INEFFECTIVE ASSISTANCE OF COUNSEL

When to raise it. How to raise it. What seems to work.

A. Legal Underpinnings:

The right to the effective assistance of counsel in dependency cases derives from two sources:

1. Due Process clause of the 14th Amendment, U.S. Constitution

Lassiter v. Department of Social Services (1981) 452 U.S. 18, 31-32,

– Does not deal with IAC, rather, discusses the factors that determine when parents in dependency proceedings have a constitutional (due process) right to counsel, weighing the: (1) the private interests at stake; (2) the government's interest; and (3) the risk that the procedures used will lead to an erroneous decision. (*Id.* at pp. 31-33.)

– due process right to counsel is decided on a case-by-case basis when the result of the hearing or proceedings may be termination of parental rights.

– right will depend upon the complexity of the issues presented and the likelihood that counsel might sway the outcome: must show the absence of counsel made a "determinative difference" and "render[ed] the proceedings fundamentally unfair . . ." (*Id*. at p. 33)

– Dependency cases finding the due process right to counsel: *In re Christina P.* (1985) 175 Cal.App.3d 115, 129; *In re Christina H.* (1986) 182 Cal.App.3d 47, 50 right extended to retained counsel; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407.)

2. Statutory right to competent counsel:

> "All parties who are represented by counsel at dependency proceedings shall be entitled to *competent* counsel." (Welf. & Inst. Code §317.5)
>
> – added by Sen Bill No. 783 (1994 Reg. Sess.) (effective 1995), so pre 1995 cases focused on the constitutional analysis. (See e.g. *Arturo A.* (1992) 8 Cal.App.4th 229, which found the right to counsel was required by due process in that case, but observed that if the right to counsel were premised on merely a statutory right, then no IAC claim could be raised.
>
> – Post section 317.5: *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1666, where the court held the statutory right to competent counsel includes the right to effective assistance of counsel, otherwise it would be a hollow right.
>
> – See also California Rules of Court, rule 5.660(d) which further defines "competent counsel."

The right to counsel protects the fundamental right to a fair trial. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.) The right to effective assistance of counsel was developed in criminal cases where the right to counsel is grounded in the 6th Amendment's provision that criminal defendants have the right to counsel.

B. What is Ineffective Assistance of Counsel?

The U.S. Supreme Court case defining the parameters for determining whether the right to effective assistance of counsel has been violated is *Strickland v. Washington* (1984) 466 U.S. 668. Two prong test:

> 1. Counsel's representation was deficient: it "fell below an objective standard of reasonableness." (*Id.* at p. 688.)

2. Counsel's deficient performance prejudiced the defense: "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Ibid.*)

> – must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)
>
> – the defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. (*Ibid.*)
>
> – the court can look first to whether a sufficient showing of prejudice is made, and if not, dispose of the claim without considering whether counsel's actions were deficient. (*Id.* at p. 697.)
>
> – Per the Cal. Supreme Court, the term "reasonable probability" as used in *Strickland* means "a reasonable chance and not merely an abstract possibility" that the defendant would have obtained a more favorable result. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1051.)
>
> –*Strickland* applied to dependency case: *In re Emilye A., supra*, 9 Cal.App.4th at p. 1711.

– Before *Strickland*, the California Supreme Court redefined the to right effective assistance of counsel from having to show counsel's actions resulted in a "farce or sham" of a trial, a standard grounded in due process, to a rule grounded in the state and federal constitutional right to counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425). The focus shifted from the fairness of the trial, to the quality of the representation provided.

> – must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys

acting as diligent advocates.

– and that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense. (*Id*. at p. 425.)

What does all of this mean? Counsel's error has to be fairly egregious such that it affected the outcome of the case. And dependency cases may require even more:

Since dependency cases are not static, some courts have emphasized that to show prejudice in a case in which parental rights have been terminated, the parent must also show it is reasonably probable there would be a different result based on *current circumstances*. (*Arturo A. supra*, 8 Cal.App.4th at p. 244.)

