MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **October 5, 2021**

I. Matter Referred to Subcommittee

The Court's May 31, 2019 letter and Chairman Babcock's June 3, 2019 letter refer the following matter to the Appellate Rules Subcommittee:

> **Out-of-Time Appeals in Parental Rights Termination Cases.** A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:
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> - a narrow late-appeal procedure;
> - an abate-and-remand procedure like the one proposed in the Phase II Report;
> - a habeas- or bill-of-review-style procedure; and
> - prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.
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> **Suits Affecting the Parent-Child Relationship.** In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

The HB 7 Phase II Report recommends four changes that affect the appellate rules and also have some bearing on the out-of-time appeal assignment: (1) right to counsel, showing authority to appeal, and frivolous appeals; (2) a procedure in the court of appeals to consider ineffective-

assistance-of-counsel claims discovered by appellate counsel; (3) a rule standardizing the currently unwritten understanding on *Anders* briefs; and (4) opinion templates for use in parental termination cases.

II. Background

The subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review. The subcommittee has not considered or discussed a similar procedure in the courts of appeals, nor has the subcommittee addressed a procedure for bringing late claims of ineffective assistance of counsel, *Anders* briefs, or frivolous appeals.

The Texas Supreme Court has indicated that it will consider the July 2017 proposals regarding late-filed petitions for review in conjunction with any additional recommendations on parental-termination topics identified in the May 31, 2019 referral letter.

III. Issues for Discussion

The subcommittee has broken down the referral topics into two stages to be addressed in the following order.

1. Stage One: Out-of-time appeals and related issues
    a. HB7 Phase II recommendations: indigent parent's right to counsel on appeal; notice of right to appeal; showing authority to appeal
    b. Assessing proposals for addressing untimely appeals and ineffective claims
        i. HB7 Phase II recommendation: abate and remand for evidentiary hearing in support of IAC claim
        ii. "narrow late-appeal procedure"
        iii. "habeas- or bill-of-review-style procedure" for a collateral attack
        iv. other possible procedures such as a requirement that counsel continue the representation until a notice of appeal has been filed.
2. Stage Two: Briefing and Opinions
    a. Frivolous appeals; *Anders* procedures in the courts of appeals as discussed by the HB7 task force; "Parental Termination Brief Checklist"
    b. Opinion templates as created by the HB7 task force

The full committee already has voted on recommendations regarding form of citation to provide notice of the right to appeal, and showing authority to appeal.

This memo moves on to Stage One, topic 1(b) with respect to proposals for addressing untimely appeals and ineffective assistance claims. The subcommittee will address Stage Two in later meetings.

IV. Discussion

A. Notice of Right to Appeal and Right to Representation by Counsel

In a suit filed by a governmental entity in which termination of the parent-child relationship or appointment of a conservator for the child is requested, an indigent parent is entitled by statute to representation by counsel until the case is dismissed; all appeals relating to any final order terminating parental rights are exhausted or waived; or the attorney is relieved or replaced. *See* Tex. Fam. Code §§ 107.013(a), 107.016(3). In termination cases, this right extends to the filing of a petition for review in the Texas Supreme Court. *In the Interest of P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (per curiam).[1]

The full committee has voted in favor of the following citation language to provide notice of the right to appeal and the right to representation by counsel.

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you at no cost to you."
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> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

B. Showing Authority to Appeal

To clarify (1) whether there is a desire on the terminated parent's part to appeal, and (2) who is responsible for prosecuting the appeal, the full committee voted in favor of a recommendation to amend TRCP 306 to read as follows.

<u>[Current] Rule 306 Recitation of Judgment</u>

> The entry of the judgment shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is

[1] The Supreme Court has not addressed whether there is a constitutional or statutory right to appointed counsel in private parental termination suits, or whether such a right extends to a non-indigent parent. The Court also has not addressed whether appointed counsel must be provided for an indigent parent at the petition for review stage in cases in which a governmental entity seeks the appointment of a conservator for a child.

rendered. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator.

