

CAFL Appellate Practice Tip

December 6, 2018

Building your Record

Don't forget to , attach performance standards, documents, and affidavits to your motion for new trial/relief from judgment. Also, request an evidentiary hearing. The motion judge has discretion to hold an evidentiary hearing or to decide the motion on the papers. If the judge offers you an evidentiary hearing, take it. We'll help you if you don't have a lot of trial experience.

Ineffective Assistance and CAFL Performance Standards

CAFL appellate attorneys have been filing more and more motions for new trial/relief from judgment based on ineffective assistance of counsel (IAC). There are two prongs to an IAC claim: first, the trial attorney's performance fell measurably below that of an ordinary fallible attorney; second, the trial attorney's poor performance prejudiced the client. See Adoption of Azziza, 77 Mass. App. Ct. 363, 368 (2010); Commonwealth v. Mahar, 442 Mass. 11, 15 (2004) (defining "prejudice" as a reasonable probability that, but for counsel's unprofessional errors, the result would have been different). The best way to raise an IAC claim is through a motion for new trial in the Juvenile Court. See Care and Protection of Stephen, 401 Mass. 144, 150 (1987). Don't raise IAC for the first time in your brief unless both prongs are so clear in the record that further factual development is unnecessary.



Can you use the CPCS/CAFL performance standards to prove the first prong? Yes, you can.

In Guardianship of L.H., 84 Mass. App. Ct. 711 (2014), the Appeals Court noted that the CPCS mental health performance standards were a "source of important guidance" for lawyers representing adults with diminished capacity in guardianship cases, and that these standards were relevant in the assessment of an IAC claim. In Commonwealth v. Marinho, 464 Mass. 115 (2013), the defendant claimed that trial counsel was ineffective for failing to advise him of the immigration consequences of conviction at trial, discuss plea matters with him, and advocate for a lesser sentence. For each claim, the SJC looked to the CPCS criminal performance standards for guidance on what is expected from an ordinary fallible lawyer. Based in part on the CPCS performance standards, the SJC held that trial counsel's performance fell measurably below that of an ordinary fallible lawyer. (It nevertheless affirmed the defendant's conviction because he was not prejudiced by counsel's poor performance.)

[continued on next page]

CAFL Appellate Practice Tip

December 6, 2018

Ineffective Assistance and CAFL Performance Standards

(Continued)

The SJC also looked at the CPCS criminal performance standards and the Massachusetts Rules of Professional Conduct to evaluate IAC in Commonwealth v. Duarte, 477 Mass. 630 (2017). In that case, the SJC held that trial counsel was ineffective for failing to inform the client that the judge's son worked for the local DA's office. The SJC cited the CPCS criminal performance standards and reasoned that it was "notable" that they required that the attorney explain such important facts to clients so that they can make informed decisions about jury-trial waiver.

Finally, in Care and Protection of Georgette, 439 Mass. 28 (2004), the SJC called for a committee to update Rule of Professional Conduct 1.14 as to the role of children's counsel. The SJC noted that, until that committee proposes (and the Court approves) a new rule – which occurred several years later – counsel should follow the CPCS child welfare performance standards.

Failing to comply with CPCS performance standards does "not render counsel's performance automatically ineffective." Doe v. Sex Offender Registry Bd., 83 Mass. App. Ct. 1103 (2012) (Mass. App. Ct. Rule 1:28). But, it's fair game for you to cite to the CAFL performance standards when arguing IAC. What CAFL performance standards are often ignored? Examples include failing to:

- file proposed findings and conclusions (CAFL Trial Perf. St. 6.2(d))
- file necessary pretrial motions, particularly comprehensive motions *in limine* (CAFL Trial Perf. St. 6.1(a))
- prepare witnesses to testify, particularly client witnesses (CAFL Trial Perf. St. 6.1(f))

If you do file a post-trial motion alleging ineffective IAC, please send a copy of the motion to CAFL Administration: Rcaseo@publiccounsel.net.