***[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.]***

**TO:** CAFL Appellate Panel Support Unit

**FROM:** [Law Student Intern]

**SUBJECT:** Ineffective Assistance of Appellate Counsel

**DATE:** July 17, 2013

**MEMORANDUM**

**Question Presented**

What constitutes ineffective assistance of appellate counsel? How should one raise a claim of ineffective assistance of appellate counsel?

**Brief Answer**

In Massachusetts, appellate counsel is ineffective when counsel’s performance reflects serious incompetency that falls measurably below that of an ordinary, fallible lawyer, and when that conduct actually prejudices a client. Most often, this occurs when counsel fails to gain access to an appeal or fails to raise issues that could have affected the outcome of a case.

Massachusetts courts have not established a specific procedure for raising claims of ineffective assistance of appellate counsel in child welfare cases. A client who wants to raise this claim may be able to do so in a motion for a new trial, a motion for rehearing or further appellate review, or a petition for a writ of habeas corpus.

**Discussion**

**A. Ineffective Assistance of Counsel at Trial**

**1. Federal Rule**

In order to examine the standards for ineffective assistance of appellate counsel, it is important to understand the general rules for ineffective assistance of counsel. The United States Supreme Court holds that counsel is ineffective when his performance falls below an objective standard of reasonableness and his performance is so deficient that it actually prejudices his client (i.e., there is a reasonable probability that the outcome of a case would have been different but for counsel’s deficiency.) Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2025, 2064 (1984). The United States Supreme Court holds that, under federal law, there is no fundamental right to counsel for parents in termination proceedings. Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 25, 101 S.Ct. 2153, 2159 (1981)

**2. Massachusetts Rule**

In Massachusetts, courts have adopted a slightly stricter rule to determine whether counsel is ineffective. The Supreme Judicial Court holds that counsel is ineffective when his behavior falls measurably below that which might be expected from an ordinary fallible lawyer, and when counsel’s behavior has likely deprived the client of an otherwise available, substantial ground of defense. Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

In child welfare cases in Massachusetts, parents and children have a statutory right to counsel. M.G.L. c. 19, § 29. Furthermore, Massachusetts courts have held that clients in care and protection proceedings are entitled to effective assistance of counsel. Care and Protection of Stephen, 401 Mass. 144, 149 (1987). The standard for effective assistance in care and protection proceedings is the same as the standard established under Saferian—whether counsel’s performance fell below that of an ordinary fallible lawyer, and whether it actually prejudiced the client. Id.; see also Care and Protection of Georgette, 439 Mass. 28, 32 (2003).

**B. Ineffective Assistance of Appellate Counsel**

**1. Federal Rule**

The United States Supreme Court has held that the right to effective assistance of counsel in criminal cases applies to the right to counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 836 (1985) (stating that “a first appeal as of right…is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney”). In determining whether appellate counsel is ineffective, federal courts have applied the test set forth in Strickland and have asked whether appellate counsel’s actions were unreasonable and prejudicial. See LeBlanc v. Grelotti, 910 F. Supp. 826, 830 (D. Mass. 1995).

**2. Massachusetts Rule**

In Massachusetts criminal cases, courts have applied the Saferian test to claims of ineffective assistance of appellate counsel (examining whether counsel’s behavior showed serious incompetency, inefficiency, or inattention that fell below that of an ordinary fallible lawyer and, if so, whether it deprived the appellant of an otherwise available, substantial ground of defense). Breese v. Commonwealth, 415 Mass. 249, 252 (1993). When considering appellate counsel’s conduct, the courts have looked at whether counsel “failed to raise a significant and obvious issue” that “may have resulted in…an order for a new trial.” Commonwealth v. Sowell, 34 Mass. App. Ct. 229, 232 (1993).

Courts have emphasized the necessity of proving that counsel’s actions actually prejudiced the client. In making claims of ineffective assistance of appellate counsel, “there ought to be some showing that better work might have accomplished something material” for the client. Commonwealth v. Richard, 398 Mass. 392, 393-94 (1986) (citing Cepulonis v. Commonwealth*,* 384 Mass. 495, 502 (1981)).

Generally, courts are very deferential to appellate counsel. “Where tactical and strategic decisions of…counsel are at issue, [courts] conduct [their] review with some deference to avoid characterizing as unreasonable a defense that was merely unsuccessful.” Commonwealth v. White*,* 409 Mass. 266, 272 (1991). Counsels’ decisions must be “manifestly unreasonable” to constitute ineffective assistance. Id.

In other words, Massachusetts courts have held that appellate counsel is ineffective when he fails to raise an obvious and significant issue that could have changed the outcome of a litigant’s case and when he does so without any strategic justification. Roger L. Michel, Jr., Constitutional Law—Ineffective Assistance of Appellate Counsel, 78 Mass. L. Rev. 110, 1112 (1993).