--the presentation (writ or appeal) must include information concerning child's current circumstances, and the case may be remanded for a hearing regarding prejudice. (*Id*. at p. 245.)

–See also *Eileen A*. (2000) 84 Cal.App.4th 1248, 1259-1260: parent only need make a prima facie showing of prejudice to obtain remand for an updated review hearing which will take into account current circumstances.

C. How to Raise It: Appeal vs. Petition for Writ of Habeas Corpus

1. A petition for writ of habeas corpus is the universally accepted method of raising claims of ineffective assistance of counsel. (*People v. Pope*, *supra*, 23 Cal.3d 412, 426.)

– Habeas proceedings are appropriate for challenging restraints on custody rights, and for raising ineffective assistance of counsel claims in dependency cases. (*In re Paul W*. (2007) 151 Cal.App.4th 37, 53.)

– the claim is often based on information that does not appear

in the appellate record. (See, e.g., *In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.)

– if favorable evidence was not introduced, such as a report or witness statement, it should be an exhibit to the habeas, with the appropriate foundational declaration attached.

– you must show that counsel's actions, or inaction, were not motivated by any reasonable, tactical decision, usually a very difficult task, unless the exception in 2., below, applies. *Kristin H., supra*, 46 Cal.App.4th at pp. 1670-1671, provides a good example of how habeas declarations demonstrated counsel had no good tactical reason for not introducing the client's favorable psychological evaluation.

– ask trial counsel to explain their strategy with respect to the approach they took (or didn't take). If you can establish a rapport with trial counsel, you may be able to get a declaration.

– *P. v. Pope* suggests that if counsel was asked for an explanation and failed to provide one, this could prove he or she had no tactical reason for the action taken. (*People v. Pope, supra*, 23 Cal.3d at p. 426.)

– Approaching trial counsel about tactical reasons:

– Letter vs. phone call (combination of both?)

– If there are a lot of points you need answers to, a letter gives them time to pull the file and respond. Phone calls can establish rapport better than a cold letter. Do your best not to be confrontational.

2. Raising IAC in the appeal is possible where there simply could be no satisfactory explanation for trial counsel's action or inaction. (*People v. Pope, supra*, 23 Cal.3d at p. 426; *In re Eileen A.* (2000)

84 Cal.App.4th 1248, 1254; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1071.)

– The dangers of raising IAC on appeal, when it should have been raised in a writ, can be seen in *In re Merrick V.* (2004) 122 Cal.App.4th 235, 254-255, where court ruled that it was not apparent from the record how appellant was prejudiced. (See also *Arturo A., supra*, same result.)

– Even if you think the record shows IAC, you should still contact trial counsel about why he or she took, or failed to take, the action in question.

– If you intend to raise an IAC claim, you must consult with ADI before doing so. We will want to know what communication you have had with trial counsel and what he or she had to say about the error at issue.

– when trial counsel's actions result in a waiver or forfeiture of a claim or defense, the appellate court may address an otherwise waived or forfeited issue on appeal in order to foreclose an ineffective assistance of counsel claim. (See *People v. Mattson* (1990) 50 Cal.3d 826, 854, failure to raise *Miranda* error at trial considered on appeal; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151, court reviewed evidentiary issue that was waived, to forestall an IAC claim.)

3. Timeliness Issue (Waiver Rule)

– Petition for extraordinary relief must be filed within a reasonable amount of time. (*In re Twighla T.* (1992) 4 Cal.App.4th 799, 803, pro per petition filed 16 months after challenged order is untimely.)

– Habeas petition filed three months after companion AOB was timely where in the interim, counsel applied to the court to expand her appoint, and further delay was attributed to trial counsel's failure to timely provide the file or his declaration.

(*In re Kristin H., supra*, 46 Cal.App.4th at p. 1659.)

– Generally, "waiver rule will be enforced unless due process forbids it." (*In re Janee J.* (1999) 74 Cal.App.4th 198, 208.)

