

Ineffective Assistance of Counsel Claims in CAFL Cases

APPELLATE PANEL SUPPORT UNIT
2020

Today's Training: What we will cover

- ▶ Overview of IAC law
- ▶ Investigating IAC claims
- ▶ Drafting Motions
- ▶ Affirmative case building on appeal
- ▶ Leave from single justice
- ▶ Dealing with trial counsel

Right to Counsel

- ▶ G.L. c. 119, § 29
- ▶ Constitution



Commonwealth v. Saferian, 366 Mass. 89 (1974)

- ▶ Well-known two-pronged test for IAC
- ▶ Applies to care and protection cases
- ▶ Poor lawyering plus prejudice

Care and Protection of Stephen, 401 Mass. 141 (1987)

Yes, IAC can be raised in Care and Protection appeals

But must be raised in the Trial Court first and not for the first time on appeal.

Care and Protection of Georgette, 439 Mass. 28 (2003)

- ▶ Sibling group
- ▶ Conflict of interests
- ▶ Rules of Professional Conduct
- ▶ CPCS Performance standards





Adoption of Holly, 432 Mass. 680 (2000)

Notice by publication case (insufficient notice)
 Father filed a motion for new trial also for ineffective assistance of counsel

- ▶ Failure to investigate witness testimony
- ▶ Failure to act as a zealous advocate
- ▶ Failure to make timely objections to hearsay
- ▶ Failure to object to exhibits

Father also argued constructive denial of counsel, structural error

Adoption of Flora,
 60 Mass. App. Ct. 334 (2004)

- ▶ Although the poor conduct of child's counsel is not labeled as IAC by the Appeals Court, the Appeals Court remanded largely based on counsel's poor performance
- ▶ Child's counsel failed to represent child's wishes

Adoption of Azziza, 77 Mass. App. Ct. 363 (2010)

- ▶ Poor lawyering: Trial counsel did not call witnesses Father wanted, who were present at court
- ▶ Prejudice: Unfitness evidence not overwhelming so defense witnesses may have swayed the outcome

Why might appellate counsel file an ineffective assistance of counsel claim?



M.R.Civ.Proc. 52 (b), 59(e), 59(a)

- ▶ It's too late to file a Motion to Amend the Findings M.R.Civ.Proc. 52(b), Motion to Amend the Judgment M.R.Civ.Proc. 59(e), or Motion for New Trial under M.R.Civ.Proc. 59(a)
 - ▶ Each one must be filed or served no later than 10 days after judgment enters
 - ▶ Unless you were also trial counsel, rare that you would have the case in time
 - ▶ If not too far over the 10 days, could argue court could still hear under its equitable authority *see* Petition of Worcester Children's Friend Soc. To Dispense with Consent to Adoption, 9 Mass.App.Ct.594, 602 (1980)
 - ▶ MNT 59(a) are great because they are much easier to file than 60(b): can file on "all or part of the issues" "for any reason for which rehearings have been granted in suits of equity"

Next Options are M.R.Civ.Proc. 60

- ▶ 60(a) Clerical Mistake
 - ▶ No time limit on filing, but if docketed in AC – need leave
 - ▶ Limited to "misprisions, oversights, omissions, unintended acts, or failures to act"
 - ▶ Can be error by clerk, court, or party
 - ▶ Includes evidentiary documents, testimony, process, pleadings

M.R.Civ.Proc. 60(b)(1-6)

- ▶ [1] "mistake, inadvertence, surprise or excusable neglect" the mistake must be excusable, not due to carelessness
- ▶ [2] newly discovered evidence which by due diligence could not have been discovered in time for a MNT under 59(b)
- ▶ [3] fraud, misrepresentation or other misconduct of an adverse party
- ▶ [4] judgment is void (court lacked SM or P jurisdiction, or acted in a manner inconsistent with DP)
- ▶ [5] judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated – or it is no longer equitable that the judgment should have prospective application
- ▶ [6] or any other reason justifying relief to "accomplish justice" - IAC

M.R.Civ. Proc. 60(b)(1)

- ▶ **"mistake, inadvertence, surprise or excusable neglect" the mistake must be excusable, not due to carelessness**
 - ▶ lack of notice: [Adoption of Eugene](#) 415 Mass. 431, 436 (1993); but also see [Adoption of Hugh](#), 35 MAC 346, 351 (1993)
 - ▶ excusable neglect: [Adoption of Pearl](#), 34 MAC 308 (1993)
 - ▶ change in the law: [Adoption of Quan](#), 470 Mass 1013 (2014) (rescript opinion)

