

MEMORANDUM

TO: Andy Cohen, Jaime Prince
 FROM: [Intern]
 DATE: December 2013 [update]
 RE: Ineffective assistance of counsel in child welfare cases – outside of Massachusetts

Ineffective assistance of counsel for care and protection cases in Massachusetts is governed by *Care and Protection of Stephen*, 401 Mass. 144, 149, (1987), and *Care and Protection of Georgette*, 439 Mass. 28, 33-34 & n.7 (2003), which set forth a two-prong test:

1. Whether the behavior of counsel fell measurably below that which might be expected from an ordinary fallible lawyer; and
2. If so, whether counsel’s conduct has likely deprived the defendant of an otherwise available, substantial ground of defense – that is, whether counsel’s conduct has prejudiced the client.

This memorandum looks at ineffective assistance of counsel in child welfare/abuse and neglect proceedings in other states. Those states generally apply some version of the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). That test, which formed the basis of *Stephen* and *Georgette*, is as follows:

1. Whether the defendant can show that counsel’s performance was deficient, and
2. If so, whether that deficient performance prejudiced the defense.

For all intents and purposes, these tests are the same.

Case	Nature of Deficient Performance	Facts
<i>Division of Youth and Family Services v. M.D.</i> , 417 N.J. Super. 583 (App. Div. 2011)	Failure to advise client of the legal effect of stipulating to certain facts.	Counsel never advised Mother that by stipulating to certain facts she was admitting she abused and/or neglected her children.
<i>In re Quadaysha C.</i> , 409 Ill. App. 3d 1020 (2011)	Failure to avoid conflict of interest.	Counsel stood in at a dispositional hearing for another attorney representing the CASA and agreed “on behalf of the children” with proposed dispositions of the abuse and neglect petitions. Counsel later appeared on behalf of Mother at the first permanency hearing and represented her until the hearing on the State’s TPR petitions.
<i>State v. N. L. (In re M.R.L.)</i> , 237 Ore. App. 133 (Or. Ct. App. 2010)	Mistakenly telling trial judge that ICWA did not apply.	Father’s counsel mistakenly told the juvenile court that ICWA did not apply when it did. There was no tactical or strategic advantage to not asserting ICWA applied.
<i>Bermea v. Tex. Dep’t</i>	Failure to file	Counsel filed a notice of appeal, but failed to file

<p><i>of Family & Protective Servs.</i>, 265 S.W.3d 34 (Tex. App. Houston 1st Dist. 2008)</p>	<p>important documents.</p>	<p>either a statement of the points that Mother intended to raise on appeal or a motion for new trial. This satisfied the first prong of the test. However, the court said this would not have affected the outcome so no ineffective assistance.</p>
<p><i>In the Interest of J.O.A.</i>, 283 S.W.3d 336 (Tex. 2009)</p>	<p>Failure to file important documents; withdrawing from case on eve of trial.</p>	<p>Counsels for Father and Mother did not present to the trial court a statement of points on which they intended to appeal within fifteen days after their parental rights had been terminated. Instead, counsels merely filed motions to withdraw and a notice of appeal. The trial court eventually appointed an appellate counsel, but it was too late for the new attorney to file a statement of points. The Texas Supreme Court held that the trial attorneys should have provided effective assistance through the deadline for filing the statement of points.</p>
<p><i>In the Interest of M.R.</i>, 2013 Tex. App. LEXIS 9172, 2013 WL 3878584 (Tex. App. Eastland July 25, 2013)</p>	<p>“Disappearing” from case.</p>	<p>Associate judge said she would enter a ruling within 3 days, but did not do so for 16 months. During the 16 months, Mother’s counsel retired and closed down his office, but forgot to withdraw from Mother’s case. Mother unsuccessfully attempted to contact counsel. Mother also tried to obtain a new attorney from the court, but the court told her she needed to contact counsel.</p>
<p><i>In re M.L.R.</i>, 150 Ohio App. 3d 39 (Ohio Ct. App., Cuyahoga County 2002)</p>	<p>Withdrawing from case on eve of trial.</p>	<p>Counsel asked to withdraw on the morning of a dispositional hearing on whether to award permanent custody of Father’s son to the State. The local rules prohibited counsel from withdrawing the two weeks before the hearing unless he had good cause. Counsel’s reasons for withdrawing were because Father was not present and had been uncooperative. Counsel did not explain how Father was uncooperative or why he had not moved to withdraw earlier. Father showed up late to the proceeding and the judge forced him to act as his own counsel.</p>
<p><i>Matter of Eileen R. (Carmine S.)</i>, 912 N.Y.S.2d 350 (N.Y. App. Div. 3d Dep’t 2010)</p>	<p>Failure to ensure Father’s presence or other manner of participation at trial.</p>	<p>Counsel failed to object when judge refused to allow Father, who was incarcerated out-of-state, to participate via telephone. Counsel also failed to request that Father be able to present evidence or testimony in some other fashion or ask for continuance to allow Father to review transcripts. Counsel attempted to cross-examine witnesses, but was unable to comprehensively do so</p>

