

**ETHICS: SUBSTANCE OVER FORM;**  
**NEW LEGAL AND ETHICAL DUTIES**  
**OF AD LITEMS**

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**A. INTRODUCTION**

The 82<sup>nd</sup> Texas Legislature passed new statutes relative to the powers and duties of Attorney Ad Litem for Parents in DFPS abuse and neglect cases. These statutes are codified in **Sections 107.013; 107.0131; 107.0132; and 107.0133** of the *Texas Family Code*. These sections were enacted largely in response to criticism on the lack of training and effort by parent attorneys in DFPS cases. There was historical frustration with the adequacy of representation in these cases which involve constitutional protections. After the Texas Supreme Court adopted within child protection cases the constitutional right to “effective assistance of counsel”, this frustration continued because the courts seemed reluctant to actually apply the standards of **Strickland v. Washington** and **Cronic v. United States**. A recent study from the Permanent Judicial Commission for Children, Youth and Families stimulated this additional legislation which codifies and provides additional legal and ethical duties and opens the door to sanctions for lawyers who do not adequately represent parent clients in DFPS cases.

**B. HISTORY**

In 2003, the Texas Supreme Court held that the statutory right to counsel for indigent parents in Texas embodies the right to effective assistance of counsel. **In the Interest of M.S., S.W. 3<sup>rd</sup> 534, 544 (Tex. 2002).** (Slide 2). The court decided that the same standards of effective assistance of counsel which apply in criminal cases should apply in DFPS cases. **Id. at 545** This standard requires that for a reversal the performance of counsel must be deficient and that the errors were so serious that the attorney was not functioning as the “counsel” guaranteed by the Sixth Amendment. In addition, there must be a showing that the deficient performance of counsel prejudiced the defense, i.e. that the counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable. **Id. at 545.** In assessing the

performance deficiency, the court must take into account all of the circumstances surrounding the case and primarily focus on whether counsel performed in a “reasonably effective” manner.

**Id.** Representation must be so grossly deficient as to render the proceedings fundamentally unfair. **Id.** The court should give deference to counsel’s performance and indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and include the possibility that counsel’s actions are strategic. **Id.** In other words, the “...conduct must be so outrageous that no competent attorney would have engaged in it.” **Id.**

In sort of a catch-22, the Mother in M.S. complained that her counsel was ineffective because attorney failed to have a record made of the voir dire, charge conference and closing argument. However, because there was no record requested, there was no way for the court to evaluate counsel’s performance. This point was ultimately unsuccessful because the Mother failed to even indicate what errors would have been recorded had a record been made. The mother also complained that her attorney failed to preserve a factual sufficiency complaint by filing a Motion for New Trial and including that point in the Statement of Appellate Points which were requested at the time. **Id. at 545-546.**

Since Texas allows for appellate review, error preservation from the trial court must be viewed in the due process prism. After analyzing the private issues at stake, the government’s interest in the proceeding and the risk of erroneous deprivation of parental rights, the court held that failure to perfect a factual sufficiency review may constitute ineffective assistance of counsel. Accordingly, the Supreme Court reversed and remanded the case to the Court of Appeals to conduct a factual sufficiency review and to determine whether counsel’s failure to perfect that issue was not objectively reasonable. **Id. at 549-550.**

Against this backdrop are the Appellate Court opinions in Walker v. DFPS and In re V.V. In Walker, the father unsuccessfully claimed that his court appointed trial counsel was ineffective because he failed to conduct any pre-trial investigation, failed to communicate with the parent or return phone calls, failed to interview witnesses, failed to provide any information or counsel relative to his rights or obligations, failed to conduct any discovery, failed to object to hearsay and misrepresentations of opposing counsel as to the contents of documents introduced into evidence, and failed to show up for trial. Counsel sent someone else that the Father never met to act as his counsel for the final trial. Walker v. DFPS, 312 S.W.3<sup>rd</sup> 608 (Tex. App.-Houston, [1<sup>st</sup> Dist.] 209, pet. denied). (Slide 3). In a strong dissent, Justice Jennings argued that the facts of the case warranted the application of the Cronic ruling from the U.S. Supreme Court. Jennings asserted that compliance with the law cannot be accomplished by the mere formal appointment of a lawyer and when the performance is so deficient as to be non-existent that there is no requirement to prove harm. Id. at 628-629. United States v. Cronic, 466 U.S. 648 (1984). (Slide 5). (See also Strickland v. Washington, 466 U.S. 668 (1984). (Slide 6). Justice Sharp dissented from the court's refusal to consider the matter en banc.

