ETHICS: INEFFECTIVE ASSISTANCE OF COUNSEL IN CPS CASES

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Ethics: Ineffective Assistance of Counsel in CPS Cases

I. INTRODUCTION:

Ineffective assistance of counsel claims have long been a part of this State's jurisprudence in criminal cases based on the constitutional right to assistance of counsel available to criminal defendants under the Sixth Amendment of the Federal Constitution.[1] Until recent times, however, these type claims were not entertained in civil cases and were routinely rejected in civil proceedings involving parental termination.[2] After this century began, however, three different appellate courts decided the right to such claims should be available in parental termination cases.[3] In 2003, the Texas Supreme Court in In re M.S., 115 S.W.3d 534, 544 (Tex. 2003) followed this lead and held that ineffective assistance claims were available for parents statutorily appointed counsel in parental termination suits.

As a direct consequence of ineffective assistance of counsel claims in civil parental termination cases the competent performance of statutorily appointed attorneys has become an important focus that compels many ethical issues. To help practitioners face the challenges produced by this claim, this paper provides discussion of the Supreme Court's decision, sample evaluation of ineffective assistance claims and considerations or strategies in addressing the ethical challenges this new claim brings.

II. IN RE: M.S.: WHAT DOES IT SAY?

A. What the court did and did not say about the right to ineffectiveness claims

1. Statutory Right Supports Claim

In In re M.S.,[4] the Texas Supreme Court considered the complaint of a parent, Shana Strickland, whose parental rights were terminated in a suit in which Ms. Strickland had court appointed counsel as required under a provision in the Family Code which requires the appointment of counsel for indigent parents who respond in opposition to a parental termination suit.[5] Ms. Strickland complained that her constitutional due process[6] rights were violated, because her statutorily appointed counsel was ineffective.[7] Specifically, Ms. Strickland complained that her appointed counsel failed to ensure the reporter recorded voir dire, the charge

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[1] *See e.g.* Freeman v. State, 125 S.W.3d 505 (Tex. Crim. App. 2003); Ward v. State, 740 S.W.2d 794 (Tex. Crim. App. 1987); Petersen v. State, 439 S.W.2d 841 (Tex. Crim. App. 1969); Wilson v. State, 407 S.W.2d 508 (Tex. Crim. App. 1966); *See also* Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainright, 372 U.S. 335, 339 (1963). U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." (emphasis added).

[2] *See* In Re B.B., 971 S.W.2d 160, 172 (Tex. App.--Beaumont 1998, pet. denied); Arteaga v. Texas Dep't of Protective & Regulatory Servs., 924 S.W.2d 756, 762 (Tex. App.--Austin 1996, writ denied); In re J.F., 888 S.W.2d 140, 143 (Tex. App.--Tyler 1994, no writ);); Krasniqi v.Dallas County Child Prot. Servs. Unit, 809 S.W.2d 927, 932 (Tex. App.—Dallas 1991, writ denied); Posner v. Dallas County Child Welfare Unit of Tex. Dep't of Human Servs., 784 S.W.2d 585, 588 (Tex. App.--Eastland 1990, writ denied; Howell v. Dallas County Child Welfare Unit, 710 S.W.2d 729, 735 (Tex. App. --Dallas 1986, writ ref'd n.r.e.); *See also* Walton v. City of Midland, 24 S.W.3d 853, 862 (Tex. App.-- El Paso 2000, no pet.) (ineffective assistance of counsel claims inapplicable in civil cases generally).

[3] In re K.L., 91 S.W.3d 1, 11 (Tex. App. – Fort Worth 2002, no pet); In re B.L.D., 56 S.W. 3d 203 (Tex. App.—Waco 2001), *reversed*, 113 S.W.3d 340 (Tex. 2003); In the Interest of A.V. and J.V., 57 S.W. 3d 51 (Tex. App.—Waco 2001), *reversed*, 113 S.W.3d 355 (Tex. 2003); and In the Interest of J.M.S., 43 S.W. 3d 60 (Tex. App. –Houston [1st Dist.] 2001, no pet.).

[4] 115 S.W.3d 534.

[5] Specifically, Ms. Strickland was appointed counsel under TEX. FAM. CODE ANN. §107.013 (Vernon 2002) which required the court to appoint counsel for any parent who is indigent and responds in opposition to a suit for termination of their parental rights.

[6] As the opinion indicates she based her challenge on "due process" which indicates her claim was under the federal constitution right, U.S. Const. Art. XIV, which provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, **without due process of law**. . . " It does not appear she relied on a construction under the Texas Constitution, TEX. CONST. art. I, § 19, which is phrased in terms of due *course* of law, providing:" "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

[7] 115 S.W.3d at p. 543.

conference, and closing arguments, failed to preserve her factual sufficiency complaint, and failed to file alternative pleadings allowing for the possibility of a less drastic outcome than outright termination. The Supreme Court agreed that she should have a right to bring ineffectiveness of counsel claims.

The reason the Supreme Court gave in support of Ms. Strickland's right to bring ineffective assistance of counsel claims was based on the statute that granted her free legal counsel. As the court explains:

> In Texas, there is a statutory right to counsel for indigent persons in parental-rights termination cases. n26 The courts of appeals, however, disagree over whether that statutory right carries an implicit requirement that counsel's assistance be competent and effective. n27 And this Court has only tangentially discussed whether a parent has a right to competent legal assistance in a parental-rights termination proceeding. n28 But we believe that "it would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively." n29 We hold that the statutory right to counsel in parental-rights termination cases embodies the right to effective counsel. We thus align Texas with most of the other states that provide a similar right. n30

115 S.W.3d at p. 544. As indicated, the court essentially found ineffective assistance of counsel claims were cognizable, at least with respect to parents who are statutorily appointed counsel, because the statutory right to counsel implicitly carries a right to complain on appeal about the appointed counsel's effectiveness.

2. Did not say constitutional due process provided right to claim

What is important in examining the Supreme Court's support for ineffective assistance of counsel claims is not just what it said, but what it did not say. As seen in the excerpt above, the Supreme Court's simple explanation for the right to an ineffectiveness claim leaves out express reliance on any constitutional basis, such as the due process clause of the Fourteenth Amendment or the Sixth Amendment right to counsel. Nevertheless, as indicated in the court's opinion, Ms. Strickland's argument was that her due process rights had been violated by the ineffectiveness of her counsel.[8] Ms. Strickland's argument seemed appropriate since the few cases where ineffective assistance claims have been recognized in Texas in the civil context have, at least suggested they are cognizable as violations of either the Fourteenth Amendment or the Sixth Amendment, because of the potential loss of physical liberty: such as in juvenile delinquency proceedings,[9] which have criminal loss of liberty implications, and mental health commitments, which result in loss of liberty much like incarceration.[10] The Supreme Court did not cite to

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[8] 115 S.W.3d at p. 543 ("Strickland alleges that her attorney failed to provide competent representation . . in violation of her right to due process of law.").

[9] *See* In re K.J.O., 27 S.W.3d 340, 342 (Tex. App. --Dallas, 2000 pet. denied) (court acknowledged Texas Supreme Court has not addressed issue, but held ineffective assistance claims could be brought in juvenile delinquency proceeding even though they were civil proceedings, because the United States Supreme Court held a juvenile is entitled to counsel in a juvenile delinquency proceeding and such right necessarily included the right to *effective* assistance); *See also* In re M.S., 940 S.W.2d 789, 791 (Tex. App. – Austin 1997, no writ) (recognized juvenile delinquency proceedings to be criminal in nature and subject to right of effective assistance of counsel); R.X.F. v. State, 921 S.W.2d 888, 902 (Tex. App. -Waco 1996, no writ) (held juvenile entitled to effective assistance of counsel in adjudication hearing, because have both a statutory right as well as a due process right to assistance of counsel); M.B. v. State, 905 S.W.2d 344, 346 (Tex. App. – El Paso 1995, no writ) (held juveniles entitled to rights of defendants in criminal proceedings, because delinquency proceeding seeks to deprive juvenile of liberty interests); M.R.R. v. State, 903 S.W.2d 49, 51-52 (Tex. App. -- San Antonio 1995, no writ) (*per curiam*) (held juveniles entitled to effective assistance of counsel, because entitled to assistance of counsel at every stage of proceeding by statute); *See also In re Gault*, 387 U.S. 1, 41 (1967) (held: "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").