– See also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1151 [following a 366.26 hearing in which a mother's parental rights were terminated, mother could not raise IAC for prior hearings in a writ since she had not filed a writ or appeal to challenge them earlier; waiver rule applied to the prior hearings, but mother could still allege IAC that occurred at the 366.26 hearing.] Note that in *In re Eileen A., supra*, 84 Cal.App.4th at p. 1258, the court noted mother had no other prior opportunity to raise the IAC claim. And *Darlice C.* (2003) 105 Cal.App.4th 459, 464-466 provides an excellent dissection of the many ways in which *Meranda P.*'s reasoning is faulty.

– Related note: *In re Carrie M.* (2001) 90 Cal.App.4th 530 [parent can file a writ claiming IAC when appeal on a hearing is still pending; original order deemed not yet final until appeal is over]; same, *In re Darlice C., supra*, 105 Cal.App.4th at p. 466.

4. Standing

– Parent may raise IAC regarding the minor's counsel. (*In re Crystal J.* (1993) 12 Cal.App.4th 407; *In re David C.* (1984) 152 Cal.App3d 1189, 1206)

-Rule limited in *In re Daniel H.* (2002) 99 Cal.App.4th 804 (parent should have some interest in why the ineffective assistance of counsel was prejudicial)
-Compare rules stated *In re Ammanda G.* (1986) 186 Cal.App.3d 1075 and *In re Christina H.* (1986) 182 Cal.App.3d 47.

– Parent does not have standing to appeal the trial court's decision to grant the other parent's habeas petition, where she wasn't a party to the habeas proceeding, did not seek to

intervene, and was not aggrieved by the order. (*In re Paul W.* (2007) 151 Cal.App.4th 37, 56-58 .)

5. Is the *Strickland* standard appropriate for dependency cases?

Law Review article: *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Court* (2004) 6 J. App. Prac. & Process 179

-Notes that not all courts nationwide adopt *Strickland* standard for IAC error. Focuses on another approach adopted by the Oregon Supreme Court in *In re Geist* (Or. 1990) 796 P.2d 1193), a "fundamental fairness approach."

-*Geist*: Performance prong: right to be heard at a meaningful time and in a meaningful manner. The requirements of notice, adequate counsel, confrontation, cross-examination, and standards of proof flow from this emphasis. Tactical decision only IAC if no responsible attorney would have chosen it (based on totality of circumstances).

-*Geist*: Prejudice prong: requires a showing that the attorney's performance denied the parent a fair trial and is sufficiently poor to call the trial court's decision into serious question.

D. What Seems to Work: Cases in Which IAC Claims Were Successful

Claims of IAC should involve something more than choosing the wrong trial tactic. (See, e.g., *In re Kerry O.* (1989) 210 Cal.App.3d 326, 333.)

1. Notice Issues

In re O.S. (2002) 102 Cal.App.4th 1402

In this case, the Court of Appeal ruled that trial counsel was ineffective in two ways and that the alleged father was prejudiced by both of these errors. First, the court ruled that counsel was prejudicially ineffective by failing to contest the lack of notice provided to the alleged father. Second, the court ruled that counsel's failure to communicate with

the alleged father about his wishes to establish paternity–when combined with counsel's failure to actually establish paternity–also constituted prejudicially ineffective assistance of counsel.

Before ruling on either of these issues, the Court of Appeal had to establish that the parent in this case had the right to raise an ineffective assistance of counsel claim. The parent here was the alleged father, and he had not attained status as the presumed or biological father. While it is arguable that an alleged father generally has a right to counsel, the Court of Appeal ruled that because the alleged father in this case had been provided counsel, who was the only person who could petition to change the father's paternity status, the alleged father here could raise a claim of ineffective assistance of counsel.