In V.V., the initial panel decision unanimously reversed and rendered in favor of the Father in a DFPS termination case holding that there was no evidence to support termination as to the Father and that trial counsel's performance was so deficient that he was wholly deprived of counsel and therefore did not have to demonstrate harm in order to secure a reversal.

In an en banc review, the full court vacated the opinion of the panel and found that the evidence supported termination and that because the Father made no showing that the outcome of the case probably would have been different save for his counsel's performance, he was not entitled to reversal on the grounds of ineffective assistance of counsel. In re V.V., 349 S.W. 3<sup>rd</sup>

**548, 551 (Tex. App. – Houston [1<sup>st</sup> Dist] 2010, pet. denied). (Slide 4).** The Father was incarcerated in the Harris County Jail at the time of the child’s birth and although he was served in jail, he was not brought to court for the Adversary Hearing. After paternity was established in January 2008, subsequent to the Father’s release from jail, the Father’s court appointed attorney for him as alleged Father now became his attorney, as the established Father. The court trial was conducted in April 2008 at which time the Father was back in jail. The trial court denied the Father’s counsel’s request on the day of trial for a bench warrant and a continuance in order to secure his counsel’s attendance at trial. During trial, DFPS counsel requested the court to take judicial notice of the removal affidavit. There was no objection by the Father’s counsel. The caseworker was allowed to testify and introduce unauthenticated documents as to the Father’s extensive criminal history, without objection. DFPS introduced a pending criminal charge against the Father for assault of the Mother, without objection. When DFPS counsel offered photos of the Mother reflecting the Father’s assault, the Father’s counsel objected as follows: “Judge, object. Goes to the criminal side.” The objection was overruled. Father’s counsel did not cross-examine the caseworker who was the only witness in the case. The Reporter’s Record for the trial was five pages long and contained thirty-eight pages of exhibits. The trial court found the appeal to be frivolous. The initial appointed appellate counsel filed a brief which was rejected by the Court of Appeals and the appeal was abated until the trial court appointed new appellate counsel that would brief and address the merits of the Father’s claims, including the claim of ineffective assistance of counsel. **Id. at 553.**

The full court held that despite the lack of proper objections which, if made, may have precluded consideration of the very evidence the court found to be sufficient to support the termination, they would be bound to apply the harmless error test of **T.R.A.P. 44.1. Id. at 558-**

**559.** According to the full court, the dissent is wrong to characterize the lack of proper objections to the otherwise inadmissible evidence by trial counsel is not ineffective because subsequent events (Father's conviction of assaulting the Mother) could have been established by DFPS if such an objection had been made. **Id. at 560.** This disregards the fact that the conviction had not occurred by the time of trial and could not have been cured. Otherwise, DFPS would not have requested the appellate court to take judicial notice of the finality of convictions on appeal as an argument in favor of the second prong of the **Strickland Standard** and **T.R.A.P. 44.1**. In the final analysis, the court indicated that the Father could have sought an abatement and remand to the trial court for a hearing to determine whether any deficiency in counsel's performance affected the outcome of the case. A sharply divided court held 5-4 with four dissenting and one concurring opinion that the termination be upheld and the claim of ineffectiveness of counsel be denied. **Id. at 561.**

In dissent, Judge Jennings asserted that the majority, by overruling a unanimous panel decision, subverted its duty to decide cases upon the law and the facts, engaged in result-oriented decision making, shut down all claims for the constructive denial of counsel in termination cases and sacrificed both the fundamental duties that attorneys owe to their clients along with the strict standards of proof that the Legislature required in parental termination cases. **Id. at 576-577.**

### **C. THE LEGISLATION**

Against this backdrop, the Texas legislature acted and as a result, repealed the onerous appellate predicates of **§263.405** and enacted four (4) additional statutes designed to spell out new legal and ethical duties on attorneys for parents in DFPS abuse and neglect cases.