[10] *See* Ex parte Ullmann, 616 S.W.2d 278 (Tex. Civ. App. – San Antonio 1981, writ dism'd); *See also* Lannett v. State,

these cases in M.S., nor did it expressly state the claim was based on due process concern. Instead, the court commented that its reliance on the statutory right to counsel as the basis for an ineffectiveness claim aligned with the reasoning given by other states in this Nation.[11]

Later in the court's evaluation of the alleged deficiencies of Ms. Strickland's lawyer, the court performed evaluation under the due process clause of the Fourteenth Amendment. Nevertheless, it is apparent that the court's reference at that point was only to determine whether the attorney's decision not to file a motion for new trial with a factual sufficiency complaint could amount to a deficiency for purposes of an ineffective assistance claim.[12]

Had the Texas Supreme Court relied on the Fourteenth Amendment of the federal constitution as the basis for the right to bring an ineffectiveness complaint, the court may have found difficulty in applying the analysis from the United States Supreme Court. The United States Supreme Court never considered whether a parent has a right to an ineffectiveness claim in a parental termination suit. Nevertheless, in Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) the Supreme Court considered an indigent parent's right to counsel claim in a parental termination proceeding that was litigated in a State that did not provide indigent parents with a statutory right to counsel. Specifically, in Lassiter, the high court acknowledged that parental termination cases were civil in nature, not subject to the Sixth Amendment right to counsel available to criminal defendants, and that the court would have to draw its due process analysis from a historical presumption that an indigent litigant only has a right to appointed counsel when, if he loses, he may be deprived of physical liberty. Id. at pp. 26-27.

The court determined that a case-by-case analysis would need to be applied to decide whether the Fourteenth Amendment's requirement of due process required appointment of counsel and cited Matthews v. Eldridge, 424 U.S. 319, 335 which contains the traditional factors applied to civil proceedings. Such test propounds three elements to be evaluated in deciding what due process requires: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. The court noted it would have to balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom. On that evaluation in the case before it, the court found the right was not compelled with respect to Ms. Lassiter.

Because the United States Supreme Court did not find that the constitution compelled the necessity for lawyers for parents in all parental termination cases, it is difficult to imagine that this precedent would have made it easy for the Texas Supreme Court to formulate an analysis that would have allowed ineffectiveness claims for parents in all parental termination cases, even if statutory appointment was involved. By using the due process analysis in the evaluation of the claim, rather than in the support for the claim in the first instance, the Texas Supreme Court avoided this problem.

3. Did not comment whether its decision about ineffectiveness claims were limited to statutorily appointed attorneys for parents in termination suits.

Relying on a statutory right as a basis for this claim; however, may have some consequences in civil litigation in this State. Absent from the court's decision is any statement indicating whether the court's holding that ineffectiveness claims derive from the statutory right to counsel extends beyond indigent parents who are statutorily appointed counsel in parental termination suits. This, therefore, leaves open the question whether ineffectiveness claims may be available with respect to other statutorily appointed attorneys.

In a parental termination case, an indigent parent is not the only party who may have

750 S.W.2d 302, 306 (Tex. App. Dallas 1988, writ denied) (while not considering an ineffective assistance of counsel claim directly, court noted ineffective assistance of counsel claims were proper based on Ex parte Ullmann, 616 S.W.2d 278 when it considered the admissibility of a psychiatrist's testimony).

[11] 115 S.W.3d at p. 544.

[12] 115 S.W.3d at 547.

statutorily appointed counsel. The attorney for the Department of Family & Protective Services [hereinafter "Department"] which brings the suit is statutorily provided counsel pursuant to TEX. FAM. CODE ANN. §264.009 (Vernon 2002). Also, both the child's attorney ad litem and guardian ad litem are mandatorily appointed under TEX. FAM. CODE ANN. §107.011 and §107.012 (Vernon Supp. 2004). In addition, an attorney may be appointed for a person entitled to service of citation if the court finds the person is incapacitated under TEX. FAM. CODE ANN. §107.010 (Vernon Supp. 2004).

While challenges have not yet been brought as to all the potential attorneys who could be appointed in a parental termination case, three opinions have issued in which the parents brought ineffectiveness complaints based on the ineffectiveness of the attorney ad litem for the child[13] All three of these opinions, however, recognized that a parent must have a sufficient interest that affects the parent's rights to bring a claim as to the child's attorney ad litem.[14] Two of these opinions, from the Fort Worth and Amarillo Court of appeals, rejected the ineffectiveness claims brought against the child's attorney holding that the parents lacked standing to complain about the child's attorney.[15] The Beaumont Court of Appeals, while recognizing there would need to be some showing that the performance of the child's ad litem affected the parents' rights to due process and equal protection, went ahead and addressed the claim and held no deficiency in the attorney's performance was shown in the record.[16]

[13] In re T.N., 142 S.W.3d 522 (Tex. App. – Fort Worth 2004, no pet.) (held mother had no standing to bring claim absent showing that the ad litem's performance affected an interest of the parent); In re S.G.S., 130 S.W.3d 223 (Tex. App. – Beaumont 2004, no pet.) (did not address whether parents had sufficient interest for standing to complain about child's attorney ad litem, and instead held no deficiency shown in record to complain about); In the Interest of Z.J., No. 07-03-0401-CV, 2004 Tex. App. 2770 (Tex. App. –Amarillo 2004, no pet.) (held parent did not have standing to allege error on the basis of the inadequate performance of the attorney ad litem).

[14] Id.

[15] In re T.N., 142, S.W.3d 522; In the Interest of Z.J., 2004 Tex. App. 2770.

[16] In re S.G.S., 130 S.W.3d 223.

some statutory right to court appointed counsel even after termination was abandoned.[21]

4. Did not comment on whether ineffectiveness claim gave rise to other procedural rights traditionally extended under construction of the Sixth Amendment right to counsel for criminal defendants

As already discussed, the Texas Supreme Court framed the ineffectiveness claim as a violation of a statutory right, rather than a claim deriving from a violation of the federal constitution's Fourteenth Amendment or Sixth Amendment. Nevertheless, since ineffectiveness claims have traditionally been a creature of constitutional protection under the Sixth Amendment, it leaves open the question whether other process might be available that traditionally have been construed under the Sixth Amendment right to counsel. For example, in In re D.E.S., No. 14-03-00724-CV, 2004 Tex. App. 3731 (Tex. App. – Houston [14th Dist.] 2004, the Fourteenth Court of Appeals held the procedure of Anders briefing, extended in criminal cases by virtue of the Sixth Amendment, was impliedly invoked under the reasoning of M.S.

The Court explained as follows:

> Last year, the Texas Supreme Court held that a Sixth Amendment right to effective assistance of counsel exists in parental-rights termination cases. *See* In re M.S., E.S., D.S., 115 S.W.3d 534 , 544, 46 Tex. Sup. Ct. J. 999 (Tex. 2003). In doing so, our high court extended the *Strickland* test n9 used in the criminal context to civil parental-rights termination proceedings. Id. at 545. The procedure prescribed by the United States Supreme Court in *Anders* derives from the Sixth Amendment right to counsel. *See* Anders, 386 U.S. at 742, 87 S.Ct. at 1399. Therefore, it seems logical to conclude that the Texas Supreme Court would allow the filing of an *Anders* brief derived from this right in the parental-rights termination context.[22]

As indicated, the Fourteenth Court suggests the high court's reasoning supports the extension of additional processes traditionally afforded to criminal defendants under the Sixth Amendment. The court then went on to further support this conclusion by noting that Anders procedures had been extended by the Texas Supreme Court in the context of juvenile-delinquency proceedings, because of their quasi-criminal nature; and that the Texas Supreme Court had considered whether additional process may be due parents with respect to unpreserved error under a Fourteenth Amendment due process analysis.[23]

The fact that the Fourteenth Court suggested parental termination cases may require additional processes available as quasi-criminal type cases, leaves open the question as to whether other processes typically available in the criminal context may become an issue. One obvious matter that comes to mind, in this context, is whether the Supreme Court would expand M.S. to allow ineffective assistance claims when a parent has a retained lawyer, because that would be a right afforded under the Sixth Amendment to criminal defendants.[24] At least one appellate court evaluated an ineffectiveness claim brought by a parent who complained that her retained lawyer was ineffective for accepting the employment three days before trial without seeking a continuance.[25] Nonetheless, the court indicated it evaluated the claim, because the statutory right to counsel embodies the right to effective counsel. Since there was no statutory right involved, it appears the evaluation may have overlooked stating the quasi-criminal analysis in support of the claim.

In this regard, it should be considered that past decisions of the Texas Supreme Court indicate the court has not been open to characterizing

[21] TEX. FAM. CODE ANN. §107.013 (Vernon 2002) requires appointment of attorneys for indigent parents who respond in opposition to a suit for parental termination. There is not a statute which requires appointment for indigent parents in suits that do not involve parental termination.

[22] 2004 Tex. App. 3731 *8-9.

[23] Id.

[24] Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.").

[25] *See* Taylor v. Brazoria County Children Prot. Servs., No. 10-03-00148-CV, 2004 Tex. App.8729 (Tex. App. – Waco 2004, no pet.).

parental termination cases as straight quasi-criminal cases. In In re A.V., the court explained that the focus of parental-termination cases is not punitive in nature, like criminal cases.[26] Also, in In re J.F.C.,[27] the Supreme Court effectively declined the invitation to treat parental termination cases as quasi-criminal to afford, as the appellate court had, review of unpreserved errors in a jury charge that relate to "core" issues. Nevertheless, this is not to say other process may become an issue under some other provision of the constitution.