Currently, there are virtually no Massachusetts cases that address ineffective assistance of appellate counsel in the realm of child welfare law. However, courts have already determined that the same standard for ineffective assistance of trial counsel in a criminal case should apply to ineffective assistance in care and protection proceedings. Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Therefore, courts will probably apply the Saferian standard for ineffective assistance of appellate counsel in child welfare cases as well.

**C. Actions Constituting Ineffective Assistance of Appellate Counsel**

In the criminal context, appellate counsel is ineffective when his actions reflect serious incompetency, inefficiency, or inattention that falls below that of a reasonable, fallible lawyer, and when they deprive the client of an otherwise available, substantial argument. Breese v. Commonwealth, 415 Mass. 249, 252 (1993). Generally, claims of ineffective assistance of appellate counsel arise when counsel fails to follow proper procedure when filing an appeal or fails to select appropriate appellate issues.

**1. Failure to Follow Proper Appellate Procedure**

Courts are most likely to find ineffectiveness of appellate counsel when a client loses access to an appeal because of counsel’s conduct. In these cases, the attorney’s deficiency and the harm to the litigant are generally very apparent. The U.S. Supreme Court has held that, in criminal cases, where appellate counsel’s conduct has deprived a client of his right to an appeal, the client does not need to prove prejudice. If a client, who intends to appeal, relies on an attorney who fails to protect the client’s right, then the client has suffered prejudice per se. See Evitts v. Lucey, 469 U.S. 387, 389-90, 105 S.Ct. 830, 833 (1985).

Massachusetts criminal courts have followed the federal standard. The Supreme Judicial Court has explained that counsel’s failure to file an appeal is “indefensible” where the client has not consented to this decision; there is no strategic justification for such a choice. Commonwealth v. Frank*,* 425 Mass. 182, 184 (1997). In Frank, the defendant’s attorney filed a timely notice of appeal but failed to file an appellate brief. The Appeals Court dismissed the defendant’s appeal for failure to prosecute. Id. at 183. The Supreme Judicial Court held that the defendant had a “clear statutory right to an appeal,” and counsel’s failure to gain access to the appeal constituted ineffective assistance. Id. The Court went on to say that when counsel’s deficiency has deprived a defendant of a direct appeal, the defendant is not required to argue the issues that he would have raised on appeal. Id. at 184. In other words, the defendant was not required to show that his lack of appeal was actually prejudicial in the sense that an appeal would have changed the outcome of his case. Instead, counsel’s failure to preserve the client’s right to an appeal was sufficiently prejudicial on its own. Id.

Similarly, in Commonwealth v. Kegler, 65 Mass. App. Ct. 907, 908 (2006), the defense counsel was ineffective where counsel repeatedly asked for extensions to file an appellate brief and still failed to do so by the required date. In Kegler, the Court dismissed the defendant’s appeal because his counsel failed to timely file the brief. The defendant filed a motion to reinstate the appeal, and a single justice denied the motion. When the defendant appealed this denial, the Appeals Court held that defense counsel’s “blatant disregard of the rules of appellate procedure is conduct demonstrably below what is to be expected of reasonably competent counsel.” Id.

Furthermore, other courts have held that appellate counsel’s failure to file an adequate appeal can constitute ineffective assistance of counsel where the conduct actually prejudices the client. In one federal case, a court held that appellate counsel was ineffective where counsel filed a two-page brief that did not assert any grounds for appeal but only requested a review for “errors patent.” Lofton v. Whitley, 905 F.2d 885, 887 (5th Cir. 1990). There, the Court held that there was a “constructive denial of counsel on appeal,” so the client was actually harmed. Id.

In contrast, if a litigant knowingly waives his right to an appeal, then he will not have a successful claim of ineffective assistance where counsel fails to preserve access to an appeal. Frank, 425 Mass. at 185, n. 2 (stating that where “loss of appellate rights was due to the deliberate and counseled choice of the defendant…the defendant must abide by that choice”).

Although criminal cases do not require a client to prove prejudice when counsel loses his right to an appeal, child welfare law may be more strict. Adoption of Nani*,* No. 09–P–1855, 76 Mass. App. Ct. 1121 (March 30, 2010). In this unpublished case, a father filed a timely notice of appeal from the trial court’s denial of his request for post-adoption visits. Id. The Court’s opinion is unclear on the appellate counsel’s deficiencies, but it explains that DCF successfully moved to dismiss the appeal for the father’s failure to prosecute. Id. The father filed a motion to reconsider the dismissal, which was denied; the father then appealed this denial, alleging ineffective assistance of appellate counsel. Id.