M.R.Civ.Proc. 60(b)(2-3)

- ▶ **(2) newly discovered evidence which by due diligence could not have been discovered in time for a MNT under 59(b) (evidence must have existed at the time of trial and it must be material and controlling as to induce a different result)**
 - ▶ ex: something accidentally not turned over in the DCF file and later discovered
- ▶ **(3) fraud, misrepresentation or other misconduct of an adverse party**
 - ▶ ex: something intentionally not turned over by DCF: See *Paternity of Cheryl*, 434 Mass. 23 (2001) for discussion of proving fraud – very difficult to prove

Mass.R.Civ.Proc. 60(b)(4)

- ▶ **judgment is void (court lacked SM or P jurisdiction, or acted in a manner inconsistent with DP)**
 - ▶ lack of jurisdiction: *Guardianship of Minor Children* 97 MAC 316 (2020)
 - ▶ lack of counsel: *Guardianship of W.V.* 470 Mass. 590 (2015); *Adoption of Roy*, 80 MAC 454 (2011) – contrast *State & Protection of Infants*, 342 Mass. 1008 (1999)
 - ▶ *Adoption of Roy*, 80 MAC 454 (2011): “Although we generally review the denial of a rule 60(b) motion for abuse of discretion, *Murphy v. Administrator of the Div. of Personal Adm.*, 322 Mass. 277 (1979), an important exception exists to the principle that a motion for relief from judgment is addressed to the judge’s discretion: **judgment is void for lack of subject matter or personal jurisdiction, or for failure to conform to the requirements of due process of law, the judge must vacate it.** See *Harris v. Sametillo*, 330 Mass. 393 (1997); *O’Reilly v. A.S.*, 360 Mass. 440 (1991); *Wang v. Nekarac*, 37 Mass. App. 71, 166, 169 (2006).”
 - ▶ Lack of notice/DP: *Adoption of Zey*, 73 MAC 905 (2009)(Rule 23) although only cites Rule 60(b) – section 4 implies

M.R.Civ.Proc.60(b)(5)

- ▶ **judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated – or it is no longer equitable that the judgment should have prospective application**
 - ▶ it is no longer equitable that the judgment should have prospective application: *Adoption of Theodore* 36 MAC 355, 358-59 (1994) case where child not in pre-adoptive placement and Mother (against whom there was little evidence of unfitness) had left abusive father
 - ▶ see also *Adoption of Cesar*, 67 MAC 708, 715-16 (2006) – did not cite 60(b)5 – only cited 60(b) but implied

M.R.Civ.Proc. 60(b)(6)

- ▶ **or any other reason justifying relief to "accomplish justice"**
 - ▶ lack of notice: Adoption of Eugene 415 Mass. 431, 436 (1993); but also see Adoption of Huxit, 35 MAC 346, 351 (1993) and section (4) above)
 - ▶ judge erroneously decided an issue that was not before the court Adoption of Reid, 39 MAC 338, 341-42 (1995)
 - ▶ IAC

Common IAC Grounds (Confluence of Factors)

- ▶ **Not preparing for trial/Not investigating facts/Not Pursuing Important Issue or Defense**
 - ▶ Comm v. Farley, 432 Mass. 153 (2000): failure to investigate and develop evidence
 - ▶ Comm v. Ly, 454 Mass. 223, 230-31 (2009): failure to subpoena and review documents
 - ▶ Comm. V. Conley, 43 MAC 385, 385-86 (1997) IAC found where defendant asked TC to investigate an important issue and TC failed to do so.
 - ▶ While a lawyer need not leave every stone unturned, strategic choices must be based on a thorough investigation. Strategic choices made after less than complete investigation are reasonable to the extent that reasonable professional judgments support the limitations on investigation. The reasonableness of counsel's actions may be determined or substantially influenced by the (client's) own statements and actions. Strickland v. Washington, 464 U.S. 668, 690-91 (1984);

Common IAC Grounds (continued)

