreme Court recently considered a claim for a right to state-appointed counsel in marriage dissolution proceedings. *In re Marriage of King*, supra. The court held that there is no right to appointed counsel in dissolution proceedings, but distinguished dissolution, which involves two private parties, from civil actions instituted by the government against a private party. See *id.* at 395-96. Truancy cases, of course, pit the resources of the state against not just a private party, but against youth who are not afforded guardians ad litem and whose parents may be adversarial parties in the same action.

Also, Washington recently promulgated a new court rule, GR 33, requiring that courts be made readily accessible to parties with disabilities, through provision of reasonable accommodations if necessary. GR 33. This new rule follows upon the U.S. Supreme Court's 2004 decision in *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), holding that state courts are subject to Title II of the Americans with Disabilities Act and must make reasonable accommodations for individuals with disabilities. The rule requires courts to consider parties' requests for particular accommodations, and states that a reasonable accommodation might include representation by counsel in cases where

counsel is not generally appointed. GR 33(a)(1)(C). Because it is a new rule, there is no additional guidance on what factors courts might find persuasive when the requested accommodation is appointment of counsel. However, where a student's particular disability impacts his or her ability to understand legal proceedings, speak on behalf of him or herself, or appreciate the potential legal consequences of the court's orders without an advocate, appointment of counsel may be an appropriate accommodation to request.

II. Motion to Disqualify School Representatives for Unauthorized Practice of Law

The Becca Bill permits non-lawyer school district employees to file truancy petitions and appear at truancy hearings without counsel. RCW 28A.225.030(3). It requires courts to permit the district to be represented by a non-attorney at hearings subsequent to the initial fact-finding hearing. RCW 28A.225.035(11). Attorneys in two counties have successfully defended against contempt sanctions by challenging these statutory provisions on grounds that they infringe on the judiciary's authority to regulate the practice of law. This issue has not been taken up on appeal, so there is no case law addressing the claim. However, it may be most successful if you can show specifically how the school district representative's lack of legal training will harm, or has harmed your client's interests. For example, consider raising this issue if:

- The school representative filed an insufficient petition without regard to its pre-filing obligations and refuses to dismiss, stay or amend the petition;
- The school representative's failure to comply with notice requirements resulted in an improper default order or issuance of a bench warrant;
- The school representative pursues contempt sanctions in spite of evidence that violations of your client's rights under state or federal laws, such as the right to special education, bilingual education, or protection from anti-discrimination, are causing your client's absences; or
- Other complicated legal or factual issues arise.

You might challenge the underlying order as void pursuant to CR 60(b), or move for disqualification of the school district representative. This may lead to involvement of the county prosecutor, or possibly to dismissal of the case.

III. Establishing an Efficient Appointment Process

In order to effectuate the constitutional right to counsel on contempt, counsel should be appointed sufficiently in advance of any contempt hearing to allow time for interviewing the client, gathering evidence and preparing a defense.

At the time of this writing, the procedures for appointment of counsel vary considerably by county. In some counties, the court administrator automatically assigns cases to the office with the truancy contract, and the assigned attorney is able to contact the client in advance of the hearing. In other counties, truancy contempt proceedings are treated in much the

same manner as initial appearances: the office holding the truancy contract makes an attorney available for the truancy calendar, that attorney meets the client and is asked to appear that same day for the scheduled hearing. In some counties, an attorney has been appointed to represent only those students who do not waive counsel.

Because last-minute appointment severely hampers counsel's ability to provide effective representation, we encourage attorneys to work with their court administrators and county officials, if necessary, to adjust the appointment process. Also, establishing a process for automatic appointment of counsel can minimize the risk that students will improperly waive counsel.

Resources and support for implementing changes in appointment processes may also be available from the State Office of Public Defense.