In Nani, the father lost his right to appeal because of his appellate counsel’s actions. Instead of holding that there was prejudice per se, though, the Court went on to examine the merits of the father’s claim. Id. The Court stated that the father was not prejudiced by his counsel’s ineffectiveness because his appeal would have been without merit. There was “overwhelming proof” of his unfitness, so he would have lost the appeal. Id. The Court’s decision to examine the merits of the claim suggests that the father’s loss of an appeal was not prejudice per se. Otherwise, the father would have been entitled to a new appeal and the Court would not have needed to examine the merits of his case. It is possible, then, that in child welfare cases in Massachusetts, courts will still require proof of prejudice when counsel’s deficiencies have caused a client to lose an appeal.

Child welfare cases from other states are divided on whether counsel’s failure to gain access to an appeal constitutes prejudice per se. The Supreme Court of Hawaii, for example, held that a court will not presume prejudice in child welfare cases where appellate counsel fails to file an appeal. In re RGB, 123 Haw. 1, 27 (2010). Instead, the Court held that appellate counsel’s decisions must “be viewed in the broader context of whether the family court proceeding was fundamentally unfair.” Id. Where the claims on appeal would be without merit, appellate counsel is not ineffective for failing to file an appeal. Id.

In contrast, a Wisconsin appellate court held that counsel’s failure to gain access to an appeal was both deficient and prejudicial. In re Alexandria G., --- N.W.2d ----, 2013 WI App. 83. In Alexandria, appellate counsel failed to file a timely notice of appeal, and as a result, the client was “deprived…of his fundamental right to an opportunity to be heard on an appellate challenge.” Id. The Court stated that where a client is denied the assistance of counsel, the client is presumed to be prejudiced. Id. This demonstrates that some courts have held that failure to gain access to an appeal is per se prejudicial in the child welfare context. Because the only Massachusetts opinion on this issue is unpublished, one could argue that failure to gain access to an appeal should constitute prejudice per se.

Essentially, counsel’s failure to gain access to an appeal may be considered ineffective assistance when a client does not knowingly waive his right to appeal. In criminal cases, if a client can show that he wanted to appeal but lost his right because of his attorney’s incompetence, this constitutes prejudice per se. In the child welfare context, however, there is evidence that a client may be required to show prejudice even if he has lost his right to an appeal.

**2. Deficient Selection of Appellate Issues**

Many ineffective assistance of appellate counsel claims concern counsel’s failure to raise a specified issue on appeal. Because courts grant great deference to appellate attorneys regarding the issues that they select, these claims often fail. The United States Supreme Court has emphasized that appellate counsel is not obligated to raise every conceivable issue on appeal: “Winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” Jones v. Barnes*,* 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983).

Massachusetts courts have agreed that appellate counsel is not ineffective for failing to raise specified issues on appeal unless failure to do so actually prejudices the client. In Commonwealth v. Huenefeld, for example, the appellant claimed that counsel was ineffective for failing to raise the same issues in his direct appeal that appellant offered in support of his motion for a new trial. 34 Mass. App. Ct. 315, 321-22 (1993). In that case, the appellant filed a motion for a new trial that included twenty-one separate grounds for relief. Id. at 316, n. 1. Appellate counsel then prepared and argued a comprehensive brief that addressed four issues. Id. at 321. The Court explained that the issues that the defendant raised in his motion for a new trial were not prominent issues at trial, and it held that appellate counsel was not ineffective for arguing the four issues adequately. Id. The Court stressed that the question of counsel’s effectiveness is “practical,” not “theoretical.” Id. In other words, counsel does not need to raise every argument that is theoretically possible as long as counsel makes effective arguments as a practical matter. See also Commonwealth v. Avellar, 1996 WL 729889 (Mass. Super. 1996) (counsel does not need to raise “every plausible argument” but should only argue issues that are likely to help the client).

Massachusetts courts have also established that appellate counsel is not required to raise claims of ineffective assistance of trial counsel unless these claims could actually assist a client. See Commonwealth v. Mac Hudson, 446 Mass. 709, 727 (2006) (appellate counsel not ineffective for failing to raise claims that trial counsel was ineffective where trial counsel’s conduct was actually effective; “failure to raise these points on appeal cannot constitute ineffective assistance because the arguments would have been of no avail”).

On the other hand, courts have held that appellate counsel is ineffective where counsel fails to raise arguments that could actually help the client. See Commonwealth v. Cormier, 41 Mass. App. Ct. 76, 77 (1996) (ineffective assistance of appellate counsel where counsel failed to argue sufficiency of evidence at trial, and where the evidence at trial was actually insufficient to support the conviction).