5. Did not comment on the effect of changes in the law effective with respect to suits filed after September 1, 2003.

Since M.S., in Brice v. Denton,[28] Justice Tom Gray of the Waco Court of Appeals commented that the Supreme Court's opinion in M.S. evaluated the right to an ineffectiveness claim without regard to at least one significant change made by the Legislature in this statutory scheme for suits filed after September 1, 2003. Specifically, Justice Gray referred to TEX. FAM. CODE ANN. §107.001(2) (Vernon Supp. 2004), not applicable to the suit before the Supreme Court in M.S., which defined the term "attorney ad litem" in suits affecting the parent child relationship to mean "an attorney who provides services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality and **competent** representation."[29] (emphasis added).

Justice Gray explained in his dissenting opinion that the legislature's new statutory provision explaining the duty owed from an attorney ad litem as "competent" representation was significant, because of how that term was evaluated by the Court of Criminal Appeals in deciding whether effective assistance rights were implicated. In Ex parte Graves, 70 S.W.3d 103, 113-16 (Tex. Crim. App. 2002), interpreting TEX. CODE CRIM. PROC. Art. 11.071, §2(a), (c) (Vernon Supp. 2004), the Texas Court of Criminal reiterated that the statutory right to "competent" appointed counsel in proceedings on writs of habeas corpus in capital cases did not implicate the requirement of the "effective" assistance of counsel. The dissent in Brice found it significant that in the same legislative session following that decision in which the legislature defined the "attorney ad litem" to owe a duty that included the duty of "competent representation" to the client in 107.001(2) of the Family Code, the Legislature seemed to accept the Court of Criminal Appeals' interpretation of Article 11.071 by not amending its references to "competent counsel" or otherwise abrogating the Court of Criminal Appeals' interpretation. Accordingly, the dissent concluded when *M.S.* interpreted the law prior to the statutory adoption of the "competent representation" standard, the court failed to consider the Legislature's prospective definition of the duties of an attorney ad litem to include "competent" representation which may have been intended to adopt the Court of Criminal Appeals' interpretation.

B. Holds the criminal Strickland standard applies in evaluating claims

In evaluating Ms. Strickland's claim in M.S., the court coincidentally considered another Strickland, Strickland v. Washington, 466 U.S. 668 (1984), and indicated that the standard in that criminal case should be applicable in deciding claims of ineffective counsel in the parental termination context.

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[26] In In re A.V., 113 S.W.3d 355 (Tex. 2003) the court commented:

> [I]n securing what is in the best interests of the child, the State is not pursuing a retributive or punitive aim, but a "purely remedial function: the protection of minors." n32 We recognize that parental-rights termination proceedings also affect a parent's constitutionally-protected relationship with his or her children, a right that presumably cannot be altered through retroactive application of law. n33 But this Court has stated that "the rights of natural parents are not absolute; protection of the child is paramount. . . . The rights of parenthood are accorded only to those fit to accept the accompanying responsibilities." n34 Therefore in parental-rights termination proceedings, though parents face losing this highly-protected legal relationship, courts cannot ignore the statute's remedial purpose of protecting abused and neglected children.)

[27] 96 S.W.3d 256, (Tex. 2003).

[28] No. 10-01-392-CV, 2004 Tex. App. LEXIS 2329 *32-33, (Tex. App. – Waco 2004, no pet) (dissenting opinion by Justice Tom Gray).

[29] *See* Act of May 27, 2003, 78th Leg., R.S., ch. 262, §§2-3, 2003 Tex. Gen. Laws at 1183.

Strickland involved an appellate challenge based on ineffectiveness of counsel brought by a criminal defendant sentenced to death. In deciding the claim, the United States Supreme Court set forth what is now a very familiar criminal standard for evaluating effective assistance of counsel claims:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

Acknowledging the two components of Strickland, in M.S., the Supreme Court indicated this standard should apply in the termination context. The Texas Supreme Court further acknowledged as follows:

> With respect to whether counsel's performance in a particular case is deficient, we must take into account all of the circumstances surrounding the case, and must primarily focus on whether counsel performed in a "reasonably effective" manner. n36 The Court of Criminal Appeals explained that counsel's performance falls below acceptable levels of performance when the "representation is so grossly deficient as to render proceedings fundamentally unfair . . . ." n37 In this process, we must give great deference to counsel's performance, indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," including the possibility that counsel's actions are strategic. n38 It is only when "the conduct was so outrageous that no competent attorney would have engaged in it," that the challenged conduct will constitute ineffective assistance. n39

M.S., 2003 Tex. App. 108 *31.

1. Parent bears burden to establish harmful conduct

a) If error relates to the absence of a particular appellate record, parent bears burden to show what errors would have shown had it been recorded.

In specifically applying the Strickland Standard in M.S., the Texas Supreme Court considered the parent's complaint that her attorney provided ineffective assistance, because he failed to have certain portions of the record transcribed. Basically, Ms. Strickland argued that if she had those portions she might have found that her attorney did something wrong.[30] The Supreme Court stated that was not good enough to show her attorney's performance was deficient or that such deficiency prejudiced her defense. The court stated she must at least show what errors would have been recorded if a record had been made.[31] In applying the Strickland standard in this way, the appellate court clarified that the party bringing an ineffectiveness claim bears the burden to establish that a particular alleged omission in legal representation actually caused harm.

b) Parent has the burden to explain how an act or omission is error.

Moreover, the court's opinion indicated that a parent's failure to carry this burden by providing adequate explanation in their appellate brief could result in it not being considered at all. The court noted that Ms. Strickland complained in her briefing that her counsel failed to file alternative pleadings that would allow the jury to consider less drastic alternatives than outright termination. But she did not argue anything further about that point. Accordingly, the court stated it would not address it.[32]

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[30] 115 S.W.3d at p. 546.
[31] Id.
[32] 115 S.W.3d at p. 550.

2. Deciding deficiency with respect to error preservation must be reviewed through due process prism.

With respect to Ms. Strickland's complaints about her attorney's failure to bring a factual sufficiency complaint, the Texas Supreme Court did not simply conclude that the failure to bring a factual sufficiency complaint was deficient conduct for purposes of the Strickland test. Instead, the court began with acknowledging that it previously held due process did not relieve a parent in a parental termination case from the effect of waiver of appellate review of an appellate point on jury charge error if the parent's attorney failed to preserve that error as required by the appellate rules. In other words, the court acknowledged that it had already determined that an attorney's failure to do what is necessary to preserve a jury charge complaint could not be a deficiency that could circumvent application of an express rules of procedure that would preclude appellate review of that error, even considering due process concerns for parents in parental termination cases.

Nevertheless, the court noted that it questioned in In re J.F.C., whether due process may compel a different result with respect to preservation of factual sufficiency complaints.[33] The court went on to explain that a due process analysis, as had been done in J.F.C., must be considered in deciding whether the preservation omission of the attorney could be a potential deficiency under the Strickland test. As such, the court suggested that it would not construe the statutory right to counsel, through an ineffective assistance of counsel claim, to provide a mechanism to avoid application of the procedural rules on preservation of error for an attorney's failure if the right to constitutional due process would not.

In further explanation, the court stated that Texas gives a right to an appeal and the United States Supreme Court had held that unreasonable restraints should not be placed on allowable appeals in parental termination cases where such restraints would impede free and equal access to the courts.[34] In this connection, the court considered M.L.B., a United States Supreme Court case that determined free and equal access to the court for an indigent parent was impeded when the indigent parent lost her right to appellate review for failure to pay for a record.[35] Accordingly, the court indicated a deficiency in failing to preserve a factual sufficiency complaint would have to be evaluated to see whether it constituted a prevailing right through a "due process prism."[36]

In turning to its due process prism, the court noted that it applied the standard used by the United States Supreme Court in Matthews v. Eldridge, 424 U.S. 319 (1976) which weights three factors: the private interests at stake, the government's interest in the proceeding, and the risk of erroneous deprivation of parental rights – and balanced that net result against the presumption that our procedural rules comport with constitutional due process requirements. Concerning the private interests, the court commented that the United States Supreme Court has described the right of a parent to maintain custody of and raise his or her child as an interest far more precious than any property right, and the Texas Supreme court recognizes the right to be paramount, and a commanding one. Moreover, the court noted that the private interest factor included consideration of the child's interest in the proceeding, sometimes aligned with the parent and sometimes aligned with the State, which the Family Code scheme indicated involved protection of the child's welfare and focus on the child's best interest.

The court goes on to comment that both the "parent and the child have a substantial interest in the accuracy and justice of a decision."[37] The court describes the State's fundamental interest as one to protect the best interest of the child, economically and with efficient resolution.[38] The court indicated that the State holds an interest in a speedy resolution, because of the psychological effects prolonged litigation have on children, and the need for speed built into the Family Code procedural scheme for prosecution of these type cases. The court also commented that Justice

[33] 115 S.W.3d at p. 546.
[34] Id. citing M.L.B. v. S.L.J., 519 US 102 (1996).
[35] M.L.B., 519 U.S. 102.
[36] 115 S.W.3d at p. 547.
[37] 115 S.W.3d at p. 547.
[38] 115 S.W.3d at p. 548.