The court then ruled that a reasonably competent attorney would know that notice to an alleged father is critical in order for the alleged father to appear in court, assert a position regarding the proceedings, and attempt to change his paternity status. If trial counsel would have objected to the agency's failure to provide the alleged father notice, a new disposition hearing would have been ordered, and paternity testing would have been arranged. If he had then been named the biological father after having undergone paternity testing, he would have received services from the agency–so long as such services were in the child's best interest. Thus, the court ruled that counsel was prejudicially ineffective by failing to object to the lack of notice.

The court then ruled that trial counsel's failure to discuss the alleged father's desire to establish paternity was also prejudicially ineffective. The alleged father himself called trial counsel several times, leaving messages that he wanted to have a paternity test done. Trial counsel never returned these messages, and no testing was ever done. Once a section 366.26 hearing was ordered, this error was compounded since the alleged father then faced a more difficult burden in proving paternity. This error was made even worse since the alleged father was never given notice about the section 366.26 hearing.

The court thus granted the alleged father's petition for habeas corpus, and the case was remanded to the trial court for a new disposition hearing.

In re Anna M. (1997) 54 Cal.App.4th 463

While this case is sometimes cited as one of the leading cases regarding ineffective assistance of counsel in dependency proceedings, the Court of Appeal's ruling was not based upon ineffective assistance of

counsel, but rather on a due process rights violation.

Specifically, the mother in this case was not given notice regarding the true nature of the section 366.26 hearing. That is, at the prior review hearing, the mother was not advised that at the section 366.26 hearing, the court would select and implement a placement plan for the minor. The oral notice by the court emphasized that it was likely that guardianship with relatives would be selected as the permanent plan; at the review hearing, the mother was not advised of the other possible permanent plans that could be selected by the court at the section 366.26 hearing (or that her parental rights could be terminated at that hearing).

Furthermore, the mother received no written notice of the section 366.26 hearing, even though written notice was required by statute. The mother did not show up at the hearing because she did not fully understand the nature and severity of it. Ultimately at the hearing, adoption was selected as the daughter's permanent plan, and the mother's parental rights were terminated. The Court of Appeal ruled that the mother's due process rights were violated and that the failure to object to the notice issue was prejudicially ineffective assistance of counsel.

2. 388 Petition

In re Eileen A. (2000) 84 Cal.App.4th 1248

In this case, a mother alleged ineffective assistance of counsel because her trial counsel failed to file a section 388 modification petition. The Court ruled that it was ineffective because a reasonably competent attorney would have filed such a petition in this case. Thus, the court spent most of its discussion determining whether it was "reasonably probable that a result more favorable" to the mother would have occurred had trial counsel filed such a petition.

First, the court stated that there was "clearly a change in circumstances." (*Id*. at p. 1250.) The Court of Appeal was significantly impressed that the mother, in effect, initiated her own reunification plan, including counseling, parenting classes, and alcoholics anonymous courses. In addition, she took significant steps to keep Jose, the father of the child, out of her life since Jose was the original perpetrator of the abuse that initiated the dependency proceedings. Jose had, in effect, left her life completely.

Second, the court applied the factors listed in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 to determine whether reunification would be in the best interests of the children. The Court of Appeal stated that since the mother was not the perpetrator of the abuse, had gotten Jose out of

her life, and had no pattern of dating abusive men, there was no indication that the problem that had led to the dependency proceedings–abuse by Jose–would continue. The Court of Appeal was also impressed by the strength of the bond between the mother and her child in addition, the mother frequently visited her child and took classes and counseling sessions in hopes of maintaining ties. For these reasons, the court ruled that the mother had demonstrated a prima facie case of prejudicially ineffective assistance of counsel.

-Note also the court's discussion regarding the waiver rule in this case. (*Id*. at pp. 1256-1258.)

-Contrast this decision with that in *In re Olivia J.* (2004) 21 Cal.Rptr.3d 506 [Unpublished] where the failure to file a 388 petition was not considered prejudicially ineffective assistance of counsel due to father's incarceration caused by a contempt charge.