- ▶ **Not retaining a medical or scientific expert**
 - ▶ Failure to use Medical or Scientific Expert = IAC when medical/scientific issue central issues to case, issue is controversial in its field, and state's case rests on expert testimony
 - ▶ Comm v. Millen, 474 Mass. 417 (2016) shaken baby syndrome case – MNT had new expert eval included with it (even though a criminal case – could be very helpful in C&P too)
 - ▶ Other controversial fields: Munchausen By Proxy, Child Abuse, maybe DV and Substance abuse
 - ▶ Even if not a controversial field, can be IAC for failure to use expert:
 - ▶ Payel v. Hollins, 261 F.3d 210, 223-25 (2nd Cir. 2001) [A decision not to call a medical expert was deficient because it was not based on pre-trial consultation with such an expert]. See also Comm v. Roberto, 428 Mass. 278, 278-80 (1998)
 - ▶ Claimant need not conclusively prove an expert would have provided favorable testimony – however, he must be able to suggest with particularity how the investigation would have benefited his defense Comm v. Duran, 435 Mass. 97, 103 (2001)

Common IAC Grounds (continued)

- ▶ **Not advocating for client's position (not telling court child's position)**
 - ▶ Adoption of Flora, 60 MAC 334 (2004) – court did not specifically find IAC but implied and remanded
 - ▶ C&P of Georgetown, 439 Mass. 28 (2003) – court did not find IAC bc overwhelming evidence of unfitness

Common IAC Grounds (continued)

Not admitting relevant evidence

- ▶ Adoption of Aziza, 77 MAC 363 (2010) – IAC found and remanded
- ▶ Adoption of Sandra (Rule 23) (2020) – IAC but no prejudice
- ▶ Adoption of Lima (Rule 23) (2019) – court did not specifically find IAC – but implied and did remand
- ▶ Comm v. Nevachukew, 65 Mass. App. Ct. 112, 116 (2005) IAC found where trial counsel had an opportunity to counter testimony with evidence to the contrary, and failed to pursue it.

Common IAC Grounds (continued)

Not objecting to clearly inadmissible evidence

- ▶ Comm v. Sepheus, 468 Mass. 160, 170 (2014)
- ▶ Comm v. Peters, 429 Mass. 22 (1999)
- ▶ Comm v. Whyte, 43 Mass.App.Ct. 920(1997) – strategy not reasonable

Common IAC Grounds (continued)

Not calling witnesses

Adoption of Azziza, supra.

Adoption of Flora, supra.

Comm. v. Garcia, 66 Mass. App. Cl. 147 (2004) – counsel cannot make a tactical decision not to call a witness he never interviews (Azziza says the same thing) – court will not validate tactical decisions that are manifestly unreasonable when made –

Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1358-59 (4th Cir. 1992). (trial counsel did not speak to the witness, therefore could not make a strategic decision not to call him.) Courts should not conjure up or support a tactical decision an attorney could have made, but plainly did not. Tolerance of a tactical miscalculation is one thing, fabrication of tactical excuses is quite another.

If TC interviews a witness and thinks the witness will cause more harm than good than not IAC to not call to stand – Adoption of Zardas, 78 Mass. App. Cl. 1109 (2010) – however see Comm. v. Hill, 432 Mass. 704, 719 (2000) – SJC acknowledges “few witnesses are totally helpful” – IAC/ITC does not review and weigh the witnesses value to case

NOTE: need affidavits proving what witnesses would have testified to Adoption of Natalia, (Rule 23) (2011)

Common IAC Grounds (continued)

Putting a witness on the stand cold

Comm. v. Garcia, supra

If TC puts witness on stand cold and unhelpful evidence elicited may not be IAC if overwhelming evidence of guilt: Comm. v. Gonzalez, 473 Mass. 415 (2015)

Not cross-examining witness or inept cross

Adoption of Sandra, supra.

Comm. v. Peters, 429 Mass. 22 (1999)

Comm. v. Marlin, 427 Mass. 816, 821 (1998)

Common IAC Grounds (continued)

Not marshalling evidence

• Adoption of Azziza, supra.