Schneider commented that the State favors preservation rules to avoid delay in termination proceedings.[39]

Nevertheless, the court commented, based on Santosky v. Kramer, that the state's interest in speedy resolution must work toward preserving familia bonds rather than severing. Therefore, notwithstanding the State's interest, its interests should be served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home. [40]

Calling it "pivotal" that termination is a drastic, permanent, and irrevocable relief, the Supreme Court then concluded that failure to raise a factual sufficiency complaint could violate a parent's due process rights. In explanation the court stated as follows:

> [A]any significant risk of erroneous deprivation is unacceptable. That a motion for new trial is required for appellate review of a factual sufficiency issue is something that competent trial counsel in Texas should know. And filing such a motion is not a difficult task. But though a just and accurate result cannot ever be absolutely guaranteed, we cannot think of a more serious risk of erroneous deprivation of parental rights than when the evidence, though minimally existing, fails to clearly and convincingly establish in favor of jury findings that parental rights should be terminated. Thus, if counsel's failure to preserve a factual sufficiency complaint is unjustified, then counsel's incompetency in failing to preserve the complaint raises the risk of erroneous deprivation too high, and our procedural rule governing factual sufficiency preservation must give way to constitutional due process considerations.[41]

3. Objective standard of reasonableness must apply in deciding whether conduct deficient.

While the Supreme Court found an attorney's incompetence in failing to raise a factual sufficiency complaint could rise to the level of a due process violation, the court did not automatically find such omission was a deficiency under Strickland and reverse the case on this point. The Supreme Court remanded this matter to the appellate court which is the only body with authority to review factual sufficiency complaints. In doing so, the court attempted to explain that it was not holding, as a matter of law, that factual sufficiency complaints rise to the level of reversible error in all cases, or even in the case before it.

Instead, the Court reaffirmed that the parent retained the burden on remand to show that the failure to preserve the factual sufficiency complaint rose to the level of ineffective assistance under Strickland. The court instructed that the appellate court to indulge a strong presumption that the counsel's conduct fell within the wide range of reasonable professional assistance, including the presumption that the omission was trial strategy, or because in the lawyer's professional opinion, he believed the evidence factually sufficient such that a motion for new trial was not warranted.[42] In short, the court stated that the appellate court must hold the parent to its burden to show that "counsel's performance fell below an objective standard of reasonableness" to characterize it as a deficiency.

4. Harm considered under a "but for" test determine whether deficiency warrants reversal.

In addition, the Supreme Court explained that finding the deficiency amounts to incompetence under an objective reasonableness standard would not be enough to justify reversal. The appellate court must also determine whether counsel's defective performance caused harm. In this connection, the court specifically explained as follows:

> [I]n other words, whether "there is a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding would have been different." n78 The appellate court will conduct such a review to determine harm as if factual sufficiency had been preserved,

[39] Id.
[40] Id.
[41] Id at p. 549.

[42] Id. at p. 549.

under our established factual sufficiency standard in parental-rights termination cases, understanding that the evidentiary burden in such cases is "clear and convincing." n79

More to the point, if the court of appeals finds that the evidence to support termination was factually insufficient, and that counsel's failure to preserve a factual sufficiency complaint was unjustified and fell below being objectively reasonable, then it must hold that counsel's failure to preserve the factual sufficiency complaint by a motion for new trial constituted ineffective assistance of counsel. In that case, the court of appeals should reverse the trial court's judgment, and remand the case for a new trial. n80[43]

III. SAMPLE EVALUATION OF INEFFECTIVE ASSISTANCE OF COUNSEL REVIEW

A. Situations decided by Texas Supreme Court before M.S.

Even before the Supreme Court decided an indigent parent with statutorily appointed counsel could properly bring an ineffectiveness of counsel claim, the court commented on situations where ineffectiveness claims would not prevail:

1. A parent's attorney's failure to challenge the charge's omission of the material best interest element did not warrant reversal for ineffectiveness in J.F.C.

In In re J.F.C.,[44] before the Supreme Court decided that ineffectiveness claims could properly be brought by parents, the Supreme Court considered numerous claims regarding the ineffectiveness of counsel in a parental termination case. While the court considered these claims, the court opined it was imprudent to decide in that case whether ineffectiveness claims were viable in parental termination cases since in the case before it those claims could not warrant relief by the court.

In one of the first challenges in J.F.C., the court considered the parents' complaint about their appointed attorney's failure to object to a charge's omission of a material element (that is: best interest). The court held it could not warrant reversal for ineffectiveness even if the criminal standard applied. In its analysis, the court noted that the parent's complaint was that the omission of the best interest element meant the parent was deprived of a jury finding on a material element, leaving it to be deemed found by the court. The Supreme Court did not find this to be a material deficiency, because the parent still had the right to challenge this evidentiary finding notwithstanding its omission. Moreover, the court did not seem to have a problem about this error depriving the parent of a jury finding on this particular issue, because it could have been sound trial strategy and the parent failed to show how it could not have been reasonable trial strategy.

2. Failure to seek jury instruction on parent's religious beliefs not ineffective assistance of counsel when sound trial strategy.

In J.F.C., the supreme court also considered the parent's complaint that their counsel was ineffective for failing to request an instruction not to consider the parents' religious beliefs. The court noted there was considerable testimony during the trial about the parents' religious beliefs, including one statement where the father testified that it was God who made cocaine available to the parents. Instead of requesting a jury instruction, however, the parents' attorney asked the Department's witnesses about the relevancy of the parents' religious beliefs and made arguments to the jury that the parents' religious beliefs were irrelevant to the termination inquiry. On this record, the supreme court stated, "[e]ven were it assumed that the trial court should have given an instruction to the jury had counsel so requested, it cannot be said that counsel's decision to address the parents' religious beliefs through argument was anything other than a reasonable exercise of trial strategy."[45]

3. Failure to object to questions about parent's sexual deviations every time is not ineffective assistance.

[43] Id. at p. 550.
[44] 96 S.W.3d 256 (Tex. 2003)
[45] In re J.F.C., 96 S.W.3d at p. 283.

In J.F.C., the parents further argued that their counsel should have objected every time they were asked during trial about their sexual conduct with third parties and alleged "sexual deviations." The Supreme Court noted that the parents' counsel objected many time, but not every time. The court opined that just because their counsel did not object to each and every question was not enough to constitute ineffectiveness, because it would presume that was an action "within the realm of reasonable trial strategy in light of the record."[46]

4. Failure to challenge reliability of testimony did not constitute ineffectiveness.

In J.F.C., the parents further urged that their counsel was ineffective for failing to challenge DPRS's expert witnesses with backgrounds in psychology and social work. The parents contended that they should have been challenged for reliability of their psychological expert testimony on the ground that there is no scientific basis for predicting future behavior or evaluating individuals. The court noted that psychological experts routinely testify in parental termination cases, and there was nothing in the record to indicate that if such objection had been made that the court would have agreed it was unreliable. Id.

5. Mistaken references to family service plans as orders not ineffectiveness.

In J.F.C., the parents also argued that their counsel treated the Family Service Plans developed by CPS as a court order even though the record confirmed only one Family Service Plan was referenced by a court order. The court noted, however, that there were three other orders in evidence which contained directives to the parents in the orders themselves, wholly apart from any Family Service Plan. Id. Apparently, because of these orders, the court found there was no actual mistake, or, if there was a mistake it did not harm the parents.

6. No ineffectiveness claim due to attorney's alleged conflict of interest in representing both parents where actual conflict not shown.

In In the Interest of B.L.D.,[47] the Supreme Court avoided review of a parent's complaint of ineffectiveness where the deficiency involved her attorney's alleged conflict of interest in representing her and another parent. The court avoided this claim, because after reviewing the claim, the court found no actual conflict existed.

B. Situations decided by Civil Appellate Courts since M.S.

l. Attorney's failure to raise constitutional challenges not ineffectiveness without objective proof that failure unreasonable and that but for failure result would be different.

In *In re W.Y.O*,[48] the Tyler Court considered a parent's ineffectiveness claim based on his counsel's failure to object to the constitutionality of applicable statutes. The parent argued this resulted in subjecting him to application of unconstitutional statutes upon him at trial and the loss of relief due to waiver on appeal.

After setting forth the Strickland test, the court concentrated mostly on the parent's failure to meet the burden of proving objective unreasonableness as well as prejudice. The court noted that the record was silent as to counsel's trial strategy, and the court saw no evidence from counsel's perspective concerning whether he considered challenging the constitutionality of section 574.034 and, if so, the reasons he decided not to. As a result, the court stated it was unable to determine whether the parent's attorney's failure to raise those issues in the trial court constituted unreasonable representation under an objective standard.