[Proposed] Rule 306 Judgment in Suit Affecting the Parent-Child Relationship

1. In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. **[Same as the current rule.]**

2. The following provisions apply in a suit filed by a governmental entity that seeks the termination of the parent-child relationship or appointment of the entity as a child's conservator. The attorney ad litem will continue the representation for appellate proceedings unless the judgment contains one of the following express statements:

a. The attorney ad litem is replaced by another attorney who will continue the representation for appellate proceedings; or

b. The attorney ad litem is discharged without continuing the representation for appellate proceedings based upon a finding of good cause. For purposes of this subpart, "good cause" means the following:

i. The parent or alleged father failed to appear after service under Texas Rule of Civil Procedure 106(a); or

ii. The attorney ad litem appointed for the parent or alleged father was unable despite diligent efforts to locate the parent or alleged father; or

iii. After being located by the attorney ad litem, the parent or alleged father failed to appear at the trial on the merits; or

iv. After being located by the attorney ad litem, the parent or alleged father never expressed to the attorney ad litem a desire to exercise the right to appeal the judgment to the court of appeals or to the Supreme Court of Texas.

Explanation of changes:

1. The first sentence of TRCP 306 is moved to TRCP 301.

2. Under Family Code §107.013 the court must appoint an attorney ad litem for:

    i. An indigent parent who responds to oppose the termination or appointment;
    ii. A parent served by publication;
    iii. An alleged father who failed to register his parenthood under Chap. 160 and whose location is unknown; and,
    iv. A registered alleged father who cannot be located for service.

    The attorney ad litem must investigate what the petitioner has done to locate an alleged father and do an independent investigation to find him. Tex. Fam. Code §107.0132(a). If the attorney locates him, he must report the address and locating information to the court and each party. Tex. Fam. Code §107.0132(b). If the attorney ad litem cannot locate him, he shall report his efforts to the court; on receipt of the report, the court must discharge the attorney. Tex. Fam. Code §107.0132(d). If the alleged father is adjudicated the parent and is determined to be indigent, the court may continue the appointment on the same basis as an indigent parent. Tex. Fam. Code §107.0132(c). This suggests that after the alleged father appears, he is entitled to continued representation only upon proof of indigency.

3. The attorney ad litem serves until the earliest of:

    i. The date the suit is dismissed;
    ii. The date appeals of a final order are exhausted or waived; or
    iii. The date the attorney is relieved of duties or replaced by another attorney after a finding of good caused rendered on the record.

    Tex. Fam. Code §107.016(3). The Supreme Court has held that once appointed, counsel may withdraw only for good cause, which did not include client disagreement or belief the appeal is meritless. *In the Interest of P.M.*, 520 S.W.3d at 27. Courts have a duty to see that withdrawal not result in foreseeable prejudice to the client; if the court permits withdrawal, it must provide for new counsel. *Id*. However, this was a case where the parent had appeared and actively pursued an appeal. This leaves unresolved whether the court may relieve the attorney ad litem if the parent/alleged father never appeared after personal service or service by publication.

Section 107.0132(d) mandates discharging counsel if the alleged father cannot be located. Section 107.0132(c) suggests the alleged father who is served is entitled to continued representation on the same basis as a parent who appears. Arguably the *P.M.* decision would permit discharging the attorney ad litem if:

i. The alleged father cannot be located;
ii. The alleged father is served, responds, but fails to prove he is indigent;
iii. The parent is served, responds, but fails to prove indigency.

4. This rule text avoids the difficulty of trying to determine whether a party who has never appeared (or has disappeared) wishes to waive the appeal. It focused on determining what is good cause under Texas Family Code section 107.016(3) to relieve the appointed attorney ad litem when the final judgment is signed. It does not address discharging or relieving an appointment prior to a final judgment.

5. The text in paragraph 2 makes clear what the default outcome is and seeks to avoid difficulty in determining finality or other consequences if the judgment does not contain one of the express statements.

Additional areas for consideration include (1) is Rule 306 the best place to put such a rule; (2) are there other rules that could be more readily adapted for this purpose, such as Rule 308a; (3) should all rules of civil procedure governing the parent-child relationship be assembled in one place as part of "Rules Relating to Special Proceedings" in Part VII of the Texas Rules of Civil Procedure.

C. Motions for Extension of Time and Conformity With Revisions to TRAP 4.7

At this juncture, the subcommittee recommends that any standards or procedures adopted for earlier appellate proceedings be compatible with those ultimately adopted with respect to petitions for review in the Texas Supreme Court. As noted earlier, the subcommittee and SCAC previously have discussed and approved TRAP amendments relating to out-of-time petitions for review.