3. Paternity Testing

See In re O.S. (2002) 102 Cal.App.4th 1402 (described above under "Notice").

4. Conflicts

In re Cliffton B. (2000) 81 Cal.App.4th 415

The Court of Appeal ruled that it was prejudicially ineffective assistance of counsel for two minors with different interests to be appointed the same attorney. At the permanency hearing, minors' counsel stated in open court that there could be a potential conflict in the representation. One of the boys, Zachary, was recommended to be placed in long-term foster care, and the other minor, Cliffton, was recommended for adoption. Zachary had expressed concern to counsel regarding the effect that Cliffton's adoption would have on the two boys' relationship. Counsel, however, stated that she had no problem with either of the agency's recommendations for the boys. Following these orders, the two brothers were supposed to have contact with each other twice a month; because of logistical problems between Cliffton's adoptive family and Zachary's group home, the two were not able to meet as often as scheduled. The Court of Appeal ruled that having one counsel for two minors with diverse interests was ineffective. Furthermore, Cliffton was prejudiced; even though his permanency plan would not have changed with independent counsel, the post-termination contact between the boys would not have been the same had two independent attorneys been appointed.

– See also *In re Patricia E.* (1985) 174 Cal.App.3d 1 for a similar

conflict of interest case when one counsel is appointed for two minors (with same result).

– Compare to *In re Zamer G.* (2007) 153 Cal.App.4th 1253, where the Court of Appeal ruled that if adoption is in the best interests of both children, having a joint attorney for two minors did not constitute ineffective assistance of counsel, even if adoption would have an adverse financial consequence on only one of the two siblings.

– Compare also to *In re Jasmine S.* (2007) 153 Cal.App.4th 835 where disqualification was not required even though two minors were represented by attorneys from the same office. The two attorneys worked in different units of that office and there was no evidence of any actual conflict because of the representation.

5. Petition Issues

Glenn C. v. Superior Court (2000) 78 Cal.App.4th 570

An attorney is not required to file a petition for extraordinary writ if there are no potentially meritorious issues to be raised. However, if such a petition is filed, then the attorney must comply with the basic requirements for an adequate petition, including points and authorities, factual support from the record, and a basic argument regarding the contested issues. (*Id.* at p. 583-584.) (NOTE: This case was not specifically an ineffective assistance of counsel case, but the opinion gives a rather severe condemnation for the practices of the attorney in this case.)

– Note: Counsel is not automatically ineffective by the mere fact that a parent's attorney does not file a writ to challenge the setting of a section 366.26 hearing. (*Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, 956.)

6. Notice of Appeal

In re Jacqueline P. (2003) 4 Cal.Rptr.3d 850 [UNREPORTED]

In this unpublished case, the Court of Appeal ruled that trial counsel's failure to file a timely notice of appeal was prejudicially ineffective assistance of counsel. In this case, appellant had made repeated attempts to communicate with trial counsel in order to get a notice of appeal timely filed. However, following the proceedings in this case, trial counsel was out of the office due to her husband's terminal illness, and so the notice of appeal was ultimately filed two weeks after the deadline. The Court of Appeal ruled that the failure to timely file a notice of appeal was not appellant's fault, but was only caused by trial counsel's admitted oversight

caused by her own extenuating personal circumstances. The court granted the writ to have the notice of appeal deemed constructively filed.

7. Jurisdictional Issues

In re S.D. (2002) 99 Cal.App.4th 1068

In this case, the Court of Appeal ruled that a mother received ineffective assistance of counsel when her counsel erroneously conceded that the juvenile court had jurisdiction over her child based upon the mother's incarceration. Welfare and Institutions Code section 300, subd. (g), provides for dependency jurisdiction only when an incarcerated parent is unable to arrange for a child's care. Trial counsel wrongly believed that this statute meant that a child would be named a dependent when a parent could not personally care for the child. The court ruled that there could be no satisfactory explanation for trial counsel's failure to raise the issue, especially since the mother had two sisters who were immediately willing to care for the child.