2. No ineffectiveness shown by attorney's failure to (1) to object to the admission of parents' criminal backgrounds; (2) failure to object to certain aspects of the jury charge; (3) failure to object to the admission of numerous CPS referrals; and (4) failure to show that the injuries of one of the children could have resulted from juvenile cerebral palsy

In In re J.W.,[49] the Dallas Court of Appeals considered a number of complaints raised by parents regarding the ineffectiveness of their counsel, and dealt with them briefly with little

[46] Id. at p. 284.
[47] 113 S.W.3d 340 (Tex. 2003).
[48] No. 12-02-00321-CV, 2003 Tex. App. LEXIS 7653 (Tex. App. – Tyler August 29, 2003) (memorandum opinion)
[49] 113 S.W.3d 605 (Tex. App. –Dallas 2003, pet. denied).

discussion. Specifically, the parents challenged their counsel's effectiveness for failing to object to the admission of criminal background information and CPS referrals, failure to challenge the charge and for failing to show that the children's injuries could have resulted from other factors, including celebral palsy. In light of the fact that the appellate court already decided that the evidence factually and legally supported the decision to terminate the parents' rights, the court stated they did not see in the record how they were harmed by these failures. Moreover, the court stated that the record was silent as to why counsel may have taken the actions that he did.

3. Ineffectiveness present when attorney for parent not appointed until date of final hearing.

In Brice v. Denton,[50] the Waco Court of Appeals considered a complaint of ineffectiveness raised with respect to a parent's attorney who the court stated was not represented until the day of the final hearing. In its explanation, the court found important that the record did not show that the appointed counsel asked for a continuance, the appointed attorney did not have an opportunity to consult his client who was in prison, the counsel's preparation appeared limited to reviewing the parent's criminal history, the evidence only filled one and half pages of the reporter's record and during cross examination, the appointed attorney actually adduced testimony about the parent's convictions for numerous things including harassment, stalking, several charges for indecency with a child and indecent exposure, as well as DWI. Considering that record, the court held the representation fell below reasonableness. Turning to the prong concerning whether it prejudiced the parent's defense, it appeared the court focused again on the deficiency of the parent's attorney whether than proof of prejudice. As justification, the court prefaced its evaluation with language from the Strickland case that indicated that a defendant need not show the deficient conduct more likely than not altered the outcome of the case.

A strong dissent was written by Justice Gray which disagreed with the opinion's conclusion that the conduct of the appointed attorney justified reversal under Strickland, especially with respect to the prejudice prong. The dissenting justice noted that most of the deficiencies which the majority opinion relied on for the prejudice prong were not even supported by the record, and some were not even alleged as deficient conduct by the parent. The dissenting opinion's main complaint, however, appeared to be the majority's decision to find prejudice without proof that the deficiencies alleged actually would have made a difference in the trial. The dissent noted that the majority's suggestion that testimony from a parent or sister at trial might have helped was no proof in the dissenter's view, since there was no evidence what their evidence would have been.

The dissenting opinion also emphasized that any idea of prejudice under the record before it would have been high unlikely considering the evidence which it outlined as follows:

> The evidence introduced at trial was that Brice had been convicted of "molesting" his children and sentenced to thirty years' imprisonment, of which he had served about four years at the time of trial. Brice does not suggest that this is false. A defendant imprisoned on a thirty-year sentence for aggravated sexual assault of a child will not become eligible for parole for at least fifteen calendar years. *See* TEX. GOV'T CODE ANN. §508.145(d) (Vernon Supp. 2004). Even after such a defendant becomes eligible for parole, it is doubtful that the parole board would recommend parole for a child abuser. n. 9. The children, were nearly ten year old at the time of the termination trial in 2001. It is, therefore, very unlikely that the children would ever even see Brice during the remainder of their childhood.9[51]

In contrast to the decision in Brice, the Amarillo Court of Appeals overruled a parent's complaint about the tardy appointment of her counsel by focusing on the parent's failure to prove deficiency in her

[50] No. 10-01-392-CV, 2004 Tex. App. LEXIS 2329 (Tex. App. –Waco 2004, pet. filed.)

[51] Id. at 2004 Tex. App LEXIS 2329 *65-66.

attorney's performance.[52] Specifically, the parent complained that her counsel was appointed only 21 days before the termination hearing. She argued, since Rule 245 of the Rules of Civil Procedure allows a party to have 45 days notice of a trial setting, the appointment of counsel 21 days before the hearing necessarily rendered counsel's assistance ineffective.

The court found it important that the parent did not assert that she was ineffectively represented, but only generally argued that the short time period "greatly affected" her ability to prepare properly for trial of the case. The parent did not point to any specific act or omission of her attorney that rendered the attorney's performance ineffective. Applying the Strickland test, the court overruled the parent's complaint indicating this was not a sufficient showing of deficient performance to prevail on an ineffective assistance claim.

4. Ineffective claim cannot be based on a lawyer's failure to conduct discovery if that fact is not established by that record.

The Beaumont Court of Appeals in In re H.D.H.,[53] emphasized that matters not established by the record cannot establish an ineffective assistance claim. Specifically, in this case, the court considered a parent's claim that their parent failed to conduct discovery. The court rejected this claim, because nothing in the record established that discovery was not conducted. This case emphasizes that ineffectiveness claims do not avoid the usual procedural requirement in appeals that the appellant must establish their error with a sufficient record.

5. Failure to timely request a jury trial not ineffective

The Fourteenth Court of Appeals in In re B.W., NO. 14-03-00068-CV, 2004 Tex. App. LEXIS 10776 (Tex. App. – Houston [14th Dist.] 2004, no pet.) rejected a claim of ineffectiveness based on the failure of an attorney to request a jury trial. The court noted the parent failed to explain how the presumption of sound trial strategy would be overcome with regard to a decision whether to present a case to a judge or jury. In addition, the court noted the parent made no effort in the appeal to show a reasonable probability that the result of the proceeding would have been different if it had been decided by a jury rather than a judge.

6. Failure to request findings of fact and conclusions of law not ineffectiveness.

In In re K.A., No. 10-04-00008-CV, 2004 Tex. App. LEXIS 8733 (Tex. App. Waco 2004, no pet.), the Waco Court of Appeals considered a parent's complaint about their lawyer's failure to request findings of fact and conclusions of law. The court found it important that the record did not reflect why counsel did not request findings of fact and conclusions of law. Moreover, the court found, in any case, the parent could not show prejudice from counsel's failure to request findings of fact and conclusions of law, especially in an appeal where the appellant adequately challenged the evidence on the inferred findings supported by the reporter's record.

7. Failure to object to evidence did not constitute ineffectiveness.

Also considered in In re K.A. was a claim that the parent's attorney was ineffective, because he failed to object to certain evidence. The court held that the record did not show the reasons for counsel's failure to object, and without a record establishing the reasons, the court would not perceive that counsel's conduct was not legitimate trial strategy.

C. Claims warranting reversal in the criminal context.

For analogous consideration, the following section provides a sample of situations in the criminal context where ineffectiveness claims were considered.

1. Ineffectiveness due to deprivation of counsel during critical stages. Jerger v. State, Nos. 12-02-00291-CR, 12-02-00292-CR, 2003 WL 22047897 (Tex. App.—Tyler August 29, 2003, no pet.) (memorandum opinion).

[52] In the Interest of J.W.M., No. 07-03-0308, 2004 Tex. App. LEXIS 2768 (Tex. App. – Amarillo 2004, pet. denied).

[53] No 09-03-388-CV, 2004 Tex. App. LEXIS 11838 (Tex. App. – Beaumont 2004, no pet.)

Facing charges of assault and manufacture of methamphetamines, the defendant was represented by different counsel on each of the charges at his plea hearing[54]. Counsel for the assault charge withdrew two days after the entering of the plea; the court did not appoint new counsel until 34 days later.[55] The Third Court of Appeals in Austin held that since the appellant lacked counsel during the time in which it was necessary to file a motion for new trial, he was "harmed by the deprivation of counsel during this critical stage."[56] The court remanded the case to the trial court, directing it to appoint new counsel for the appellant. [57]

2. Ineffectiveness due to incomplete or faulty investigations.

The following involve three cases finding ineffective assistance due to incomplete or faulty investigations by counsel:

a. Ex parte Pool, 738 S.W.2d 285 (Tex. Crim. App. 1987) (en banc).

Applicant was granted relief on his petition for writ of habeas corpus after he showed that his counsel improperly relied on the prosecutor's representations concerning his prior convictions. *Id*. at 286. Relying on these faulty representations, counsel recommended Applicant accept a plea bargain; Applicant did so, fearing that doing otherwise would result in a much larger minimum sentence. *Id*. The Court of Criminal Appeals found that Applicant satisfied the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): "counsel's representation clearly fell below an objective standard of reasonableness and as a result the plea bargain arrangement agreed to by the applicant was entered into unknowingly and involuntarily." *Pool*, 738 S.W.2d at 286.

b. Ex Parte Langley, 833 S.W.2d 141 (Tex. Crim. App. 1992) (en banc).