- (A) **§107.013(e) – Mandatory Appointment of Attorney Ad Litem.** A trial court determination of indigency lasts through all appeals unless the court finds the

parent is no longer indigent due to a material and substantial change of circumstances. **(Slide 7). (Appendix “A”).**

**(B) §107.0131 – Powers and Duties of Ad Litem For Parent.** This entirely new statute requires the attorney for the parent to:

1. Within a reasonable time after appointment, interview:
  - (a) the Client
  - (b) each person with significant knowledge of the case; and
  - (c) the parties to the suit.
2. Investigate the facts of the case; **(Slide 8).**
3. Ensure competent representation at hearings, mediations, pre-trial matters and the trial on the merits;
  - (a) Obtain and review copies of all court files; and
  - (b) When necessary, conduct formal discovery;
4. Take any action, consistent with the Client’s interest to:
  - (a) encourage settlement and use of alternative dispute resolution Procedures; and
  - (b) review and sign or decline to sign any proposed or agreed order. **(Slide 9).**
5. Meet with Client before each court hearing, unless the court finds:
  - (a) that the attorney has shown good cause why compliance is not feasible; or
  - (b) on a showing of good cause, authorize the attorney to comply with the meeting requirement by conference or telephone.
6. To become familiar with the American Bar Association Standards of practice for Attorney Representing Parents in Abuse and Neglect Cases; **(Slide 10). (Appendix “B”)**

7. Complete at least three (3) hours continuing legal education related to child protection laws unless the court exempts due to experience;
8. Abide by the parent's objectives of representation; and
9. Be trained in child protection laws unless exempted by the court due to experience. **(Slide 11).**

The attorney is entitled to:

1. Request clarification of the role if it is ambiguous;
2. Request a hearing or trial on the merits;
3. Consent or refuse to consent to an interview of the parent by another attorney;
4. Receive a copy of each pleading or other paper filed with the court;
5. Receive a notice of each hearing in the suit; **(Slide 12).**
6. Notice and an opportunity to participate in any case staffing that the parent is invited to participate in, including, as appropriate:
  - (a) case staffing to develop a Family Plan of Service;
  - (b) family group conference;
  - (c) permanency conference;
  - (d) mediation;
  - (e) staffing on discharge and return home; and
  - (f) any other staffing the department determines would be appropriate for a parent to attend, but excluding internal department staffing and staffing between DFPS and its counsel.
7. Attend all legal proceedings in the suit. **(Slide 13).**

In addition, this statute and **§107.0133** also cross-references to the Texas Disciplinary Rules of Professional Conduct and a subsequent section cross-references the Texas Government Code for discipline issues for parents' lawyers that do not comply with these duties.

**Disciplinary Rule 4.02** prohibits communications with a person, organization, or entity of government that the lawyer knows is represented by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law to do so. **(Slide 14). (Appendix “D”).**

**Disciplinary Rule 4.03** prohibits communications with a party not represented by counsel by a lawyer for another party in a manner that states or implies that the lawyer is disinterested. If the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role, the lawyer is required to make reasonable efforts to correct the misunderstanding. **(Slide 15). (Appendix “E”).**

**Disciplinary Rule 4.04** prohibits a lawyer from:

1. Using means that have no substantial purpose other than to embarrass, delay, or burden a third person;
2. Use methods of obtaining evidence that violate the legal rights of such a person;
3. Presenting, participating in presenting, or threaten to present:
  - (a) criminal or disciplinary charges solely to gain advantage in a civil matter; or
  - (b) civil, criminal, or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness, or potential witness. **(Slide 16). (Appendix “F”).**

**C. §107.0133. Discipline of Attorney Ad Litem for Parent or Alleged Father.**

The Government Code cross-reference is to a statute that specifically indicates that a lawyer for a parent that fails to perform the duties outlined in **§107.0131** or **§107.0132** is subject to disciplinary action under the Government Code. **(Slide 17). (Appendix “G”).**