There are no Massachusetts child welfare cases that discuss ineffective assistance of appellate counsel for failing to raise specified issues on appeal. However, since juvenile courts have already established that they will follow the Saferian standard for ineffective assistance claims, Care and Protection of Stephen, 401 Mass. 144, 149 (1987), it is probable that appellate counsel in child welfare cases will be held to the same standard as appellate counsel in criminal cases. Courts will find ineffective assistance where counsel fails to raise issues that likely would have helped a client on appeal and does not have a reasonable justification for his decisions.

**D. Procedure - Raising Ineffective Assistance of Appellate Counsel Claims**

Massachusetts courts have established that a claim of ineffective assistance of appellate counsel only entitles litigants to a new appeal. In Adoption of Nani*,* No. 09–P–1855, 76 Mass. App. Ct. 1121 (March 30, 2010), the Court examined whether the client’s appellate counsel was ineffective and whether the father was entitled to reinstatement of his appeal. In its decision, the Court cited Commonwealth v. Stote, 456 Mass. 213, 218 (2010). In Stote, the Supreme Judicial Court explained that if the defendant could establish ineffective assistance of appellate counsel, “he would be entitled…to a new appeal, not to a new trial.” Id. at 218 n. 9. See also Commonwealth v. Boria, 460 Mass. 249, 252 (2011) (stating that if the defendant could successfully show that her appellate counsel was ineffective, she would be entitled to a new appeal). Accordingly, the remedy for ineffective assistance of appellate counsel is a reinstatement of the appeal.

Massachusetts courts have not clearly established a procedure for raising claims of ineffective assistance of appellate counsel in the child welfare context. Nani is the only child welfare case addressing this claim in Massachusetts. 76 Mass. App. Ct. 1121. However, this is an unpublished decision and it does not clearly state the proper way to raise a claim of ineffective assistance of appellate counsel. Therefore, a litigant may have several options in pursuing a claim of ineffective assistance of appellate counsel in a child welfare case.

**1. Rule 60(b) Motion for New Trial**

Although a majority of Massachusetts child welfare cases only discuss ineffective assistance of trial counsel, courts have established that “an ineffective assistance of counsel claim ordinarily should be raised in the first instance by means of a motion for new trial.” Adoption of Sidona, 76 Mass. App. Ct. 1127, 925 N.E.2d 573 (2010). See also Care and Protection of Stephen*,* 401 Mass. 144, 150 (1987); Adoption of Mary, 414 Mass. 705, 713 (1993). These cases have noted that Rule 60(b) is intended to address meritorious ineffective assistance claims. Care and Protection of Georgette, 439 Mass. 28, 32 (2003). Courts have also emphasized that they generally will not hear claims for the first time on appeal. Stephen, 401 Mass. at 150. This suggests that a claim of ineffective assistance of appellate counsel should be raised in a Rule 60(b) motion for a new trial.

Further, in the only Massachusetts child welfare case in which the client raised a claim of ineffective assistance of appellate counsel, the client used a “motion to reconsider the dismissal of the father’s appeal.” Adoption of Nani*,* No. 09–P–1855, 76 Mass. App. Ct. 1121 (March 30, 2010). In that case, the father was denied post-adoption visits with his daughter, and he appealed the denial. Id. The Court did not explain what the father’s appellate counsel failed to do, but DCF successfully moved to dismiss the case for failure to prosecute. Id. The father then filed a motion to reconsider dismissal of the appeal on the grounds that his appellate counsel was ineffective in failing to perfect the appeal. Id.

Although this case is unpublished, it is the only case that offers guidance for raising child welfare claims of ineffective assistance of appellate counsel in Massachusetts, and it suggests that a “motion for reconsideration” is a proper way to do so. The 2013 Reporter’s Notes of the Massachusetts Rules of Appellate Procedure establish that a “motion for reconsideration” can be treated as a Rule 59 motion for a new trial or a Rule 60(b) motion for relief from judgment, depending on the timing of the motion. Mass. R. App. P. 4 – Reporter’s Notes 2013; Mass. R. Civ. Pro. 59; Mass. R. Civ. Pro. 60(b).

Similarly, other states have determined that child welfare clients may raise claims of ineffective assistance of counsel in motions that are similar to Massachusetts’ Rule 60(b). See In re RGB, 123 Haw. 1, 22 (2010) (“Rule 60(b)(6) was an appropriate vehicle for raising ineffective assistance” of trial and appellate counsel); Ex parte E.D., 777 So. 2d 113, 116 (Ala. 2000) ( “A Rule 60(b)(6) motion…can be an appropriate means by which a parent facing the termination of parental rights can present claims of ineffective assistance of appointed counsel”).

