Memorandum

To: Andrew Cohen, Director of Appeals
From: Allison Cleveland
Re: Elements required to demonstrate ineffective assistance of counsel in child welfare cases
Date: August 12, 2008

Questions Presented

This memorandum addresses the following questions:

1. What elements must be satisfied to support the claim of ineffective assistance of counsel in care and protection cases?

2. What types of poor attorney performance have resulted in successful claims of ineffective assistance of counsel in Massachusetts criminal cases?

3. In other states, what types of poor attorney performance have led to successful ineffective assistance claims in child welfare cases?

4. Under what circumstances might attorney performance be so poor that counsel's behavior is enough to result in a reversal without a showing of harm?

Brief Answers

1. The Commonwealth recognizes that parents and children in child custody cases are entitled to effective assistance of counsel. Care and Protection of Stephen, 401 Mass. 144, 149-50 (1987). The test to evaluate ineffective assistance claims is essentially the same as in criminal cases. Care and Protection of Georgette, 439 Mass. 28, 33-34, 34 n.7 (2003); Stephen, 401 Mass. at 149-50; Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974).

To support the claim, counsel's performance must satisfy two elements. First, the lawyer's conduct must be so poor that it falls below the conduct "which might be expected from an ordinary fallible lawyer." Stephen, 401 Mass. at 149; Saferian, 366 Mass. at 96-97. Second, the attorney's errors must have prejudiced his client. Georgette, 439 Mass. at 33-34, 34 n.7 (modifying the Saferian standard, 366 Mass. at 96-97, for child welfare cases). To date, no published appellate decisions have reversed a trial court's decision explicitly on the basis of ineffective assistance, although language in one case suggests that reversal was granted on these grounds. See Adoption of Flora, 60 Mass. App. Ct. 334, 339-342 (2004).

2. Reversals have been granted in Massachusetts criminal cases where counsel deprived a client of "an otherwise available, substantial ground of defence." Saferian, 366 Mass. at 96. For example, ineffective assistance claims have been successful where counsel failed to assert a client's only available defense during closing argument, Commonwealth v. Triplett, 398 Mass. 561, 568 (1986); Commonwealth v. Westmoreland, 388 Mass. 269, 273-74 (1983), failed to investigate his client's only available defense, Commonwealth v. Haggerty, 400 Mass. 437, 443 (1987), or failed to call or effectively cross-examine crucial witnesses. Commonwealth v. Hill, 432 Mass. 704, 719 (2000); Commonwealth v. Farley, 432 Mass. 153, 157 (2000).

3. In other states, courts have reversed trial court decisions in child welfare cases where the attorney's conduct fell below acceptable standards and prejudiced their client, leaving the clients with essentially no means to reclaim custody of their children. See, e.g., In the Interest of C.H., 166 P.3d 288, 292 (Colo. App. 2007); In the Matter of: Trinity Sox, No. 03-JC-8052006, 2006 Ohio App. LEXIS 7064, at *15-18, *66 (Ohio Ct. App. December 28, 2006); In re Kristin H., 46 Cal. App. 4th 1635, 1642 (1996).

4. In some very extreme cases, performance by counsel may be so poor as to justify reversal without a showing of actual prejudice. In these cases, prejudice can be assumed because counsel's substandard performance leaves his client with no defense at all. Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979). Attorney behavior constituting per se ineffective assistance has included sleeping through critical moments at trial, Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001), sitting silently throughout the entire trial, Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989), and counsel advocating the position that his client should be convicted. Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988).

Discussion

A. Children and parents in care and protection cases are entitled to *effective* assistance of counsel.

In Massachusetts, all children and indigent parents are entitled to counsel in "all hearings ... and in any other proceedings regarding child custody where the department of social services or a licensed child placement agency is a party ..." G. L. c. 119, § 29. In addition, the Supreme Judicial Court has held that "[t]he right to counsel is of little value unless there is an expectation that counsel's assistance will be effective." Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Consequently, the Commonwealth recognizes the right to

a new trial in care and protection cases where counsel renders ineffective assistance to his or her client. See Georgette, 439 Mass. at 33-34, 34 n.7; id. at 149-50. The method preferred by the courts to review claims invoking ineffective assistance is through a motion for a new trial. Stephen, 401 Mass. at 150.