		without Father's input. When the Family Court accidentally ordered Father to appear by telephone on the first day of the hearing, but then changed its position without explanation, saying Father was not allowed to participate by telephone, counsel did nothing.
<i>In re Kristin H.</i> , 46 Cal. App. 4th 1635 (Cal. App. 6th Dist. 1996)	Failure to contact favorable expert.	Court suspended Mother's visitation until she submitted to a psychological evaluation. Mother obtained a favorable evaluation from an expert and submitted it to her counsel, but counsel never contacted the expert after he received the report. He only used the report for cross-examination. He did not attempt to submit the report or call the expert as a witness. (This is similar to certain aspects of <u>Adoption of Azziza</u>)
<i>In re Nicholas "GG"</i> , 726 N.Y.S.2d 802 (N.Y. App. Div. 3d Dep't 2001)	Failure to call any witnesses or present any evidence.	Counsel did not present any evidence during the dispositional hearing, did not call any witnesses (including the client), and made no arguments for a suspended judgment. However, he was familiar with the facts and relevant case law, obtained favorable testimony on cross-examination and made numerous successful objections during trial. Although termination may have been a forgone conclusion, the claim of ineffectiveness is a concern about the fairness of the process as a whole and therefore counsel's omissions deprived Mother of meaningful representation.
<i>State ex rel. State Office for Servs. to Children & Families v. Thomas (In re Stephens)</i> , 12 P.3d 537 (Or. Ct. App. 2000)	Failure to help client attend hearing, failure to cross-examine witnesses, call any witnesses, or give a closing argument.	Father wanted to attend the TPR hearing, but needed counsel to obtain a subpoena in order for him to leave his treatment facility. Counsel failed to ask facility personnel about allowing father to leave and did not serve them with a subpoena. Counsel admitted he was unprepared at trial. He failed to advocate any real case theory, gave no closing, did not call any witnesses, did not offer any testimony from Father, and did not cross-examine Mother, the caseworkers, or Father's parole officer.
<i>In the Interest of J.M.B.</i> , 939 S.W.2d 53 (Mo. Ct. App. 1997)	Failure to attempt to contact client who failed to appear at trial or ask for continuance, failure to offer evidence or object to state's	Mother's counsel failed to request continuance or recess to try to contact mother when mother failed to appear at trial. Counsel raised no objections during State's direct examination of its sole witness and only asked three questions regarding a crucial issue on cross-examination. Counsel stated he had no evidence to present on