Having been convicted by a jury for aggravated kidnapping and denied relief by the appellate court, Applicant filed for writ of habeas corpus, alleging ineffective assistance of counsel. Specifically, applicant alleged that his counsel's failure to properly investigate his prior convictions lead to an improper enhancement of his sentence. One of Applicant's prior convictions had resulted in "shock" probation; due to this, the conviction was not final and therefore not includable for enhancement purposes. Despite counsel's assessment that his client had obtained the best possible sentence, the Court of Criminal Appeals held that "[r]egardless of the degree of skill demonstrated in securing the minimum sentence in such a case, failing to appropriately challenge the enhancement allegation so as to insure that the correct minimum punishment was available was not effective assistance." *Id.* at 144.

c. Ex parte Castillo, Nos. 74,748; 74,749, 2003 WL 22097074 (Tex. Crim. App. September 10, 2003) (per curiam) [not designated for publication].

Applicant for writ of habeas corpus had previously pled guilty to two felony offenses of driving while intoxicated, believing that his prior convictions would serve as enhancement allegations and therefore significantly lengthen his sentence. *Id* at *1. Applicant was sentenced to twenty years for each offense; however, one enhancement allegation was later found to be a state felony and therefore not eligible for use to enhance punishment. *Id*.

The trial court found that Applicant operated under the belief that he was subject to habitual offender punishment, that the decision to enter guilty pleas did not constitute trial strategy, that "the guilty pleas were not knowingly, intelligently, freely and voluntarily entered," and recommended that habeas relief be granted. *Id*. Citing *Langley* and *Pool*, the Court of Criminal Appeals agreed in a per curiam opinion, holding that the Applicant's pleas were "rendered involuntary" by his attorney's failure to properly research the classification of his prior convictions. *Id*.

3. Shortcomings in an attorney's closing argument cannot constitute a deficiency just because the attorney could have done

54 Jerger v. State, 2003 WL 22047897 *1.
[55] Id.
[56] Id. at *4.
[57] Id. at *5.

better. Yarborough v. Gentry, 124 S.Ct. 1 (2003)(per curiam)

In Yarborough, the United States Supreme Court again clarified that there must be proof that the attorney's performance was deficient, not that it could have been better. Specifically, in the facts of that case, the defense counsel in closing argument acknowledged certain statements made by the prosecutor about the defendant, and, in fact, referred to her as a "lying, bad person, lousy drug addict, stinking thief, jail, bird," but stated that neither he nor the district attorney were present during the stabbing and only the jury could decide what really happened. The Ninth Circuit held that the defendant's counsel should have highlighted exculpatory evidence during closing to try to sway the jury for the defense. Nevertheless, the United States Supreme Court reversed this holding and held that counsel could have been taking a calculated risk in acknowledging his client's shortcomings to build credibility with the jury. Moreover, the court held that the Ninth Circuit's holding gave too little deference to the state court's supervision of the defense counsel in that situation.

III. ETHICAL IMPLICATIONS.

All lawyers have a duty to represent the interests of their clients zealously within the bounds of the law, because the public has a clear interest in loyal, faithful, and aggressive representation by the legal profession.[58] The public's interest in loyal, faithful, and aggressive representation takes on an even stronger dimension, however, when the lawyer involved is charged by law with a statutory duty of representing a legal interest in a State action for child protection.

Now, in light of M.S., the public interest in such performance is not just theoretical. An attorney appointed for the parent can become the subject of a legal challenge that scrutinizes the attorney's legal competence in a written opinion easily accessible to the legal profession and the public at large. Such scrutiny raises the possibility that such appointed lawyers could be at greater risk for ethical complaints that could subject them to disciplinary proceedings. Moreover, because an ineffectiveness claim could set up a case for the possibility of reversal on appeal, the other attorneys appointed in a child protection face the dilemma of not only making sure their own representation is competent but in monitoring the competence of their opponent's attorney. This places new meaning to the pledge in our State's Lawyer's Creed in which each attorney affirms he or she is "responsible to assure that all persons have access to competent representation regardless of wealth or position in life."[59]

Because the ineffectiveness claim obviously impacts the ethical obligations of lawyers appointed in child protection cases, some thought needs to be put into how to respond. This section provides a sample of ethical issues the different attorneys in these type cases may wish to consider.

A. Department and Attorney ad Litem for Child should help ensure timely appointment for parents, when appropriate.

As mentioned above in discussing the different evaluations of ineffectiveness since M.S., the timing of the appointment of an attorney could set up a situation where ineffectiveness could be an issue.[60] In this regard, it is important to note that the timelines for the different appointments in a child protection case are not the same. When the State files a child protection suit, the Family Code requires that an attorney ad litem for the child be appointed "**immediately** after the filing, but before the full adversary hearing, to ensure adequate representation of the child."[61] The mandatory appointment for an indigent parent who responds in opposition to a termination,

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[58] Bradt v. West, 892 S.W.2d 56, 71 (Tex. App. Houston [1st Dist.] 1994), *cert, denied*, 516 U.S. 868 (1995);[58] *See also* TEX. R. DISCPL. P., Preamble, No. 3, *reprinted in* TEX. GOV'T CODE ANN., title 2, subtit. G app. A-1 (Vernon 1998) [Individual Rules shall be referred to hereinafter as a "Disciplinary Rule"][58] ("In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law.").

[59] Order promulgated by the Texas Supreme Court and Court of Criminal Appeals, November 7, 1989, THE TEXAS LAWYER'S CREED A MANDATE FOR PROFESSIONALISM [hereinafter "Lawyer's Creed"].

[60] Brice v. Denton, 2004 Tex. App. LEXIS 2329; *Cf* In the Interest of J.W.M., No. 07-03-0308, 2004 Tex. App. LEXIS 2768; *See also* Jerger v. State, 2003 WL 22047897;

[61] TEX. FAM. CODE ANN. §107.012 (Vernon 2002) (emphasis added).

however, is not so immediate.[62] The timing depends on when the parent "responds in opposition to the termination" and establishes their indigence.[63] Consequently, the trigger for a parent's counsel's appointment may go for some time before an indigent parent affirmatively expresses opposition to allow the court to consider the facts about the parent's financial status for a possible appointment.

The attorney representing the State agency that files the suit for child protection should know the statutory requirements on appointments and take the steps necessary to ensure the court makes the mandatory appointments required by law in a timely manner. Nevertheless, this may not always be easy, especially if the parent does not make appearances in court, fails to express opposition to the proceeding, and the parent's financial status is unknown.

The attorney ad litem for the child could be helpful in this regard, since the attorney ad litem for the child has a duty to interview "all parties" in the case within a reasonable time after appointment, and could find out information about the parent.[64] That attorney also has an interest in protecting the case against ineffectiveness claims that could delay disposition for a child, because such attorney has a specific duty to ensure the proceedings are expedited.[65] Of course, any communication with an unrepresented parent by other appointed attorneys in the case will be subject to Rule 4.03 of the Disciplinary Rules which requires that the unrepresented party understand that the lawyer is not disinterested and prevent misunderstandings about the attorney's role.[66]

At least one court indicates that a parent personally served in a parental termination proceeding has the responsibility to advise the court of their opposition to a termination proceeding in order to trigger an appointment under Section 107.013 of the Family Code, and that they cannot complain about a court's failure to appoint an attorney before they affirmatively do so.[67] Nonetheless, to preclude the possibility of complaints regarding the timing of an appointment, it may be prudent to request a pretrial conference to address the issue. A court has the power to direct the attorneys and the parties to appear for pretrial conference under Rule 166. TEX. R. CIV. P. 166. At such conference, the court may issue any orders that will aid in the disposition of the case. Id. TEX. R. CIV. P. 166(p). In this connection, a court could order the parents to state their position and provide documentation on their financial status to the court as well as the other parties in the case so that an evaluation can be made under Section 107.013 of the Family Code. The pretrial order could also specify a subsequent date when a hearing under TEX. FAM. CODE ANN. §107.013 (Vernon 2002) will be held after the information is required to be produced.

B. Dilemma if parent is untruthful about financial status.

One difficult circumstance that can raise ethical dilemmas in connection with an appointment under section 107.013 of the Family Code deals with a parent who is discovered to have been dishonest about their financial status to allow the appointment. A court may only appoint attorneys ad litem as allowed by law.[68] If the appointment is based on a false claim of indigence, there is probably no basis for the appointment and this could result in a court order that allows public funds to be spent for an unauthorized purpose.

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[62] Note: In addition, to appointments for an indigent parent who responds in opposition, a court must appoint an attorney ad litem for any parent (1) served by publication; or (2) who is an alleged father who failed to register with the registry under Chapter 160 and whose identity or location is unknown; or (3) who is an alleged father who registered with the paternity registry but the attempt to personally serve citation at the address provided and any other address has been unsuccessful. TEX. FAM. CODE ANN. §107.013 (Vernon 2002) and (Vernon Supp. 2004).

[63] TEX. FAM. CODE ANN. §107.013 (Vernon 2002) and (Vernon Supp. 2004); *See e.g.* Taylor v. Brazoria County Children Prot. Servs., No. 10-03-00148-CV, 2004 Tex. App.8729 *8 (Tex. App. – Waco 2004, no pet.) (where record showed parents earned $18/hour at time of request, record failed to establish court erred in refusing to appoint counsel).