Since the Massachusetts child welfare cases are somewhat unclear, and since ineffective assistance claims in child welfare law utilize the criminal standard, it is possible to receive guidance from Massachusetts criminal cases. Those cases also suggest that clients can bring claims of ineffective assistance of appellate counsel in a motion for a new trial. See, e.g., Commonwealth v. Woody, 429 Mass. 95, 97 n. 2 (1999) (“If an appellate counsel's lack of diligence…has prejudiced an appeal, a defendant could move for a new trial based on ineffective assistance of appellate counsel”).

Furthermore, several criminal courts from other jurisdictions have held that one can properly bring a claim of ineffective assistance of appellate counsel before a trial court. See State v. Herrera, 183 Ariz. 642, 645-47 (1995) (holding that claims of ineffective assistance of appellate counsel should be brought before trial courts, which are “better equipped to resolve the factual disputes that frequently underlie assertions of ineffective assistance of appellate counsel”); Commonwealth v. Sullivan*,* 472 Pa. 129, 143 (1977) (claims of ineffective assistance of appellate counsel should be brought before trial courts, not appellate courts, because “the structure and function of an appellate court precludes it from being an initial factfinder”); Wilson v. State, 284 Md. 664, 678 (1979) (trial court can consider issue of ineffective assistance of appellate counsel under post-conviction relief statute).

On the other hand, many jurisdictions have explained that, at least in criminal cases, claims of ineffective assistance of appellate counsel should be brought before an appellate court with jurisdiction over the appeal. See, e.g., State v. Knight, 168 Wis. 2d 509, 518 (1992); Watson v. United States, 536 A.2d 1056, 1060 (D.C. 1987); People v. Bachert, 516 N.Y.S.2d 623, 624 (1987); Hemphill v. State, 566 S.W.2d 200, 207 (Mo. 1978). Those Courts are concerned that allowing a trial court to make decisions that affect the appellate court’s rulings would usurp the function of appellate courts.

However, some jurisdictions still allow trial courts to hear claims of ineffective assistance of appellate counsel. Wilson, 284 Md. at 676; Sullivan, 472 Pa. at 143; Herrera, 183 Ariz. at 646. Those courts emphasize that this does not usurp the appellate court’s function because ineffective assistance claims do not necessarily involve errors regarding the appellate stage of the proceedings, but they involve errors “relating to the validity of the original judgment.” Wilson, 284 Md. at 676. Further, in those cases, the trial court does not pass judgment on the appellate court’s decision, but makes a finding concerning the conduct of appellate counsel. Sullivan, 472 Pa. at 143. Finally, those Courts emphasize that any fact finding or conclusions of law are still subject to appellate review. Herrera, 183 Ariz. at 646.

Overall, a client may have a good argument that he should be able to raise a claim of ineffective assistance of appellate counsel in a Rule 60(b) motion. Massachusetts case law has established that claims of ineffective assistance of trial counsel in child welfare cases should be raised that way, and some other jurisdictions agree. Case law also establishes that appellate courts generally will not address claims raised for the first time on appeal. Furthermore, criminal defendants in Massachusetts have the ability to raise ineffective assistance of appellate counsel claims in a motion for a new trial. Since child welfare courts in Massachusetts already follow the criminal standard in claims of ineffective assistance of trial counsel, it is likely that they will also follow the procedure for appellate counsel. Finally, litigants can argue that trial courts are well-equipped to handle these types of claims and that allowing a trial court to hear these claims will not usurp the appellate court’s power.

**2. Motion for Rehearing or Further Appellate Review**

Many jurisdictions have established that litigants should bring claims of ineffective assistance of appellate counsel before appellate courts. Herrera, 183 Ariz. at 645 (exploring other states’ procedures and citing, e.g., State v. Knight, 168 Wis. 2d 509, 518 (1992); Watson v. United States, 536 A.2d 1056, 1060 (D.C. 1987)). Massachusetts courts have not decisively stated that these claims belong in trial court. Therefore, it is important to examine the procedure by which a client in a Massachusetts child welfare case could raise the claim in an appellate court. It is possible that claims of ineffective assistance of appellate counsel could be raised in a petition for rehearing or a petition for further appellate review. Mass. R. App. P. 27; Mass. R. App. P. 27.1. Ordinarily, those rules do not contemplate claims like ineffective assistance of counsel; appellate courts generally will not hear claims for the first time on appeal. Care and Protection of Stephen, 401 Mass. 144, 150, 514 (1987). However, many Massachusetts courts have held that appellate courts can hear issues for the first time on appeal in “exceptional circumstances.” Id.; Adoption of Parker, 77 Mass. App. Ct. 619, 621-23 (2010); Commonwealth v. Adamides, 27 Mass. App. Ct. 339, 344 (1994); Albert v. Municipal Court of Boston, 388 Mass. 491, 494 (1983).