B. In Massachusetts, the elements of ineffective assistance of counsel claims are essentially the same in criminal and care and protection cases.

In order to support a claim of ineffective assistance of counsel, two elements must be shown. See Stephen, 401 Mass. at 150 (adopting the Saferian standard for care and protection proceedings, Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974)); see also Care and Protection of Georgette, 439 Mass. 28, 33-34, 34 n.7 (2003); Adoption of Yvette, 71 Mass. App. Ct. 327, 345 (2008).

First, counsel's performance must fall below that to "be expected from an ordinary fallible lawyer." Georgette, 439 Mass. at 33; Stephen, 401 Mass. at 149; Saferian, 366 Mass. at 96-97. Second, the attorney's poor performance must have deprived the client of an otherwise available substantial defense or claim. Saferian, 366 Mass. at 96-97. In Care and Protection of Georgette, the court modified the second prong to require "prejudice" to the client's case rather than the deprivation of a substantial defense, in order to reflect

fundamental differences between criminal and civil cases. 439 Mass. at 33 n.7. An evaluation of counsel's performance must take into account the case as a whole and counsel's overall representation. See Commonwealth v. Frank, 433 Mass. 185, 192 (2001); Commonwealth v. Adams, 374 Mass. 722, 728 (1978). The elements reflect the belief that counsel's representation should be sufficient to assure that the outcome of the proceeding is not called into doubt. See, e.g., Frank, 433 Mass. 185 at 192.

C. The first prong requires a showing that counsel's performance fell below that to be expected of an ordinary fallible lawyer.

To satisfy the first prong of the test in an ineffective assistance claim, the plaintiff carries the burden of showing that counsel's performance failed to meet the standard that would "be expected from an ordinary fallible lawyer." Stephen, 401 Mass. 149; Saferian, 366 Mass. at 96. Counsel's conduct has been found to fall below that of an ordinary fallible lawyer when he leaves his client "denuded of a defense," Commonwealth v. Street, 388 Mass. 281, 287 (1983), for example, by failing to investigate the only defense available to his client, Commonwealth v. Haggerty, 400 Mass. 437, 443 (1987), abandoning a defense during closing argument, Commonwealth v. Triplett, 398 Mass. 561, 568 (1986); Street, 388 Mass. at 287; Commonwealth v. Westmoreland, 388 Mass. 269, 273-74 (1983), failing to call or

effectively cross-exam crucial witnesses, Commonwealth v. Hill, 432 Mass. 704, 719 (2000); Commonwealth v. Farley, 432 Mass. 153, 157 (2000), or conceding vital elements of the defense. Commonwealth v. McCrae, 54 Mass. App. Ct. 27, 30 (2002). When counsel fails in these tasks, he deprives his client of an otherwise available substantial ground of defense. See Street, 388 Mass. at 287; Westmoreland, 388 Mass. at 273-74.

Plaintiffs who have shown that counsel's closing argument severely undermined a substantial defense have generally prevailed in meeting the first prong of the test. See Street, 388 Mass. at 287-88; Westmoreland, 388 Mass. at 274. In Street, counsel's decision to abandon an insanity defense during closing argument left the defendant "denuded of a defense" because the jury could have reasonably concluded that the defendant was legally insane at the time he committed a homicide. 388 Mass. at 287. The defendant was left only with a defense that could "at best ... result in a conviction for murder in the second degree." Id. at 286.

Similarly, the Court found conduct below the standard of an ordinary fallible lawyer where counsel withdrew a mental impairment defense during closing arguments in Commonwealth v. Westmoreland, leaving his client with only a vague theory of manslaughter and depriving him of any substantial defense. 388 Mass. at 274; see also Triplett, 398 Mass. at 569 (where

attorney's closing statements were "tantamount to an admission of his client's guilt"); McCrae, 54 Mass. App. Ct. at 29-30 (where defense counsel conceded victim's lack of consent in an indecent assault and battery case, and based trial strategy on a defense that was not available as a matter of law).

