***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

MEMORANDUM

To: CAFL Appellate Panel Support Unit

Fr: [law student intern]

Re: Ineffective assistance of counsel- Failure of counsel to participate at trial

Date: June 17, 2016

**Question Presented**

When does counsel’s failure to participate at trial constitute ineffective assistance of counsel?

**Answer**

Counsel’s failure to participate at trial constitutes ineffective assistance of counsel when counsel’s lack of participation effectively deprives the client of her right to counsel.

**Discussion**

In determining the issue of ineffective assistance of counsel, courts have used the Saferian standard. First, courts look to determine whether the behavior of counsel fell measurably below that which might be expected from an ordinary fallible lawyer and, if so, inquire whether counsel’s conduct deprived the defendant of an otherwise available, substantial ground of defense. Care and Protection of Stephen, 401 Mass. 144, 149 (1987), quoting from Commonwealth v. Saferian, 366 Mass. 89, 96 (1974); Adoption of Yvette, 71 Mass. App. Ct. 327, 345 (2008).

In Commonwealth v. Vickers, 60 Mass. App. Ct. 24, 25 (2003), the defendant appealed her conviction on the ground that she was afforded ineffective assistance of counsel when her attorney refused to participate in the trial when she (the defendant) had disappeared. Id. Trial counsel made no objections, declined to cross-examine a key prosecution witness and responded “no comment” when addressed by the judge. Id. at 32. The court held that counsel was deficient for failure to perform any defense functions and that this deficiency created a substantial risk of miscarriage of justice. Id. at 35. See also Reyes-Vasquez v. U.S, 865 F. Supp. 1539, 1540 (S.D. Fla. 1994) (presuming prejudice where counsel refused to participate and no codefendant’s counsel to assist); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (presuming prejudice when defense counsel stayed silent throughout most of the criminal proceedings and then failed to object to the judge’s unconstitutional directed verdict against the defendant).

In In re Roque, No. 2005-T- 0138, 2006 Ohio App. LEXIS 6961, at \* 2 (Ohio Ct. App. 2006), a mother appealed from the termination of her parental rights on the ground that she was not afforded effective assistance of counsel. At the time of the permanent custody hearing, mother’s counsel had not spoken to her in eight months. Id. at \* 7. Counsel failed to attend review hearings; failed to participate in discovery; failed to challenge hearsay evidence submitted at the permanent custody hearing; and failed to cross-examine effectively state’s witnesses. Id. Furthermore, counsel allowed three letters from mother to the trial court, pleading for its help, to suffice for mother’s participation in the permanent custody hearing and failed to object to their admission as evidence against mother. Id. The Appeals Court held that there was no possibility of a fair trial with a reliable outcome to result from the proceedings due to the failure of mother’s counsel to participate. Id. at \* 9. As a result, the judgment of the trial court was reversed and the matter was remanded for further proceedings. Id. at \* 13.

In State ex rel. State Office for Servs. To Children & Families v. Thomas, 12 P.3d 537, 538 (Or. Ct. App. 2000), a father appealed from the termination of his parental rights on the ground that he was not afforded effective assistance of counsel. Father argued that his trial counsel was inadequate because he failed to procure father’s attendance at the termination hearing and was unprepared to proceed at the hearing. Id. at 541. Even though father was in a residential treatment facility as a condition of probation, he wished to attend the hearing. Id. However his attorney neither asked personnel at the facility about allowing father to attend the hearing, nor served a subpoena for father’s attendance. Id. at 542. In addition, at trial, counsel did not call any witnesses for father, did not offer any written or oral testimony from father, nor did counsel cross examine mother, caseworkers or father’s parole officer, or object to introduction of, or attempt to rebut, expert witnesses’ opinions and reports. Id. at 543. The Court held that counsel’s performance was inadequate. Id. at 544. The Court reversed and remanded the matter for rehearing on the petition to terminate father’s parent. Id.

In Javor v. United States, 724 F.2d 831, 832 (9th Cir. Cal. 1984), the defendant who had been convicted of possession and sale of heroin, filed a writ of habeas corpus claiming that he was denied his right to counsel. The defendant claimed that his attorney had slept through significant portions of the trial, that counsel failed to participate when evidence against defendant was being heard, and that the judge was at times concerned about his inattentiveness. Id. at 833. However, the magistrate concluded that the defense was adequate and there was no prejudice. Id. The court reversed, and held that a sleeping lawyer was the equivalent of no counsel present at all. Id. at 833-34. The evil of lack of counsel the court reasoned, lies in what the attorney did not do and cannot be measured by examining the record. Id. at 835. See also Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001) (ruling that even though counsel was present in the courtroom, his temporary naps during trial violated Sixth Amendment); Tippins v. Walker, 77 F.3d 682, 683 (2nd Cir. 1996) (presuming prejudice when counsel was sufficiently asleep to amount to being unconscious for extended periods of time during 12 drug trial and slept through a key witness and through damaging testimony); U.S v. Ragin, 820 F.3d 609, 619 (4th Cir. 2016) (holding that defendant’s right to counsel was violated when defendant’s counsel was asleep during a substantial portion of the defendant’s trial).

**Conclusion**

Counsel’s failure to participate at trial constitutes ineffective assistance of counsel when counsel’s lack of participation effectively deprives the client of her right to counsel.