In Massachusetts, there are very few published opinions that address whether there are “exceptional circumstances” in child welfare cases. However, Courts have emphasized the importance of promptly resolving child welfare cases, which could encourage appellate courts to hear issues for the first time. Massachusetts courts have stated that custody proceedings “fail to accomplish their purpose” unless they are expedited. Custody of a Minor, 389 Mass. 755, 764 (1983) (appellate court considered the possibility of deciding substantive issues on the merits in order to ensure promptness). Appellate courts may decide to hear substantive issues on the merits for the purpose of advancing a case quickly. Id.

Appellate courts have found exceptional circumstances in some child welfare cases. Adoption of Parker, 77 Mass. App. Ct. 619, 621-23 (2010). In Parker, the trial judge only relied upon offers of proof instead of testimonial evidence when terminating the mother’s parental rights. Id. The mother objected to the trial judge’s procedure, and she raised her claim for the first time on appeal. Id. The appellate court agreed that there were exceptional circumstances “given the uniqueness of the procedure employed by the judge.” Id. at 657. Similarly, in Adoption of Norbert, 83 Mass. App. Ct. 542 (2013), an appellate court heard a mother’s claim concerning a trial judge’s bias for the first time on appeal. Even though the mother had no explanation for failing to raise the claim at trial, the court held that it could hear the claim because of the “serious nature of the case, coupled with the fact that due process governs these proceedings.” Id. This suggests that in child welfare cases, appellate courts may be willing to hear issues for the first time on appeal where the record clearly shows that there has been an egregious error.

Further, in some unpublished child welfare cases, Massachusetts appellate courts have heard claims of ineffective assistance of trial counsel when these claims are raised for the first time on appeal. See Adoption of Selina, No. 03-P-1655, 809 N.E.2d 1099 (Mass. App. Ct. June 8, 2004) (reviewing mother’s claim of ineffective assistance of trial counsel, raised for the first time on appeal, where the record was sufficient to assess the claim and because “there are compelling reasons to resolve cases of this nature promptly”); Adoption of Tori, No. 02-P-971, 786 N.E.2d 1 (Mass. App. Ct. April 1, 2003) (hearing daughter’s claim of ineffective assistance for the first time on appeal).

On the other hand, ineffective assistance claims in child welfare cases do not necessarily create the “exceptional circumstances” that allow an appellate court to hear these claims for the first time. Adoption of Mary, 414 Mass. 705, 713 (1993) (declining to hear ineffective assistance claim because “there has been no showing made of exceptional circumstances”). The Court in Mary does not explain the types of circumstances that would be “exceptional” and would allow the appellate court to hear the claim.

Because Massachusetts courts have not clarified what constitutes an “exceptional circumstance” in child welfare cases, it is instructive to look at other types of cases. Several Massachusetts criminal cases have examined whether “exceptional circumstances” exist in a given case. Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994). In that case, the Court held that “a claim of ineffective assistance may be resolved on direct appeal…when the factual basis of the claim appears indisputably on the trial record.” Id. There, the defendant claimed that his trial counsel was ineffective for failing to call certain witnesses. The Court determined that the defendant’s ineffective assistance claim could not be resolved without some fact-finding, so it held that the defendant should raise his ineffective assistance claim in a motion for a new trial. Id.

Accordingly, appellate courts in criminal cases have agreed to hear claims of ineffective assistance of trial counsel for the first time on appeal where the record is clear. Commonwealth v. Frisino, 21 Mass. App. Ct. 551, 556 (1986). In Frisino, the defendant’s trial counsel failed to object to admission of hearsay statements. The appellate court stated that, although “moving for a new trial is the customary practice in situations involving ineffective assistance of counsel,” the Court would hear the claim where the “record clearly shows the Commonwealth’s case to be deficient” without the hearsay evidence. Id. Since it was clear from the record that trial counsel’s conduct fell below that of a fallible lawyer and prejudiced the client, the appellate court could hear the claim.

Similarly, Massachusetts civil cases hold that appellate courts can hear claims for the first time in exceptional circumstances. Albert v. Municipal Court of Boston, 388 Mass. 491, 494 (1983). Courts have found exceptional circumstances where the parties “would not have had the opportunity to present the issue to the court below,” Atlas Tack Corp. v. DiMasi, 37 Mass. App. Ct. 66, 71 (1994), or where “injustice might otherwise result” because of a limited opportunity to present an issue to a lower court. White v. White, 40 Mass. App. Ct. 132, 133 (1996).