D. Ineffective Assistance of Counsel

"[T]he statutory right to counsel in parental-rights termination cases embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003).[2] The standard for determining

[2] The right to effective assistance of counsel also applies when parents in government-initiated suits to terminate the parent-child relationship retain counsel of their choosing. *In the Interest of D.T.*, 625 S.W.3d 62, 66 (Tex. 2021).

whether counsel is effective in this context is the same as the standard applied in the criminal context pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *See In re M.S.*, 115 S.W.3d at 545; *see also In the Interest of D.T.*, 625 S.W.3d at 73-74.

Under *Strickland*, a defendant seeking to establish ineffective assistance must establish both prongs of a two-prong inquiry by showing that (1) "counsel's performance was deficient" by showing "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment; and (2) "the deficient performance prejudiced the defense" by showing that "counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable." *Strickland*, 466 U.S at 687; *see also In re M.S.*, 115 S.W.3d at 545.

"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." *In re M.S.*, 115 S.W.3d at 545 (quoting *Strickland*, 466 U.S. at 687). "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." *Id.* (quoting *Strickland*, 466 U.S. at 689). Ineffective assistance claims generally must be supported by evidence beyond the bare record of the underlying proceeding.

The HB7 Task Force noted an important distinction between the operation of ineffective assistance claims in the criminal context versus the parental termination context. In the criminal context, it is difficult for a defendant to effectively assert an ineffective assistance claim on direct appeal; the preferred avenue for raising this claim is a post-conviction habeas corpus proceeding. *See, e.g., Mata v State*, 226 S.W.3d 425, 430 n.1 (Tex. Crim. App. 2007). The HB7 Task Force observed: "By contrast, the exhaustion of a direct appeal in a parental-termination case is essentially the end of the procedural road, at least to the extent a parent has no other procedural opportunity to collaterally attack a final order of termination."

The HB7 Task Force recommended a proposed rule to provide an opportunity for the limited abatement of an appeal to hold an evidentiary hearing in support of an ineffective assistance claim. The proposed rule would be part of Texas Rule of Appellate Procedure 28.4 and provide as follows:

> (d) *Remand for Evidentiary Hearing*. For good cause shown by written motion filed no later than 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel. The appellate court must rule on the motion for remand within three days; otherwise, it will be denied by operation of law. The trial court shall begin the evidentiary hearing no later than the seventh day after the abatement order. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result. No later than 20 days from the date of the abatement order the court reporter shall file a supplemental court reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact,

> and the appeal shall be reinstated. The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule.

The subcommittee is in general agreement with the Task Force's proposed approach via rule to address ineffective assistance claims in the parental termination context. Prior to the September 3, 2021 meeting, the subcommittee identified the following points for consideration in connection with the operation of such a rule in practical terms.

- The subcommittee discussed whether any further effort to define the parameters of "good cause" is warranted, and concluded that the better course is to leave the phrase undefined given the difficulty of formulating a fair and reasonable written standard that will capture the many possible scenarios that could lead to invocation of this rule.

- The proposed rule contemplates that, if a remand is ordered, the appeal will be abated while trial proceedings are undertaken to address the ineffective assistance claim. Consideration should be given to requiring the party seeking remand/abatement to establish a prima facie case of ineffective assistance before a remand and abatement is authorized. This requirement would act as a brake on this mechanism so that the interests of the affected children in obtaining a prompt resolution of the issues are not unduly compromised.

- The proposed rule contemplates that a direct appeal will be the vehicle for asserting an ineffective assistance of counsel claim in the parental termination context. This is a feasible approach when new appellate counsel enters the case. *See, e.g., Interest of D.T.*, 625 S.W.3d at 68 (claim of IAC by trial counsel pursued on direct appeal by subsequently appointed appellate counsel). However, if trial counsel remains on the case through the appeal, then this approach potentially puts trial counsel in the untenable position of asserting counsel's own ineffectiveness at the same time the direct appeal is underway on the merits. For this reason, consideration should be given to recognizing a vehicle with a short time limit for collaterally attacking a termination determination, through an equitable bill of review procedure or similar means, in circumstances in which the same attorney represents the terminated parent in the trial court and on appeal. A vehicle allowing collateral attack also would address situations involving allegations of ineffective assistance on appeal by newly appointed appellate counsel.

Discussion and recommendations from the September 3, 2021 full committee meeting focused on the following points.