8. Stipulations

In re Elizabeth M. (2008) 158 Cal.App.4th 1551

The notable part of this decision is the court's discussion on pages 1558 and 1559. The opinion provides two scenarios regarding trial counsel entering into a stipulation regarding a parent's visitation rights. The court rules the second scenario described to be ineffective assistance of counsel. In that scenario, trial counsel entered into a stipulation which reduced the amount of visitation rights for the father–with no reason or tactic for doing so. The court stated that this would be ineffective assistance of counsel if the parent was not personally there to object.

9. No Reporter Present

In re Christina P. (1985) 175 Cal.App.3d 115

The Court of Appeal ruled that it was ineffective assistance of counsel for parent's trial counsel to fail to summon a court reporter to record the termination hearing. Since no reporter's transcript of the hearing existed and the probation officer's report was insufficient to warrant termination of parental rights, the parents were prejudiced by not having the opportunity to mount a potentially meritorious defense on appeal.

10. Failure to Raise Potentially Meritorious Exception to Adoption

In re Darlice C. (2003) 105 Cal.App.4th 459

In this case, the court extensively discussed and criticized *In re Meranda P.* (1997) 56 Cal.App.4th 1143. The court ruled that a parent can file a writ alleging IAC while an appeal on the case is still pending; such a collateral attack is proper since the order the petition is challenging is not final until the appeal has concluded. The parent in this case was specifically challenging the trial counsel's failure to advise the trial court at the termination proceeding of the existence and applicability of the sibling relationship exception to adoptability. Since termination of parental rights was at issue, the Court of Appeal believed that the mother's due process rights were invoked. The court ultimately ruled that the parent had made a prima facie showing of IAC because of trial counsel's failure to assert the sibling bonding exception to adoptability. (NOTE: Court did not extensively discuss the specific facts of the case that supported its ruling that mother had made a prima facie showing of IAC.)

11. Failure to Present Doctor's Report

In re Kristin H. (1996) 46 Cal.App.4th 1635

Following an extensive discussion on the impact of the addition of Welfare Code section 317.5 (right to competent counsel), the Court of Appeal applied the *Pope* standard of review and the *Watson* standard of prejudice for appellant's IAC claim. Specifically, appellant alleged that trial counsel was ineffective for failing to present a doctor's report which concluded mother was able to care for her child. The report went directly to the trial court's finding that mother was unable to care for her child, which was based on agency's expert's opinion.

The Court of Appeal concluded a reasonably competent attorney would not have failed to present the report at trial. The report was highly favorable to the client and went into extensive detail regarding her ability to take care of her child. Although trial counsel cross-examined the agency's expert with the report, he did not submit the report into evidence, and he did not call the doctor who wrote the report as a witness. Trial counsel received the report on the first day of trial and believed that it was not admissible because it was not available until after the discovery deadline. However, minor's counsel did not receive a report from its expert until trial had already started, and the report was still entered into evidence. The court stated that mother's counsel at the very least should have contacted and interviewed the doctor after having received a report that was so favorable to his client.

Furthermore, the court believed that the mother was prejudiced by this failure. The trial court's determination rested predominantly on only

one expert's opinion, and the admission of a report highly favorable to the mother would have rebutted this. In addition, the court took one month to make its determination and had asserted that the decision was an extremely close one. The court remanded the case for a new trial.

Criminal Case Resource: This website contains almost 600 pages of searchable text, in pdf format, listing cases throughout the U.S. in which an appellate court reversed based on ineffective assistance of counsel in the past 25 years: www.capdefnet.org. Click on: 1) habeas assistance and training, 2) Web site contents, 3) Constitutional issues: cases on point, and 4) Choose a topic – ineffective assistance of counsel.

> – This looks like a good resource for evidentiary issues or a failure-to-investigate type of claim. If you think your IAC claim could have a counterpart in the criminal arena, it would be worth checking out this site.