Overall, these cases hold that, where the record is sufficient to allow an appellate court to examine a claim, and where there is an exceptional circumstance, an appellate court in the child welfare context may be willing to hear an ineffective assistance of appellate counsel claim for the first time. Using this argument, a client could raise a claim of ineffective assistance of appellate counsel in a petition for rehearing or a petition for further appellate review. Although courts offer little guidance on what constitutes an “exceptional circumstance” in the child welfare context, a client could argue that such circumstances exist where the record clearly shows that an attorney’s conduct was ineffective and where there is a need to resolve the case promptly or where there has been an egregious error.

Furthermore, other jurisdictions have established that appellate courts should hear claims of ineffective assistance of appellate counsel. Those courts believe that only appellate courts, not trial courts, should be able to make rulings on appellate proceedings. See, e.g., State v. Knight, 168 Wis. 2d 509, 518 (1992); Watson v. United States, 536 A.2d 1056, 1060 (D.C. 1987); Hemphill v. State, 566 S.W.2d 200, 207-08 (Mo. 1978); People v. Bachert, 516 N.Y.S.2d 623, 624 (1987). The Wisconsin Supreme Court, for example, has explained that a “remedy in the trial courts…is designed to set aside a sentence only for infirmities arising during the trial proceedings,” not for issues that arise on appeal. Knight, 168 Wis. 2d at 518. Where trial courts hear meritorious claims of ineffective assistance of appellate counsel, the proceeding “results in an order setting aside the appellate decision, not in an order setting aside the trial proceedings.” Id. Some courts believe that trial courts “should not have authority to rule on the constitutionality of an appellate proceeding.” Watson v. United States, 536 A.2d 1056, 1060 (D.C. 1987). This supports the idea that a litigant should bring an ineffective assistance of appellate counsel claim to an appellate court.

Raising a claim of ineffective assistance of appellate counsel through a petition for rehearing or further appellate review may be problematic because a litigant must make these petitions within fourteen or twenty days after the rescript, respectively. In Massachusetts, there are no clear remedies in appellate courts for a client who alleges ineffective assistance of appellate counsel but who fails to file a motion within the proper amount of time.

However, the Supreme Judicial Court has held that it has the power to hear a claim that a client raises for the first time after the client’s motion for further appellate review. Phillips v. Youth Development Program, 390 Mass. 652, 660 (1983). In Phillips, the plaintiff filed an application for further appellate review, which the Supreme Judicial Court granted. After the court granted review, the plaintiff filed a supplemental brief with a new claim. The Supreme Judicial Court determined that it would not hear the new claim because it was a constitutional question that was “raised as an afterthought and not fully briefed on both sides.” Id. The Court emphasized that it would not ordinarily hear issues that were raised after the Court granted further appellate review. However, the Court established that it was within its power to do so in exceptional circumstances. Id.

Furthermore, other states who have considered this issue more extensively have developed more lenient systems for clients who received ineffective assistance of appellate counsel. For example, the Supreme Court of Ohio was concerned with the possibility that “claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration.” State v. Murnahan, 63 Ohio St. 3d 60, 65-66 (1992). As a result, the Supreme Court of Ohio developed a procedure by which an appellant could apply for delayed reconsideration or a delayed appeal. Id. This was codified in Ohio App. R. 26(b)(1), which established that litigants who have claims of ineffective assistance of appellate counsel should file applications for reopening with the Court of Appeals within ninety days.

Similarly, Georgia courts have established a procedure for “out-of-time” appeals in situations where an appellate counsel’s deficiencies deny a criminal defendant of the right to an appeal. Rowland v. State, 264 Ga. 872, 875 (1995). That procedure allows criminal defendants to appeal their convictions much later than ordinarily would be allowed when they have lost their rights to appeal due to error of counsel. Roberts v. Caldwell, 230 Ga. 223 (1973) (allowing an appeal 20 months after conviction, where defendant had been denied appellate counsel). In Massachusetts, one could argue that the courts should follow the lead of other states that have considered the issue by granting extended time to file motions in appellate courts.

**3. Petition for writ of habeas corpus**

Massachusetts courts have never addressed whether habeas corpus proceedings are appropriate in child welfare cases. However, some states have established that clients can use writs of habeas corpus in care and protection proceedings to raise claims of ineffective assistance.