Similarly, an attorney's failure to investigate the only possible viable defense may leave a defendant with effectively no defense at all. In Commonwealth v. Haggerty, counsel did not conduct even a cursory investigation as to whether defendant's conduct was a proximate cause of the victim's death. 400 Mass. at 442. (where 82-year-old victim died of a heart attack and defendant had beaten the victim weeks before). Id. The attorney thus failed to investigate the only defense his client had.

Failure to call crucial witnesses, or to effectively examine witnesses, may also constitute conduct that falls below the ordinary fallible lawyer standard. In Commonwealth v. Martin, defense counsel's failure to effectively cross-examine key witnesses fell below that to be expected of an ordinary fallible lawyer because he "barely contested" a crucial element of the Commonwealth's theory against the defendant, despite questionable evidence presented by the prosecution. 427 Mass. 816, 821 (1998). See also Hill, 432 Mass. at 719 (where counsel was ineffective for failing to call a key eye witness who could

have contradicted the Commonwealth's entire case against the defendant); Farley, 432 Mass. at 157 (where counsel's cross-examination of key witnesses was "pointless and rambling"); Commonwealth v. Roberio, 428 Mass. 278, 280-82 (1998)(where counsel failed to call an expert psychiatric witness to testify for an insanity defense, and counsel knew that the defendant had previously received mental health treatment).

In a child welfare case, the Court of Appeals of California similarly found that counsel's performance fell below that to be expected of a reasonably competent attorney when he failed to call the one witness (a psychotherapist) who could have presented favorable evidence for the mother. In re Kristin, 46 Cal. App. 4th 1635, 1671-72 (1996). He did so despite the mother's psychological state being the critical issue in the proceedings, and thus left his client with no defense against the state's allegations that she was too psychologically unstable to care for her child. Id.; see also In the Interest of M.S., 115 S.W.3d 534, 550 (Texas 2003) (where counsel failed to preserve a factual sufficiency issue, mother could not appeal the termination of her parental rights as a result, and the case was remanded for a decision as to whether lawyer's conduct was manifestly unreasonable); In the Interest of C.H., 166 P.3d 288, 292 (Colo. App. 2007) (where lawyer's failure to call therapist to testify that the mother displayed good parenting skills and

was capable of taking care of her children, on its face, satisfied first prong because counsel's conduct left client without favorable evidence at trial).

The Ohio Court of Appeals held that a lawyer's failure to take the "elementary" and "minimal" steps of raising due process concerns caused by an unconscionably long delay by the magistrate and trial court, and to challenge questionable findings of fact against the mother in a permanent custody hearing, also fell below acceptable standards in In the Matter of: Trinity Sox, No. 03-JC-8052006, 2006 Ohio App. LEXIS 7064, at *15-18. The lawyer's actions left the parent without the "procedural and substantive protection the law allows" and thus fell below the work to be expected of an ordinary fallible lawyer. See id. at *2.

Counsel's poor tactical decisions do not satisfy the first prong unless those decisions were "manifestly unreasonable" when made. Adams, 374 Mass. 722 at 728. See also Yvette, 71 Mass. App. Ct. at 345; Adoption of Rhona, 63 Mass. App. Ct. 117, 130 (2005). Tactical decisions "which may appear questionable from the vantage point of hindsight, do not amount to ineffective assistance unless 'manifestly unreasonable.'" Commonwealth v. Roberts, 423 Mass. 17, 20 (1996), quoting Commonwealth v. Haley, 413 Mass. 770 at 777-78. This is because "particular errors of judgment, bad tactics, or inadequate understanding of legal

consequences ... [do] not deny a defendant's constitutional right to the assistance of counsel." Adams, 374 Mass. at 728, quoting Saferian, 366 Mass. at 96. The Court will not "second guess competent lawyers working hard for defendants who turn on them when the jury happen to find their clients guilty." Commonwealth v. Stone, 366 Mass. 506, 517 (1974).