• Adoption of Flora, supra – doesn't specifically say but implied

• There are tons of criminal cases and CAFL has a memo you can request, but I think Azziza and Flora more helpful

Not participating in trial

• Comm. v. Vickas, 40 MAC 24 (2003)

Common IAC Grounds (continued)

- Failure request post termination/adoption visits
 - *Adoption of Hessa* supra
 - *Adoption of Uma* supra
- Failure put forward competing plan
 - *Adoption of Uma* supra
- Failure to challenge reasonable efforts, Failure to raise ADA claim, Failure to Challenge Adoption Plan

Common IAC Grounds (continued)

Conceding unfitness

Comm v. Trickett, 398 Mass. 561, 569 (1986)
Comm v. Street, 388 Mass 281, 286-88 (1983)

But see *Adoption of Ronald* (Rule 23) (2012): TC said mother was "a risk to her children" in closing argument – AC said statement was not IAC b/c closing is not evidence, not convinced TJ was affected, and AC looks at overall evidence in case of unfitness (not controlling but not helpful)
 See also *Adoption of Quentin* (Rule 23) 2016 – without consent, TC stipulated to father's unfitness and termination of his parental rights – not IAC b/c no prejudice (not controlling but not helpful)

Common IAC Grounds (continued)

- Not cooperating with AC on appeal
 - *Adoption of Uma* supra, never mailed requested documents, only returned 2 out of many messages, never provided an affidavit in response to "continuing care" request
- Not communicating with the client
- Not understanding the law
- Advising client not to appear
- Disclosing confidential information
- Not advising client about testifying
- Not counseling about stipulating and waiving trial
- Not preparing client for trial

Trial Counsel Performance: Tactical decisions

"Where a strategic choice is at issue, '[a]n attorney's tactical decision amounts to ineffective assistance of counsel only if it was manifestly unreasonable when made.'" *Adoption of Yvette (No. 11)*, quoting from *Commonwealth v. Martin*, 427 Mass. 816, 822(1998); citing *Adoption of Rhonda*, 63 Mass. App. Ct. 117, 130 (2005).

* NOTE: if TC never reviewed a document or never spoke to a witness (or never considered an issue), it is hard to argue he/she made a tactical decision: See *Aziza, Garcia* and *Griffin* cited on slide 25 for good case law and language

Affidavit of Trial Counsel & Witnesses – Evidence of Documents

Petitioner's burden to supply affidavits of TC and expected/available witnesses – also burden to supply documents

PREJUDICE: the second prong



Structural Error – no prejudice showing required

U.S. v. Cronin, 466 U.S. 648, 659 (1984): Constructive denial of counsel

- Absence of TC at critical stages of case
 - Critical stage is any state parent's essential rights may be effected, where parent may need assistance addressing legal issues, or "meeting his adversary"
- Counsel's complete failure to subject state's case to meaningful adversary testing
- Although counsel is present circumstances of trial prevent even a competent lawyer likely to provide effective assistance

Constructive Denial Cases

- Failure to file appellate brief: Comm v. Goewey 452 Mass 399; Comm. V. Frank, 425 Mass. 182(1997) Comm. V. Alvarez 69 MAC 438 (2007) – must file brief even if decide no appeal warranted (Moffett)
- Sleeping lawyer: Javor v. United States, 724 F.2d 831 (9th Cir.1984)
- Silent until closing and then concede case: U.S. v. Swanson 943 F.2d 1070 (9th Cir.1991)
- Silent and then fail object directed verdict: Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989)
- Counsel did not have any opportunity to prepare or consult with client: Powell v. Albama 287 U.S. 45(1932) Hunt v. Mitchell, 267 F.3d 575 (6th Cir. 2001); MacKenna v. Ellis, 280 F.2d 592 (5th Cir.1960), Mitchell v. Mason, 325 F.3d 732 (6th Cir 2003), U.S. v. Morris, 470 F.3d 596 (6th Cir. 2006)

Constructive Denial Counsel Continued

- Can raise on appeal even if issue not properly preserved at trial: Comm. V. Valentin, 470 Mass. 186, 210(2014), Comm v. Bacigalupo, 49 MAC 629, 440 (2007)
- But always best try to preserve below – see Comm v. LaChance 469 Mass. 854, 856 (2014)
- Consider implications of Weaverv. Mass., 137 S.Ct. 1899 (2017)

INVESTIGATING AN IAC CLAIM



INVESTIGATING AN IAC CLAIM



Interview

- The client
- Trial counsel
- Your client's desired permanency plan
- Other witnesses

INVESTIGATING AN IAC CLAIM



How to interview trial counsel

INVESTIGATING AN IAC CLAIM



Review

- The court file
- Trial counsel's file
- Transcripts—may need to request extra
- Findings when they are ready

What else?