	evidence, failure to meaningfully cross-examine witnesses, and throwing client under the bus.	behalf of Mother and told the court, without explanation, that he believed Mother's parental rights should be terminated.
<i>Brice v. Denton</i> , 135 S.W.3d 139 (Tex. App. 2004)	Failure to meet with client before trial, failure to prepare for trial, conducting damaging cross-examination.	Counsel was appointed to represent Father on final day of TPR hearing. Counsel did not request a continuance to meet or consult with Father, who was in prison, and did not attempt to consult with him. The only preparation counsel did was to review his criminal history. During trial, she only cross-examined Mother and in doing so, evidence of Father's history of bad acts came out.
<i>In re O. S.</i> , 102 Cal. App. 4th 1402 (Cal. App. 4th Dist. 2002)	Failure to meet with or contact client prior to trial; failure to establish client's presumptive parent status.	Counsel did not object to Father's lack of notice and did not attempt to establish Father was the "presumed" father rather than merely the "alleged" father, which meant Father was in a weaker position. Counsel did not try to contact Father to determine his wishes despite Father calling her repeatedly.
<i>State ex rel. State Office for Servs. to Children & Families v. Rogers (In re Eldrige)</i> , 986 P.2d 726 (Or. Ct. App. 1999)	Failure to meet with client before trial, failure to prepare for trial, failure to be aware of and review agency file.	Counsel never met with Mother prior to trial, had not prepared for trial, and only came to court to withdraw from case. Counsel was unaware of 800-page agency file he had received two days earlier which showed that State had failed to offer Mother services and that State never envisioned reunification with her (children had been living with Father and his girlfriend).
<i>In re James R.</i> , 661 N.Y.S.2d 160 (N.Y. App. Div. 4th Dep't 1997)	Failure to meet with client prior to trial; failure to tell client to appear; failure to appear in court.	Counsel failed to appear on one court date and on day of trial. Counsel did not meet with Mother. Mother did not appear on the scheduled trial date because she did not know she needed to be present, and counsel did nothing to clear up misunderstanding and may have contributed to it. Counsel then did not follow through on her promise to bring motion to vacate judgment.
<i>In re D.E.G.</i> , 747 S.E.2d 280 (N.C. Ct. App. 2013)	Failure to appear at trial.	Father's counsel didn't appear at trial, effectively precluding judge from determining what efforts, if any, counsel had made to contact Father to inform him of his intention to withdraw.
<i>In re Alexandria G.</i> , 834 N.W.2d 432 (Wis. Ct. App. 2013)	Failure to discuss strategy with client or file timely appeal.	Trial court had terminated Father's parental rights and Father timely filed a notice of intent to pursue post-disposition relief. Counsel told Father she would review record for possible IAC claim but failed to consult with him before the

		deadline had passed for filing a notice of appeal (and never filed notice of appeal). In two conversations after deadline, counsel never informed Father that deadline had passed.
<i>In re Joshua G.</i> , 1996 Wisc. App. LEXIS 86, 199 Wis. 2d 527 (Wis. Ct. App. 1996)	Failure to file timely appeal.	Counsel filed untimely notice of intent of appeal of TPR order. The summons had erroneous listed the time to appeal as 40 days even though it should have been 15 days pursuant to a recent change in the law. Trial counsel relied on the information in the summons and did not file the intent of appeal within the 15 days. However, the court dismissed the case because it held the trial court's order was not appealable.
<i>People ex rel. C.H.</i> , 166 P.3d 288, 292 (Colo. App. 2007)	Failure to call therapist and other witnesses who would have given favorable testimony.	The mother's appellate attorney submitted offer of proof in support of IAC claim asserting that (1) therapist was well-respected psychotherapist with extensive expertise in area of child development; (2) he would have testified that mother had made strides in overcoming her self-destructive behavior and was capable of appropriate parenting and demonstrated good parenting skills during therapy sessions with child; and (3) mother's former attorney did not present any witness to establish her progress in therapy, her ability to parent, or that the child's behavioral problems were the result of conditions other than the mother's parenting. The IAC allegations warranted further inquiry by the trial court, and case remanded.
<u>In the Matter of: Trinity Sox</u> , No. 03-JC-8052006, 2006 Ohio App. LEXIS 7064, at *15-18, *66 (Ohio Ct. App. December 28, 2006)	Failure to make specific objections to preliminary findings; failure to object to unconscionable delay.	Counsel failed to object to magistrate's proposed findings for trial court. While this is very different that the Mass. system, the appellate court held that "the failure to take this minimal step [of objecting to the magistrate's findings] leaves the parent as if she did not have any counsel at all; the failure to file specific objections is treated the same as the failure to file any objections." Counsel also failed to make due process objection to case languishing on court's docket for long time.
<i>In re Kristin H.</i> , 46 Cal. App. 4th 1635, 1642 (1996)	Failure to call psychiatrist who had favorable testimony or submit his report	Even though counsel used favorable psychiatrist's report to cross-examine agency witnesses, the failure to interview the psychiatrist, call him as witness, or admit his report was not strategic (despite trial counsel's claim to the contrary) and was damaging.