In Commonwealth v. Satterfield, counsel's decision not to pursue a certain defense was reasonable because the weight of the evidence was overwhelmingly against it. 373 Mass. 109, 115 (1977). In Commonwealth v. Frank, counsel's tactical decision not to use a medical expert was similarly reasonable because the decision was based on the probability that cross-examination of the expert would be damaging. 433 Mass. at 189-90. Similarly, a defense attorney's decision not to call particular witnesses could have been "a reasonable tactical decision" because the testimony of those witnesses had the potential to harm the defense. Commonwealth v. Novo, 449 Mass. 84, 98 (2007).

In Adoption of Yvette, a mother's counsel failed to raise objections to subject matter jurisdiction in Massachusetts when care and protection proceedings were already underway in Maryland. 71 Mass. App. Ct. at 345-46. The Court held that the attorney's decision not to do so was reasonable because the proceedings in Maryland had already resulted in the mother's loss of custody, and counsel could have believed that the mother

would benefit from presenting herself in a "fresh light" in the new forum in Massachusetts. Id. at 346. Similarly, the conduct of a father's attorney in Adoption of Rhona was not deficient because there was no evidence that counsel's tactical decisions were manifestly unreasonable. 63 Mass. App. Ct. at 130 (2005); See also Adoption of Holly, 432 Mass. 680, 690 (2000)(lawyer's decisions, while unsuccessful, were designed to present client as a fit parent and so were reasonable).

In Commonwealth v. Adams, the Court found that a lawyer's tactical decision to call a witness whose testimony was highly damaging to the defense, while poor in hindsight, was not manifestly unreasonable. 374 Mass. at 729-30. Similarly, counsel's failure to impeach a witness based on criminal history "ordinarily is not a denial of effective assistance of counsel." Roberts, 423 Mass. at 22.

D. The second prong requires a showing that counsel's deficient performance prejudiced the outcome of the proceeding against his client.

In order to support a claim of ineffective assistance, there must also be evidence that counsel's errors prejudiced the outcome of the proceeding against his client. Georgette, 439 Mass. at 33 n.7; cf. Saferian, 366 Mass. at 96. This second prong examines whether "better work might have accomplished

something material for the defense." See Satterfield, 373 Mass. at 115.

In Commonwealth v. Roberio, for example, counsel's decision to forego calling a psychiatrist to support an insanity defense, despite knowing that the defendant had been treated in the past for mental health problems, prejudiced the defendant. 428 Mass. at 280-82. The witness would likely have moved the jury to return a verdict of not guilty by reason of insanity, and thus could have produced better results for the defendant. See id. Similarly, where counsel made closing statements that were "tantamount to an admission of his client's guilt," better work might have accomplished something material for the defense. Triplett, 398 Mass. at 569, quoting Satterfield 373 Mass. at 115. See also Westmoreland, 388 Mass. at 273-74 (attorney withdrew the possibility of a mental impairment defense during closing argument, leaving defendant with no substantial defense).

In Adoption of Flora, the Massachusetts Supreme Judicial Court remanded a proceeding to decide the termination of a mother's parental rights. 60 Mass. App. Ct. 334, 343 (2004). The Court did not explicitly remand on the basis that counsel's assistance was ineffective. However, the Court implicitly held that Child's counsel was ineffective in failing to advocate the client's wishes to live with her mother, failing to present

evidence as to the positive relationship between mother and daughter at trial, and in neglecting to explore the possibility of post-termination visitation. Id. at 339-41. The Court found prejudice because it had "grave doubts whether the judge would have made his findings as to visitation and removal" had child's counsel advocated for the child's wishes, including visitation, and presented strong evidence of the child's good relationship with her mother. Id. at 341.