For example, California courts have held that clients can use writs of habeas corpus in child welfare cases. In re Kristin H., 46 Cal. App. 4th 1635, 1642 (1996) (holding that “mother’s claim of ineffective assistance of counsel, raised by petition for a writ of habeas corpus, is cognizable”). Similarly, in Wisconsin, courts have held that writs of habeas corpus are appropriate in child welfare cases. The Supreme Court of Wisconsin has explained that, although care and protection proceedings do not involve a restraint of physical liberty, “the question in such matters is not physical restraint but the assertion of a lawful right to retain custody of the child.” See Anderson v. Anderson, 36 Wis. 2d 455, 459 (1967); Ex parte Bellmore, 189 Wis. 431, 433 (1926).

Further, Wisconsin courts have recently decided that a parent may use a writ of habeas corpus when he seeks to challenge termination of his parental rights due to ineffective assistance of appellate counsel. In re Alexandria G., 2013 WI App. 83. In Alexandria, a father sought to appeal the termination of his parental rights, but his counsel failed to file the appeal within the appropriate amount of time. He filed a motion to receive new counsel and to extend the deadline for filing a notice of appeal, and the Court denied the motion. He then filed a petition for a writ of habeas corpus, alleging ineffective assistance of appellate counsel. Id. The Court agreed that a writ of habeas corpus was an appropriate way to bring this claim, and it granted the writ. Id. In its opinion, the Court explained that habeas corpus was appropriate where there is a restraint of liberty (i.e., restraint of the right to retain custody of a child), where there is a right to counsel, and where there are no other available remedies. Id.

A majority of states, however, have held that writs of habeas corpus are not appropriate in most child welfare cases. See Cosgrove v. Kansas State Dept. of Social and Rehabilitation Services, 14 Kan. App. 2d 217, 220-21 (1990); State in Interest of E.H. v. A.H., 880 P.2d 11, 13 (Utah Ct. App. 1994); In re Jonathan M., 255 Conn. 208, 233 (2001). In Kansas, the Appeals Court held that it would not allow habeas corpus petitions by parents whose parental rights have been severed. Cosgrove, 14 Kan. App. 2d at 220. Allowing those petitions would make adoptions “impractical” because adoptive parents could be subject to a lawsuit at any time. Id. Likewise, Utah courts have expressed concern that allowing habeas corpus petitions in termination proceedings would “unacceptably require that children remain indefinitely in temporary foster care.” E.H., 880 P.2d at 13 n. 2. The Supreme Court of Connecticut has also discussed the “frightening possibility that a habeas petition will negate the permanent placement of a child whose status has presumably been in limbo for several years.” Jonathan M., 255 Conn. at 233.

Despite the potential problems with using writs of habeas corpus in child welfare cases, Massachusetts courts have never explicitly held that child welfare clients cannot use these writs. One could argue that, because child welfare cases involve a restriction of liberty and a right to counsel, Massachusetts courts should allow writs of habeas corpus in these cases.

**Conclusion**

In Massachusetts, courts examine claims of ineffective assistance of appellate counsel under the Saferian standard. Appellate counsel is ineffective when counsel’s conduct reflected serious incompetency, inefficiency, or inattention that fell measurably below behavior that would be expected from an ordinary, fallible lawyer, and when counsel’s conduct materially affected the outcome of the case. Commonwealth v. Saferian*,* 366 Mass. 89, 96 (1974). More generally, courts have stated that “there ought to be some showing that better work might have accomplished something material for the defense.” Cepulonis v. Commonwealth*,* 384 Mass. 495, 502 (1981). Courts tend to be deferential to appellate counsel, especially concerning strategic decisions, to “avoid characterizing as unreasonable a defense that was merely unsuccessful.” Commonwealth v. White*,* 409 Mass. 266, 272 (1991).

Claims of ineffective assistance of appellate counsel usually occur when a litigant contends that counsel either lost access to an appeal or deficiently selected issues for the appeal. Litigants are most likely to be successful when counsel failed to protect access to the appeal. Otherwise, courts are extremely deferential to appellate counsels’ decisions on filing and arguing appeals. Courts will only find ineffective assistance when appellate counsel’s decisions lacked strategic justification and when the choices likely affected the outcome of the case.

A client who wants to raise a claim of ineffective assistance of appellate counsel may be able to do so through a Rule 60(b) motion for a new trial. A Rule 60(b) motion will allow a trial court to find facts concerning appellate counsel’s conduct, and it may be an appellant’s only option after an appeal is completed. A litigant may also be able to file a petition for rehearing or a petition for further appellate review. However, clients only have a short amount of time to make these motions, and Massachusetts does not have a specific process through which appellants can take more time to make those claims. One who wishes to use those motions could ask for more time, citing other states’ laws that allow untimely motions in these circumstances. Finally, a litigant may be able to petition for a writ of habeas corpus. The client could argue that child welfare cases involve a restriction of liberty and that habeas writs are appropriate vehicles to raise child welfare claims.