[64] TEX. FAM. CODE ANN. §107.003(1)(A)(iii) (Vernon Supp. 2004).

[65] Id. at §107.003(a)(E).

[66] Disciplinary Rule 4.04.

[67] Salinas v. Tex. Dep. of Prot. & Reg. Servs., NO. 03-04-00065-CV, 2004 Tex. App. LEXIS 7640 (Tex. App. – Austin 2004, no pet.).

[68] *See* Samara v. Samara, 52 S.W.3d 455, 457-58 (Tex. (held no statute gave the court power to appoint an attorney for guardian ad litem, and in reaching this holding noted that the court did not have inherent power to do so).

If the information about the dishonesty is discovered through communications the parent has with their appointed attorney, this can present a particularly difficult dilemma for the appointed attorney.[69] Confidential information received in the attorney/client relationship is generally protected from disclosure.[70] Nevertheless, Rule 3.03(a)(2) of the Texas Disciplinary Rules requires a lawyer to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act. According to one ethics opinion, while the lawyer may know about the fraud through confidential information received from the client, Disciplinary Rule 1.05(f) requires the lawyer to disclose the confidential information to the court when required to do so by Rule 3.03(a)(2).[71] Accordingly, the attorney for the parent may have a responsibility to advise the court of the fraud.

Nevertheless, before approaching the court, Disciplinary Rule 1.02 indicates communication between the lawyer and client should occur to encourage remedial action. Rule 1.02(c) indicates the lawyer may discuss the legal consequences of a client's proposed course of conduct that the attorney knows is fraudulent. This would appear to be applicable to the situation, because the client's failure to correct the fraud would be conduct that would allow the perpetuation of a fraud on the court in order to allow the appointment of their attorney to continue. Also, Rule 1.02(e) indicates that when the lawyer has confidential information establishing his client committed a fraudulent act and the attorney's services were used in the commission of that act, the lawyer should make reasonable efforts under the circumstances to persuade the client to take corrective action. Also, Rule 1.02(f) indicates that the lawyer should advise the client of the lawyer's duties under the Disciplinary Rules, including Rule 3.03(a)(2) which limits the attorney from allowing a fraud to continue to be perpetuated on the court.

If it comes to the attention of the other parties in the case through other sources that a parent committed fraud to obtain a free appointment, the other parties, like the attorney for the parent, would appear to have the same duty under Disciplinary Rule 3.03 to disclose that information to the court to avoid assisting a fraudulent act. Admittedly, this could present a dilemma for a prosecutor who believes it is better for their State client to litigate against an attorney rather than a pro se litigant. Nonetheless, this cannot overcome a prosecutor's duty in upholding the laws of this State, and ensuring against the misuse of public funds.[72] Moreover, because the law places the duty of representation in child protection cases upon county attorneys, who often represent the County,[73] the prosecutor would have a duty to their County client to defend against orders under Section 107.015 of the Family Code requiring county payments for legal services that are not authorized.[74]

<u>C. The experience of criminal prosecutors may help in formulating ways to avoid ineffectivness claims.</u>

Once all the attorneys are properly appointed in the case, the more difficult challenge is how to guard against lawyer incompetence that could result in an ineffective assistance claim. There is no simple answer on how to address this problem.

Attempts to make up for the inadequacies of an opposing party's attorney cannot be easily remedied. An attorney cannot cure an opponent's attorney's incompetence by assuming legal services for the opponent, because such would be a conflict of interest.[75] Nevertheless, it might be that litigants in child protection cases can find at least one strategy to deal with this issue from criminal prosecutors who have been dealing with ineffectiveness claims for a long period of time.

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[69] Professional Ethics Committee of the Supreme Court of Texas, Op. 473 (1991) (hereinafter "Op. 473) (can be accessed on: www.law.uh.edu/libraries/ethics).
[70] *See generally* Disciplinary Rule 1.05.
[71] Op. 473.

[72] *See e.g.* TEX. PEN. CODE ANN. §39.06 (Vernon 1994) (misuse of official information acquired in a public servant's office or employment could expose servant to prosecution).
[73] TEX. FAM. CODE ANN. §264.009 (Vernon Supp. 2002) (outlines the prosecuting offices in this state with duty to represent State in child protection cases); *See eg.* TEX. GOV'T CODE ANN. §45.201 (Vernon 1988) (responsibility of Harris County Attorney to represent State, County and officials in County).
[74] TEX. FAM. CODE ANN. §107.015(c) (Vernon 2002) and (Vernon Supp. 2004) (county general fund responsible to pay for ad litem fees when parents are indigent).
[75] Disciplinary Rule 1.06(a)("A lawyer shall not represent opposing parties to the same litigation.").

One suggestion the author of this article gleaned from an article for criminal prosecutors was the suggestion of finding ways to make the trial judge involved in ensuring the defendant's representation is being fairly advanced. For example, to circumvent concerns that a defendant's attorney failed to order retesting of critical evidence that could conceivably form the basis of an ineffectiveness claim in a criminal case, one prosecutor suggested filing a letter or pleading with the court specifically inviting the defendant's attorney to retest the evidence; and then, if no response appeared, to file a request with the court to ask the defendant personally (not the lawyer) in court whether the defendant wanted retesting.[76] Of course, the dynamics of a child protection case are a little different than a criminal case and that should make strategy for protecting against ineffectiveness of counsel a little different. Nevertheless, a greater involvement of the trial judge, as has been done in criminal cases, could be one way to ensure the record reflects a party received fair representation.

D. Attorney for parent faces difficult challenge in facing their own incompetence

The attorney in a child protection case who probably faces the most difficult ethical dilemmas from the possibility of an ineffectiveness claim is the attorney for the parent. After a judgment is rendered against a parent, the attorney for the parent could decide it resulted from a deficiency in their representation that properly should be brought as an ineffectiveness claim. Nonetheless, an attorney who routinely receives court appointments and has a good reputation in the trial court may be reluctant in bringing such issue to the court's attention. The attorney could feel the issue will tarnish the attorney's reputation with that trial court, and if the trial court denies a motion for new trial based on such claim, the attorney's deficiency could later become scrutinized in an appellate opinion that could raise fears about disciplinary action.

[76] Kreeger, Lisa and Weiss, Danielle, "Keeping a Conviction Secure," 34 THE TEXAS PROSECUTOR (May/June 2004) (Journal of Texas District & County Attorney's Association).

Of course, the reluctance that a lawyer feels about pursuing an ineffectiveness claim does not excuse an attorney to neglect the legal matter entrusted to them by their client.[77] Moreover, a lawyer cannot allow their personal interests to impede their undivided allegiance and loyalty to their client's interests.[78] An attorney in this situation could argue that their withdrawal is authorized by Disciplinary Rule 1.06 which indicates that a lawyer shall not represent a person if representation of that person reasonably appears to be or become adversely limited by the lawyer's own interests. Nevertheless, this argument does not authorize withdrawal automatically and may not constitute a complete bar, even if applicable. This same rule allows the representation in that circumstance, if the attorney believes the representation of the client will not be materially affected and the client consents to representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the representation, and advantages, if any.[79]

Moreover, the fact that the attorney's representation is pursuant to an appointment by a tribunal affects analysis of an attorney's duty of continued representation. Disciplinary Rule 6.01 states that: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for "good cause." Examples of what constitute "good cause" are listed; and representation of a client that likely would result in violation of law or rules of professional conduct is listed.[80] Nonetheless, Disciplinary

[77] Disciplinary Rule 1.01(b) ("In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.").

[78] *See* Lawyer's Creed, para 2; Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973) (holding that when a conflict arises between insurer who pays fee and the insured whom attorney represents, the attorney, as the insured's legal representative, owes the insured unqualified loyalty).

[79] Disciplinary Rule 1.06(c).

[80] Specifically the Rule states:

> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
> (a) representing the client is likely to result in violation of law or rules of professional conduct;
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

Rule 1.15 (c) provides: "When ordered to do so by a tribunal, a lawyer shall continue representation **notwithstanding good cause** for terminating the representation." (emphasis added). Accordingly, even if good cause exists for withdrawal as counsel under these described circumstances, the Disciplinary Rules indicate an appointed attorney can be compelled to continue representation by the court.

There may be good reasons for a court to deny a request for withdrawal at the post-judgment stage, because of the time sensitive activities that must occur. Disciplinary Rule 1.15(b)(1) provides an attorney may not withdraw unless the withdrawal may be accomplished without material adverse effect on the interests of the client.[81] Obviously, if the dilemma is raised at the post-judgment stage when an attorney is reluctant to file a motion for new trial to raise facts about the attorney's incompetence for an ineffectiveness claim, there is limited time available for such motion.[82] Accordingly, a court may likely find a withdrawal for that purpose at that time is inappropriate, because there is not enough time to obtain a suitable substitute to present the claim in a timely motion.