Ineffective assistance claims have not succeeded where the plaintiff failed to show that the attorney's conduct prejudiced the outcome of the proceeding. In care and protection cases, this has generally been due to overwhelming evidence of a parent's unfitness, making it unlikely that different actions by counsel would have resulted in a better outcome for the parent. See Georgette, 439 Mass. at 34; Holly, 432 Mass. 680 at 690.

For example, in Georgette, strong evidence of Father's sexual abuse and alcoholism led the court to hold that counsel's assistance to the child, even if ineffective, did not prejudice the proceeding's outcome, because better advocacy was unlikely to have resulted in the child's placement with her parent. 439 Mass. at 34; see also Holly, 432 Mass. 680 at 690 (where father had been in and out of jail, abused numerous drugs, and had been abusive, there was overwhelming evidence as to unfitness).

Similar patterns have resulted in criminal cases. For example, in Commonwealth v. Plant, the Court was not persuaded that any errors by counsel in failing to investigate an insanity defense were "likely to have unfairly influenced the jury's verdict." 417 Mass. 704, 715 (1994). In addition, the Court in Commonwealth v. Medina held that, even if the defendant's attorney "was no model," and counsel "might have done more," the former client failed to demonstrate how any of the actions his counsel should have taken would have been likely to change the outcome of the proceeding. 20 Mass. App. Ct. 258, 259 (1985).

E. Counsel's performance may be so poor in some cases as to constitute per se prejudice, without the need to satisfy the second prong of the test.

In most cases, both elements must be assessed in an ineffective assistance claim. "[A]ttorney error, even when egregious" almost always requires analysis of both elements. See Scarpa v. Dubois, 38 F.3d 1, 14 (1st Cir. 1994). In some cases, however, an attorney's performance may fall so far below the ordinary fallible lawyer standard that the attorney's conduct alone will constitute ineffective assistance because it leaves the client with no defense at all, allowing prejudice to be assumed. See Commonwealth v. Vickers, 60 Mass. App. Ct. 24, 35 (2003). In these cases, the entirety of the two-prong

Saferian test is not necessary, and the first prong alone will suffice for a successful claim. Id.

In Haggerty, counsel did not conduct even a cursory investigation into whether his client's assault on an 82-year-old woman, who later died of a heart attack, was the proximate cause of the victim's death. 400 Mass. at 443. Counsel's behavior fell so far below acceptable standards that it was not a case where 'arguably reasoned tactical or strategic judgments ... are called into question' but one in which the lawyer's conduct clearly left his client devoid of any defense at all. Id., quoting Rondeau, 378 Mass. at 413.

Federal court decisions provide the most illustrative examples of attorney conduct that is so poor, and counsel's failure so complete, that prejudice can be assumed. See United States v. Cronic, 466 U.S. 648, 659 (1984) ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then ... [n]o specific showing of prejudice is required" and "no amount of showing of want of prejudice would cure [the error]").

Prejudice has been assumed where defense counsel slept during critical points in a murder trial, Burdine, 262 F.3d at 338, where defense counsel sat silently throughout an entire trial, failing to present any case at all for his client, Harding, 878 F.2d at 1345, and where counsel advocated the

position that his client should be convicted, Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). In each of these cases, counsel's failure was deemed so complete that no showing of actual harm was required. See Vickers, 60 Mass. App. Ct. at 35.

Conclusion

Massachusetts recognizes the right of children and parents to effective assistance of counsel in care and protection cases. Where counsel's conduct falls below that to be expected from an ordinary fallible lawyer, and prejudices the outcome of the proceeding against his client, a new trial is justified.

To date, no claim for ineffective assistance of counsel has been successful in a Massachusetts care and protection proceeding, although one recent case contains language suggesting that the case was reversed on this basis. A small number of child welfare cases have been reversed in other states on grounds of ineffective assistance.

A greater number of ineffective assistance claims in criminal cases have been successful in both Massachusetts and in other jurisdictions. In some cases, counsel's behavior fell so far below that of an ordinary fallible lawyer that, on its face, it left defendant denuded of a defense, such that no showing of actual prejudice was necessary.