- The comment to the proposed rule should say that *Strickland* is the standard, and the motion must address both prongs of the standard.

- "Good cause" and an allegation of IAC are two different things. There was some sentiment for using a lower standard, such as a prima facie standard, to trigger further IAC proceedings in the trial court.

- The HB 7 proposed rule is problematic because three days is not enough time to decide whether to remand; seven days is not enough time for a hearing.

- There was some sentiment in favor of a "dual track" procedure under which an appeal on the merits of the termination decision would proceed simultaneously with an IAC challenge.

    - Under this approach, the terminated parent could file a motion for new trial to assert IAC; and then, pursue an IAC claim separately from the direct appeal but simultaneously with the direct appeal.

    - If dual-track is allowed, what is the timing? Does the merits appeal need to be decided before IAC?

    - There was some sentiment for requiring IAC to be pursued in conjunction with the direct appeal, and not as part of a collateral attack.

        - If trial counsel remains with the case on appeal, how could that trial counsel simultaneously pursue the merits appeal and attack his/her own performance in the trial court as being ineffective?

        - If a collateral attack is allowed, Texas Family Code section 161.211 could be the vehicle for a collateral attack on termination order based upon IAC. This section sets a 6-month time limit.

- Concern was expressed about allowing an IAC claim to be denied by operation of law as opposed to an explicit order.

The subcommittee reconvened to discuss these approaches. The subcommittee discussion focused on the following points.

- **Terminology.** As a threshold matter, the subcommittee notes the possibility of confusion arising from referring in shorthand version to a "dual track," which could refer to either (1) IAC claims that are pursued simultaneously with the merits appeal; or (2) IAC claims that are pursued only after the merits appeal is decided as part of an allowed collateral attack mechanism. For this reason, further subcommittee discussions and recommendations will focus on a "simultaneous" mechanism vs. a "post-appeal" mechanism.

- **The conundrum of the *Strickland* harm showing.** A recurring question that arises in connection with a simultaneous mechanism is this: How can *Strickland*'s second prong, which requires a showing of prejudice from the assertedly ineffective representation, be satisfied before a merits appeal of the termination order has been decided? If the termination decision is reversed on the merits, then it may be difficult or impossible to show that any asserted deficiencies in the representation prejudiced the parent whose rights were terminated. By analogy, the statute of limitations on a legal malpractice claim is equitably tolled until all appeals on the underlying claim are exhausted. *See Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

- **Templates for simultaneous mechanism.** Existing procedures in the Texas Rules of Appellate Procedure provide examples of circumstances under which a merits appeal

continues ***without abatement*** while the trial court simultaneously addresses a discrete inquiry related to the pending appeal; these examples potentially can be adapted for use in termination appeals under Texas Rule of Appellate Procedure 28.4. One example is found in Texas Rules of Appellate Procedure 24.3 and 24.4(d), which provide that (1) the trial court has continuing jurisdiction to address the sufficiency of security required to supersede a judgment, and (2) the court of appeals can remand for findings/conclusions or the taking of evidence related to the sufficiency of security on appeal. Another example is Texas Rule of Appellate Procedure 29.4 addressing orders pending interlocutory appeals in civil cases, which allows an appellate court to "refer" an enforcement proceeding to the trial court with instructions to hear evidence, and to make findings and recommendations to be reported to the appellate court.

The subcommittee concluded that the simultaneous mechanism could work with adjustments to the HB 7 Task Force proposed addition of Texas Rule of Civil Procedure 28.4(d)

> (d) ~~*Remand*~~ *Referral for Evidentiary Hearing*. For good cause shown by written motion filed no later than ~~20~~ __ days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may refer an allegation of ineffective assistance of counsel to the trial court with instructions make findings and recommendations and report them to the appellate court.~~order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel~~. The appellate court must **[rule on]** the motion ~~for remand~~ within ~~three~~ __ days; **[otherwise, it will be denied by operation of law]**. The trial court shall begin the evidentiary hearing no later than the ~~seventh~~ **[ ]** day after the ~~abatement~~ order is signed. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result. No later than ~~20~~ ___ days from the date of the ~~abatement~~ order the court reporter shall file a supplemental court reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact and recommendation.~~, and the appeal shall be reinstated.~~ [**The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule**.]