An appointed trial attorney may be more likely to obtain an order allowing withdrawal for substitution of an attorney for the appeal after all the time sensitive trial activities have been completed. The appellate attorney can bring an ineffective assistance of counsel claim for the first time on appeal even though the trial attorney failed to preserve the issue in the trial court.[83] Nonetheless, the failure to develop a record of ineffective behavior in a motion for new trial can produce a difficult burden to overcome because the challenged action might be considered sound trial strategy.[84] Therefore, a trial attorney may have to consider this in deciding the appropriate course of action.

E. Potential ineffectiveness during post-judgment raise special concerns

In M.S., the big issue that made the court consider ineffectiveness of counsel had to do with the failure of a parent's attorney to perform the simple task of filing a motion for new trial asserting factual insufficiency.[85] Another important post-judgment document that a parent's attorney could neglect to file that could impact on a parent's appeal rights is a parent's attorney's failure to simply file a notice of appeal. These type errors can become particularly difficult because these time-sensitive filings occur during a limited plenary time frame and can be compounded by the attitudes of appointed lawyers who do not wish to perform appellate representation.

In this connection, a trial attorney could be reluctant to sign a notice of appeal and be required to continue on the appeal when the attorney feels incompetent to handle the appeal. According to TEX. R. APP. P. 6.1, the attorney's signature on the notice of appeal confers their status in the appellate court as lead counsel, unless another attorney is designated. A trial lawyer may not want to sign a notice of appeal that designates them as appellate counsel, because the attorney determines that it would be beyond their competence and violate Disciplinary Rule 1.01.

Nevertheless, an appointed lawyer's reluctance to appear as appellate counsel cannot be the driving force in their decisions about post-judgment activities. Absent a specific order limiting an appointment, the appointment of an attorney ad litem does not discontinue with the final judgment. In Cahill v. Lyda, 826 S.W.2d 932, 933 (Tex. 1992) considering an appointment

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

[81] Disciplinary Rule 1.15 (b)(1).

[82] TEX. R. CIV. P. 329b(a) (motion must be filed prior to or within 30 days after judgment signed)

[83] In re B.T., No. 02-03-261-CV, 2004 Tex. App. LEXIS 11380 (Tex. App. – Fort Worth 2004, no pet.) (citing In re J.M.S., 43 S.W. 3d 60, 64 (Tex. App. – Houston [1st Dist.] 2001, no pet.); In re M.S., 115 S.W.3rd at 546-50 (considering ineffectiveness of counsel even though no motion for new trial filed)).

[84] Id. (citing In re J.M.S., 43 S.W.3d at 64); *See also* L.T.H. v. Dept of Fam. & Prot. Servs., NO. 01-04-00444-CV, 2004 Tex. App. LEXIS 8786 *7, (Tex. App. – Houston [1st Dist.] 2004, no pet.) ("In the absence of a proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient.").

[85] 115 S.W.3d at p. 549.

made in the trial court under Rule 244, which as Section 107.013 of the Family Code makes no mention of the appointed attorney's responsibility on appeal, the Supreme Court made clear that the "attorney ad litem must exhaust all remedies available to his client and, if necessary, represent his client's interest on appeal." Accordingly, the duties appurtenant to the appointment of an attorney under section 107.013 of the Family Code may require continued representation on appeal unless the court allows substitution of a new attorney or limits the appointment in the original order of appointment.

The Disciplinary Rules do not authorize an attorney ad litem simply to refuse representation when he feels he is incompetent without the court's permission.[86] Moreover, a lawyer's feeling of incompetence in handling a matter does not necessarily amount to incompetence if the lawyer could remedy that defect through reasonable efforts.[87] Also, as already mentioned, when ordered to do so, Disciplinary Rule 1.15 states the attorney must continue representation "notwithstanding good cause for terminating the representation."

Accordingly, even if a trial lawyer feels incompetent to handle post-trial and appellate matters, the court could continue them in the case. This is certainly a strong possibility in counties where the resources of appointed lawyers is limited. A motion to withdraw for substitution by more competent counsel, therefore, would not be an automatic remedy for an appointed lawyer who does not want to continue on the appeal.

Because an appointed trial lawyer who does not want to be in the position of appellate work can be called upon to continue representation on appeal, the other parties who wish to protect the judgment of the court against ineffectiveness claims can be placed in a difficult situation. One strategy may be to make the trial judge aware of time sensitive issues as soon as possible. This could be done at the date of entry of judgment or at the hearing which the court is required to hold within 30 days after the final order is signed.[88] Importantly, the court would need to be advised about post-judgment matters that have, *or have not*, been handled for the parent in plenty of time for a written motion for new trial and notice of appeal to be filed.[89]

F. Reporting: The Difficult Question

Probably the most difficult ethics topic that ineffective assistance claims brings to the forefront is the topic of reporting.

Disciplinary Rule 8.03 states:

> Except as permitted by paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

As indicated, this rule requires lawyers to report to the disciplinary authority when they know that another lawyer has committed a violation of the applicable rules that raises a substantial question about their fitness. The question compelled in the context of ineffectiveness claims is whether an appointed lawyer's deficiencies automatically rise to the level of a substantial question as to the lawyer's fitness if an appellate court determines the lawyer's deficiency constitutes ineffective assistance of counsel.

Consideration of the comments to the rule may be helpful in this evaluation. As indicated by the comments, the reporting rule does not require reporting whenever a lawyer knows another

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[86] *See* Hawkins v. Comm'n for Lawyer Discipline, 988 S.W.2d 927, 933 (Tex. App. – El Paso 1999, pet. denied), cert. denied, 529 U.S. 1022.

[87] Id. (citing Robert P. Schwerk & John F. Sutton, Jr., A Guide to theTexas Disciplinary Rules of Professional Conduct, 27A HOUS. L. REV. 398-400 (1990)).

[88] TEX. FAM. CODE ANN. §263.405(d) (Vernon Supp. 2004) (requires trial judge to hold hearing within 30 days of judgment to decide if new trial should be granted, whether appeal would be frivolous and whether parent indigent).

[89] A motion for new trial must be filed within 30 days after the judgment is signed. TEX. R.. CIV. P. 329b. Parental termination judgments are accelerated, requiring the notice of appeal to be filed within 20 days of the judgment, however, the notice could be filed late 15 days of the deadline if an appropriate explanation is given requesting the additional time. *See* TEX. FAM. CODE ANN. §263.405 & §109.002 (Vernon 2002); TEX. R. APP. P. 26.1(b) and 26.3.

lawyer violated a single rule of professional conduct, because that has proven to be unenforceable.[90] The comment goes on to confirm that a measure of judgment is required for application of this rule. Evaluation must be made whether the violation is "substantial" and the comment indicates that refers to the "seriousness" of the possible offense and not merely the quantum of evidence of which the lawyer knows about.[91] Considering these comments it could be argued that reporting is not automatic when an appointed attorney's ineffectiveness results in reversal of a case for retrial on such claim, because the error that supports the claim for ineffectiveness may not be "serious" enough when viewed alone in the particular case.

On the other hand, comment 2 to the rule also clarifies as guidance that reporting under this rule is appropriate "to those offenses that a self-regulating profession must vigorously endeavor to prevent."[92] Considering the significant impact that delay can have on the permanency and stability of a child's life if an ineffectiveness of counsel claim results in retrial, it could be argued that this situation clearly fits the circumstance that our self-regulating profession must vigorously endeavor to prevent. As mentioned earlier, the public's interest in loyal, faithful, and aggressive representation is heightened in cases involving appointments in child protection cases. It could be argued then that reporting is required when an appointed lawyer's deficiency supports reversal of a case based on ineffective assistance in a child protection case.

IV. CONCLUSION

In conclusion, although the court's reasoning may require further clarification, the Texas Supreme Court now holds that ineffectiveness claims can be brought as viable appellate challenges in civil appeals, at least with respect to indigent parents who are statutorily appointed counsel in parental termination suits. What remains unclear is whether this will apply to retained counsel for parents in parental termination suits, and other appointed counsel in these suits or all type civil suits. Also, the supreme court has not addressed whether this holding extends to situations where appointed counsel defend parents in non-parental termination situations.

While these questions remain unanswered, how courts will decide ineffective issues in individual fact scenarios remains to be seen. Based on the decisions already decided by the Texas Supreme Court and a few appellate courts since M.S., the situations when ineffectiveness claims can prevail on appeal appear limited. Also, because the Supreme Court found deficiencies in preservation deficiencies must be reviewed through a due process prism before they can even be considered a deficiency, criminal jurisprudence may not always be the best predictor of how these claims are resolved.

With the possibility of ineffectiveness claims in parental termination cases, all parties in the case now have an ethical obligation to be cognizant of competency issues with respect to appointed lawyers, and the difficult issue of reporting. Otherwise, judgments may be subject to ineffectiveness claims that could delay a child's disposition with a needless retrial because of a lawyer's incompetence. Strategies need to be employed to ensure the process of appointment is done at the appropriate time and that appointed lawyers are advancing the interests of their clients competently. Learning from the experience in criminal prosecution, it may be that the best strategy is to find ways to involve the trial judge in monitoring representation and at a point early enough to allow correction.

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[90] Disciplinary Rule 8.03, comment 2.
[91] Id.
[92] Id.