This section references to the Government Code establishes the legal authority for the Texas Attorney Grievance and Disciplinary Process. **(Appendix “H”).**

There is also a cross-reference and requirement that an attorney representing a parent become familiar with the American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases. **§107.0131(1)(H). (Appendix “F”).**

**D. §107.0132. Powers and Duties of Attorney Ad Litem For Alleged Father. (Appendix “C”).**

The attorney in this role is required to:

1. Conduct an investigation regarding the Petitioner’s due diligence in locating the father;
2. Verify that the Petitioner has obtained a certificate of the results of a paternity registry;
3. Interview any party or other person who has significant knowledge of the case and who may have information relating to the identity or location of the alleged father;
4. Conduct an independent investigation to identify or locate the alleged father. **(Slide 17).**

If the attorney does locate the alleged father, the attorney shall:

1. Provide to each party and the court the alleged father’s name, address, and locating information;
2. If appropriate, request approval from the court to assert the alleged father in establishing paternity. **(Slide 19).**

If the alleged father is indigent and adjudicated to be the father, the court may convert the attorney’s role and appoint the attorney to represent the parent.

If the attorney does not locate the alleged father, the attorney is required to submit to the court a written statement of the efforts which were made to identify or locate the alleged father and that he/she was unable to do so. **(Slide 20).**

**D. UNANSWERED QUESTIONS**

The statutes pose some interesting questions and dilemmas:

1. Has the Legislature overruled **In re M.S.** and its progeny and established a new standard for ineffective assistance of counsel;
2. Has the Legislature created a negligence, per se statute for attorney liability;
3. Who has the duty to monitor the attorney's performance;
4. Who is authorized to file a grievance; **(Slide 21)**.
5. Will DFPS always give access to their clients and witnesses to the attorney for the parent so that the attorney can fulfill his/her duties;
6. Will all of the courts allow the attorney to copy the files;
7. Will all courts be willing to pay for Ad Litem trips or indigent parent trips in order to accomplish the meeting requirement before each hearing;
8. Will all courts grant bench warrants before all hearings; **(Slide 22)**.
9. Will DFPS and all other attorneys actively seek written permission before they interview a parent;
10. If the attorney invokes a restriction on communication with a parent-client, will DFPS declare that parent to be uncooperative;
11. Will the State and each county provide sufficient resources so that each attorney actually receives a copy of each pleading or other paper filed with the court;
12. Will DPFS be required to schedule or reschedule any or all of its staffings and conferences to accommodate the attorney's schedule and the right of the attorney to be present; **(Slide 23)**.
13. Can attorneys still cover hearings and trials for other attorneys and if so, are the duties being transferred with the appearance, and if not, how can any of the duties be enforced;
14. If there is no duty for service on an alleged father in some circumstances, how can an attorney be disciplined for not forcing DFPS into doing its job in finding an alleged father or in not making an effort to find a parent in circumstances when the Petitioner does not have to find them;

15. Where is the statute that subjects a DFPS caseworker, supervisor, and program director to discipline for shirking their duties, misleading the court, conducting slipshod investigations, or making placement decisions based upon prohibited factors such as race; and
16. The legislation mandates the State to provide low-cost training to parent attorneys but delegates that responsibility to no one agency in particular. **(Slide 24).**

**E. CONCLUSION**

The new legal and ethical duties both impose and raise a lot of questions. It is unclear, subsequent to the statute, whether **Strickland**, **Cronic**, or the statute would apply as a metric relative to a deficient performance. It is both unfortunate and beneficial to have statutory guidance. It is also somewhat shameful that the Legislature felt compelled to pass legislation for parents mandating that attorneys in abuse and neglect cases actually have to live up to ethical and legal standards in representing their clients. Only time will tell if the effort will bear fruit or if some adjustments will be made and performance of the parent's attorneys will remain essentially the same. Understanding the frustration that was the genesis of the legislation does not mean these efforts have solved the problem. The legislation imposes legal duties that defy some practical application, but the elimination of **§263.405** may make some of this easier to live with in the long run.