Under this approach, the merits appeal would proceed; the trial court would make findings and recommendations to the appellate court; and then the appellate court would address both the merits and, if necessary, the IAC claim at one time. The merits appeal would not be abated. The rule could provide for abatement if the court of appeals deemed it necessary after receiving the trial court's input on ineffective counsel.

Subcommittee member Evan Young offers the following views on this approach and the proposed rule revisions.

- **Vehicle for collateral attack.** The analysis above says: "If a collateral attack is allowed, Texas Family Code section 161.211 could be the vehicle for a collateral attack on termination order based upon IAC. This section sets a 6-month time limit." I don't see

how §161.211 could be a "vehicle" for anything—it seems to me to be framed as a kind of statute of repose and a restriction on the basis of some claims, but not the affirmative authorization of any such attack. If it is saying nothing more than that, an attack, *if any*, may not come more than 6 months after entry of the termination order, it wouldn't necessarily take any position about whether any such attack is available at all, much less *authorize* or supply a vehicle for the attack. It's not like it creates a cause of action, for example. I would think that there would have to be some other procedural mechanism required—such as, most obviously, a direct appeal. Keeping IAC as part of the appeal whenever possible (and it could be as early as simply an included issue in the first brief or as late as well into the appellate process, as I discuss below) has the virtue of avoiding the need to figure out what other vehicle would be available.

- **"The conundrum of the *Strickland* harm showing."** The analysis above identifies the conundrum as how one could satisfy the "prejudice" showing until we know what the court of appeals does with any separate issues. I do not regard this as a conundrum. The "prejudice" is the trial court's judgment that terminates parental rights. As with any number of appeals where issues may be interlocking, resolving one issue may either moot or activate another issue—that is, some issues are contingent. I don't see why that's any more troubling for a "simultaneous" mechanism than if IAC were part either of a single appeal from the beginning OR if it were totally collateral and raised only after the appeal was final:

    - Suppose that new counsel appears for the appeal. That counsel *might* discover the IAC immediately and could simply include it as an appellate point. If the basis for IAC is conclusively established, the court of appeals could reverse the judgment using IAC. Or, if not, it could vacate and remand for the kind of hearing and resulting findings that we have discussed (and the trial court, on a limited remand, would be expected to assume that its own judgment on the merits is valid; that assumption supplies the prejudice in that context). Or it could abate the appeal and order a limited remand for that purpose. Or any other combination. Once armed with whatever data the court of appeals needs, it could proceed to resolve the appeal in one fell swoop. It could, if it wished, address the merits issues first; assuming there was any reversible error, there would be no need to further address IAC (although nothing would prohibit an alternative holding, in which the court assumed for argument's sake that there was no reversible error, then proceeded to address IAC, particularly if it previously ordered a remand). Or, I would think, that "alternative" holding could be how the court *starts*—assuming arguendo no other error, if IAC is apparent, then the court could simply reverse on that basis, although, again, it might be useful to address any merits issues that would likely recur on retrial.

    - Likewise, suppose that new counsel appears but doesn't discover the IAC until later in the appeal. The process we are discussing amounts, in my view, to authorization to add a late appellate point; depending on how soon or how late, the court of appeals might abate the appeal (e.g., if the discovery comes pretty soon), or it might require "simultaneous" proceedings. It could even be an authorized ground for rehearing, in which the sole rehearing point is "wait, looks like there may have been

IAC—please give the trial court a limited remand to conduct its hearing." Regardless, the goal would simply be to aggregate the appellate points for the court of appeals, such that the court could decide IAC if necessary.

- Or suppose IAC was presented as a purely collateral matter. In that instance, the prejudice is especially obvious—the termination order has just been affirmed. But rather than come up with some new collateral vehicle, why not authorize a late filing of a motion for rehearing in the court of appeals on showing of good cause and a prima facie case of IAC, thus formally keeping the whole thing within the same appeal and before the same panel? It would have to be within 6 months, given Family Code §161.211, I take it, in either event.

- The bottom line to me is that I don't see any particular conundrum. The specific problem identified above is: "If the termination decision is reversed on the merits, then it may be difficult or impossible to show that any asserted deficiencies in the representation prejudiced the parent whose rights were terminated." Yes, exactly—and who cares? If the termination decision is reversed on the merits, then IAC is just mooted out (unless it is made the subject of an alternative holding per the discussion above, of course). That's no big deal, is it? The purpose of proceeding expeditiously is to ensure that finality for all parties is generated as quickly as possible while respecting parental rights as rigorously as possible. If mooting out an IAC claim happens now and then, that seems like small potatoes, and certainly not a good reason to avoid simultaneous proceedings if the IAC claim is presented comparatively late in the process.