- dictation notes, police records, home study reports . . . be creative

How to Raise IAC: Motion for New Trial

▶ Motion for new trial

- ▶ Rule 59 – within 10 days
- ▶ **Rule 60(b)** – within "reasonable time"
 - ▶ Judgment is void
 - ▶ In the interest of justice

Post-Judgment Motion Practice

- ▶ Affirmative case building
- ▶ Telling the story of injustice

How to tell your client's story?



ETHOS Credibility 	PATHOS Emotion 	LOGOS Logic 
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Motion Exhibits and Attachments

- ▶ Affidavit from trial counsel – **"always"**
- ▶ Affidavit from appellate counsel
- ▶ Affidavit from any witness you're claiming should have been called
- ▶ Affidavit from client
- ▶ Any documentary evidence you're claiming should have been introduced
- ▶ Correspondence between trial counsel and client

Motion Exhibits and Attachments



Timing

Don't wait to raise ineffective assistance claims until the last minute. File your new trial motion *before the appeal docket*s in the Appeals Court, if at all possible.

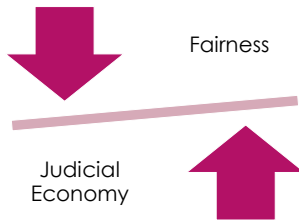


Motion to Stay the Appeal & for Leave to File New Trial Motion

What if you cannot file your MNT before the appeal docket?

Adoption of Ulrich, 94 Mass. App. Ct. 668 (2019)
For these motions, "the issue presented . . . is whether the interests of fairness, balanced with the interests of judicial economy, best will be served by giving priority to a trial court resolution of the defendant's new trial motion."

Motion to Stay the Appeal & for Leave to File MNT





Trial counsel should withdraw
Conflict of interest

Dealing with Trial Counsel

Normal rapport to start for all appeals:

- ▶ Share information about client
- ▶ Get copy of entire file
- ▶ Discuss potential appellate issues
- ▶ Discuss appellate process

Dealing with Trial Counsel

But . . . if you decide to file a motion for new trial based on IAC,

- ▶ be gentle with trial counsel
- ▶ ask trial counsel to move to withdraw and for appointment of new trial counsel ASAP

Dealing with Trial Counsel

There must be still be communication and cooperation

Dealing with Trial Counsel

Factual affidavit of trial counsel:

- ▶ What trial counsel did and didn't do
- ▶ Why trial counsel did or didn't do it
- ▶ NOT that trial counsel was wrong or incompetent or ineffective

Dealing with Trial Counsel

- ▶ If no affidavit from trial counsel, then appellate counsel must file her own affidavit about same topics
- ▶ Consequences for case when no trial counsel affidavit

Dealing with Trial Counsel

- ▶ Make sure trial counsel knows:
 - ▶ Never turn on the client
 - ▶ Never oppose the motion for new trial
 - ▶ Never help the adverse parties
 - ▶ Never share the client's file with the adverse parties

Dealing with Trial Counsel – New Trial Hrg

- ▶ Ask for closed hearing (to kick out trial attorney's friends/co-workers); try to void spectacle
- ▶ If offered evidentiary hearing, take it!
- ▶ You may have to put trial attorney on stand

Dealing with Trial Counsel – New Trial Hrg

- Make sure trial counsel knows, never:
- ▶ Show up at hearing on new trial motion unless you ask them to come, court orders it, or they are subpoenaed.
 - ▶ Speak to the judge off the record or *in camera*.
 - ▶ Make any oral proffers to court about their performance.
 - ▶ Volunteer to appear as witness for DCF or another party.

Dealing with Trial Counsel – New Trial Hrg

If trial counsel is ordered to show in court or is subpoenaed, they must:

- ▶ Appear
- ▶ Speak about case *only* to you outside courtroom
- ▶ Testify honestly
- ▶ Be careful of confidentiality while on stand

Dealing with Trial Counsel

Does trial counsel have questions? Are they:

- ▶ Confused about how to deal with you?
- ▶ Confused about how to handle DCF or judge?
- ▶ In middle of hearing and asked to discuss confidential information?

Don't quarrel with them; have them call CAFL Administration, at (617) 482-6212.

Motion denied – now what?

- ▶ New notice of appeal within 30 days
- ▶ Get client signature on new notice of appeal
- ▶ Consolidate the two appeals (denial of motion for new trial and underlying judgment)

Thank you!

If you have any questions, email us:

- ▶ Andy, acohen@publiccounsel.net
- ▶ Ann, anarris@publiccounsel.net
- ▶ Sarah, slopresti@publiccounsel.net