Issues to address in an efficient appointment process would include:

- Means to ensure prompt appointment;
- Scope of representation;
- Protections to ensure youth are not asked to waive counsel without first consulting with an attorney; and
- Procedures to ensure that demands of attorney costs from parents do not improperly hinder a students' access to counsel

A. Appointment Procedures to Protect the Child's Right to Counsel

Ideally, counsel will be automatically assigned to represent each student each time a motion for contempt is filed or a show cause hearing is set in a truancy matter. The hearing dates should be set far enough in the future to allow time for counsel to receive the case file, meet with the client and develop the case. If the child later decides to retain counsel, appointed counsel can withdraw from representation.

An automatic appointment process might be established as follows:

- When a motion for contempt is filed, the court clerk generates a notice to counsel informing him or her of assignment of a new case;
- If the court sets a contempt hearing on its own motion, the court clerk generates the same notice to counsel informing him or her of assignment of a new case;
- Upon receipt of notice of the assignment, counsel runs a conflict check; if a conflict exists, counsel returns the case to the court clerk for re-assignment or refers to conflict counsel;
- If no conflict exists, counsel informs the court that he or she accepts representation;
- Counsel contacts the court to secure a complete copy of the existing court file;
- Counsel contacts the client prior to the scheduled hearing date.
- Counsel submits a Notice of Appearance/Request for Discovery to obtain school, medical and counseling records, including appropriate releases. See *Chapter Two: Gathering Documents*.

At the same time:

- When a motion for contempt is filed or a contempt hearing is set, the school or the court provides the student with notice of the motion, the hearing date, and his or her rights, including the right to counsel.
- The notice informs the student that he or she has the right to have an attorney and that one will be appointed and will represent him or her at no cost if the student cannot afford an attorney.
- The student is contacted by the attorney prior to the hearing.

B. Scope of Representation

To assure consistency in representation and adequate knowledge of the individual student's needs, counsel should be appointed to represent a student for the entire duration of a truancy case. Once counsel is appointed, the defender should retain the case until it is dismissed, or until the student turns eighteen.

In practice, counsel is almost always appointed only to represent a student to defend against contempt charges. At a minimum, counsel must retain the matter until the contempt motion has been denied or dismissed, or, in cases in which the student is found in contempt, until the student has purged contempt. Preferably, representation will extend to post-disposition monitoring of the case, so that counsel is able to retain the case for so long as is appropriate and necessary to ensure that conditions are being properly implemented and the student is successfully re-engaged in school. This may mean advocating for continued cooperation by the school and moving for dismissal of the order after a reasonable period of improved attendance.

The duration of the appointment will generally be dependent the defense contract used in each jurisdiction. Review your contract to understand the expectations regarding scope of representation in your jurisdiction. If the contract is ambiguous, or does not reasonably permit representation throughout the contempt process, consider whether adjustments might be appropriate or necessary.

Many opportunities exist for advocacy even if the defender is appointed only for purposes of the contempt hearing. It may take several months for a student to actually purge contempt. A review hearing will often be set by the court to determine whether the student has met his or her purge conditions. A defender remains appointed during this time, and should take those opportunities to advocate for the client to address the causes of their truancy.

C. Basics of Representation at Contempt Hearings

When counsel represents students for the purpose of defense at the contempt hearing, this should include:

- An opportunity to meet with the client and his or her parents or guardians prior to the contempt hearing;
- Review of all relevant discovery, including past court records, school records, (including attendance, discipline, grades, and other documents such as meeting notes, special education records, and school rules and attendance policies), medical or mental health records, and all other documentation;
- Negotiation or settlement discussions with the school representative or prosecutor prior to the truancy contempt hearing;

- Representation at the contempt hearing, including submitting appropriate motions and briefs, presenting evidence, calling or cross examining witnesses, and preparing mitigation arguments; and
- Representation at any subsequent review hearings, including submitting appropriate motions and briefs, presenting evidence, calling or cross examining witnesses, and preparing mitigation arguments.

If appointment of counsel is made the morning of the contempt proceeding, counsel may need to seek a continuance. See *Chapter Three: Checklist - Seeking a Continuance*.