- **Encouraging rapid identification of IAC—how to choose between abatement and "simultaneous proceedings."** If I am right that the real problem is simultaneously (a) generating finality as quickly as possible so that children's futures do not remain clouded with uncertainty any longer than necessary while (b) ensuring that no parental relationship is terminated unless the law clearly requires it, then incentivizing the identification and development of IAC as quickly and efficiently as possible is the overriding goal. When new counsel is appointed, it is possible that IAC will be instantly apparent (e.g., it appears from the face of the record, or from discussion with the client or prior counsel, that the prior counsel did not conduct even a cursory investigation, ignored potential witnesses who volunteered information, failed to review materials supplied to him or her, etc.). Or such things might be available with a certain amount of time invested at the front end. To encourage that initial investment, I would favor requiring an abatement of the appeal if a prima facie case is presented to the court of appeals within a reasonably early period; abatement, rather than simultaneous proceedings, is a benefit that would warrant acting expeditiously. For IAC identified after that early period, I would favor a default presumption (subject to the court of appeals' discretion to modify) that there would *not* be any abatement. Some IAC won't emerge until late despite a good early effort, *but incentivizing an early effort* will probably be sensible both as a matter of judicial efficiency AND as a matter of accelerating a final resolution. Incentivizing scrutiny of IAC early on will also help remove some clouds—the analysis by the new counsel is likely to *clear* prior counsel far more often, and thus eliminate the specter of a later attack.

- **The appellate court's job in a "simultaneous proceedings" case**. I would think that, if the appellate court does not abate the proceedings but orders a partial remand, the appellate court should still instantly reverse (even if the lower court's IAC proceedings have not concluded) if it reaches a conclusion that there is other reversible error. No need to wait, although it could still allow the lower court to assess IAC (e.g., if the state intends to seek a PFR, thus making it possible that IAC will again become a live issue). By contrast, the limited remand would presumably be sufficiently expeditious that, if the court of appeals concludes that there is no reversible error on the merits, it should hold back its judgment pending receipt of the IAC proceedings, but then resolve them as soon as possible once the FOF/COL—*and possibly simultaneous supplemental briefs*—have been received.

- **What about when there *isn't* new counsel?** If we are correct that §161.211 imposes a six-month limit, it seems to me that the parent/alleged father needs to be told in no uncertain terms that, if the lawyer's performance has been deficient in any material way, the client will have only 6 months to alert the court to it, either pro se or with separate counsel. This is deeply unsatisfactory for incarcerated or impoverished litigants—"let them eat cake," almost. But it is still much better than *not* telling them that, if the statute honestly does have that consequence. It at least encourages divulging anything relevant, and perhaps could generate pro bono help. If the client manages to get another lawyer (or proceeds pro se on IAC), I still think there's virtue in essentially deeming it another authorized appellate issue in the same direct appeal. The rule can provide flexibility on timing. This late appellate issue—brought by different counsel—would then essentially be folded into the same process described above. It would just be IAC against continuing counsel rather than the less awkward situation of IAC against prior counsel.

- **Appellate IAC, etc.** We have occasionally discussed the possibility of IAC of the new counsel on appeal, or the IAC of the new Supreme Court counsel, or the IAC of the IAC counsel, etc. I think we should address that to the committee, and my own skepticism has deepened about second or third-order IAC (or beyond). Balancing speed for the kids and due process for the parent cannot be infinitely weighted toward the latter with a Russian doll of embedded IAC claims. This is the "turtles all the way down problem." The legislature's 6-month limit—if it really means that—also suggests that a line must be drawn, whether or not totally fair. If greater protection than allowing claims of *trial* counsel's IAC to be available to disturb an otherwise final judgment is required, I think that the Legislature would need to authorize some sort of additional services, or create an ombudsman, or something along those lines to provide rapid assessment of IAC early on. (For "turtles all the way down," I quote Justice Scalia: "In our favored version, an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies 'Ah, after that it is turtles all the way down.'" *Rapanos v. United States*, 547 U.S. 715, 754 n.14 (2006) (plurality op.).).