

# Chapter 5 – Right to Legal Representation

## 5.1 Overview

Quality representation of all parties in dependency proceedings is necessary to produce good outcomes for children and families. Justice flows best from a system in which all parties are represented by competent and actively engaged legal counsel. In the end, courts' decisions are only as good as the information upon which they are based, and it is the attorney (or Pro Se litigant) who is ultimately responsible for collecting, preparing, and delivering that information. Critical to this role is an understanding of the parties who are being represented. If a child or adult party has special needs, it is imperative that the court and counsel are aware of any communication barriers so that accommodations can be made that minimize trauma to any of the parties.

Historically, there has been a recognized deficiency in the quality of legal representation in dependency cases across jurisdictions. This is attributable to various factors, including a lack of standards of practice, low expectations, high caseloads, unclear role definition, inadequate compensation, inadequate resources, and the mistaken view that attorneys working in these cases are relieved of the traditional rigors of the practice of law. This situation has improved as courts have come to recognize the importance of legal counsel in achieving the system's goals of safety, permanency, and well-being for children.

The assignment of competent, well-trained legal counsel for all parties is extremely important in dependency proceedings. Understanding one's rights and responsibilities, as well as the potential legal consequences of actions or inactions, is critical to the outcome of a case. As such, courts should ensure that counsel for all parties is well-trained and well-equipped to provide comprehensive and thorough client representation. Additionally, counsel should be appointed as early in the case as possible. If a shelter care hearing is necessary, it is preferable to have legal representation at that proceeding when possible.

Attorneys should also be engaged in systemic efforts to improve the handling of dependency cases. They should understand the culture change taking place in this area and have a strength-based, family-engagement focus in their work while zealously representing their clients. The agency and the court should include attorneys representing parents, children, and child welfare agencies in training to improve practice in the county.

With quality legal representation as a stated system objective, several projects have been undertaken to create enhanced practice. Much of the work has focused on the representation of children, as this was considered the least developed area. However, over time, more attention has been focused on parents' counsel in recognizing their critical role in achieving good outcomes for children involved in dependency proceedings by

protecting due process and statutory rights, presenting balanced information to judges, and promoting the preservation of family relationships when appropriate.

## 5.2 Legal Representation in Dependency Matters in Pennsylvania

### 5.2.1 Judge's Role

Judges should understand that attorneys working on dependency cases often receive limited compensation or, in some cases, none. While they should be acknowledged for the public service they are providing, this should not preclude quality work. The court, which is ultimately responsible for the appointment of counsel, can have a great degree of positive influence on representation in dependency matters. The judge sets the tone in dependency matters and should expect that all counsel come into hearings prepared. The judge also has the authority to remove or stop appointing ineffective counsel. If judges are only as good as the attorneys in front of them, they should take steps to ensure those attorneys are of the highest quality.

### 5.2.2 Guardian *Ad Litem* (GAL)

#### **\*Best Practice — Online Pre-Service Training for GALs\***

Prior to the appointment of their first case, GALs must receive pre-service training to qualify for federal reimbursement of costs to the agency. The required training is the Core One: An Attorney's Introduction to Pennsylvania's Dependency System. This training is available through the Office of Children and Families in the Courts website: <https://ocfcpacourts.us/core-one-an-attorneys-introduction-to-pennsylvanias-dependency-system/>

The GAL is the child's voice in the courtroom, especially if the child is not of age to articulate his or her own best interests. Pa.R.J.C.P. 1128 requires the presence of the child's attorney at all dependency proceedings, with no exceptions provided. If the child has a GAL and legal counsel, both attorneys shall be present. Additionally, the Juvenile Court Rules have expressly set forth the duties and responsibilities of the GAL. The GAL should meet with the child immediately upon appointment to the case to ascertain the child's wishes as best as the GAL can determine. The visits should continue regularly in a manner appropriate to the child's age and maturity. Pa.R.J.C.P. 1154. The Pennsylvania Supreme Court decisions *In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017) and *In re T.S.*, 192 A.3d 1080 (Pa. 2018) discuss the role of GALs in Termination of Parental Rights cases. (See also Chapter 17: Termination of Parental Rights.)

The GAL should always be kept apprised of changes to the child's placement, custody, visitation, or treatment plan. Both the county agency and the GAL should be proactive in assuring the GAL is informed of all actions that affect the child's safety, well-being, and permanence. If there is a plan to relocate the child, the GAL shall be informed as soon as possible. Pa.R.J.C.P. 1154 (6)(a). The GAL shall be given access to all relevant court and agency records, reports of examination of the guardians or the child, and medical, psychological, and school records. Pa.R.J.C.P. 1154 (2). To fully understand the child's circumstances and represent the child's best interest to the court, the GAL may need to further investigate by interviewing potential witnesses, including the child's guardians, caretakers, or foster parents. In representing the child's best interest to the court, the GAL should fully advise the child of the proceeding and discuss potential outcomes with the child to ascertain the child's wishes to the extent possible. At hearings, the GAL must play an active role in the case by cross-examining witnesses, presenting witnesses, and presenting evidence necessary to communicate the child's wishes and best interests to the court.

"My new Guardian Ad Litem, she is amazing. She's there to talk to if I need her. I have the number for her office, if she doesn't pick up she calls me back within the same business day. She's just better, she cares and it shows."

- J.J., 19, Former Pennsylvania Foster Youth

#### **\*Best Practice — GAL Meetings with the Child\***

Too often, the GAL's first encounter with the child occurs moments before the first hearing begins. Subsequent meetings follow suit with the GAL and the child meeting in the courtroom or hallway prior to each proceeding. This type of meeting has proven to be ineffective and does not provide adequate time for the GAL to understand the child's wishes or best interests.

In some jurisdictions, GAL caseloads are overwhelming, making regular meetings with child clients challenging. To address this issue, some jurisdictions have begun teaming GALs with social workers who meet with children and report back to the GALs. Other jurisdictions have caseloads that allow GALs to visit clients in their homes. Regardless, caseload size should not reduce the level of advocacy and representation provided to child clients or that expected by the court.

Ideally, the GAL should remain with a case throughout its life span with the courts. Maintaining one GAL throughout the case provides continuity for the child and helps to build a positive relationship.

### **5.2.3 Legal Counsel for the Child**

In some situations, a child may need the services of both a GAL and legal counsel. There are significant differences between the GAL and the child's legal counsel. The GAL is concerned with the child's best interests, whereas legal counsel is concerned with the child's legal interests. A child may waive his or her right to legal counsel, but a child cannot waive his or her right to a GAL.

Generally, a GAL is assigned to represent all interests of the child if the reasons necessitating the child's placement result from the acts of the parent. These reasons are identified in 42 Pa.C.S. § 6302 (definition of a dependent child) and include paragraphs (1), (2), (3), (4) and (10).

If, however, the child's behavior plays a role in the allegations of dependency, there may be an underlying legal liability, in which case the child may need separate legal counsel. These reasons are identified in 42 Pa.C.S. § 6302 (5), (6), (7), (8) and (9). The provisions of Pa.R.J.C.P. 1151 specify the circumstances under which a GAL and separate legal counsel should be appointed to protect the child's best interests and legal interests. If the child waives legal counsel, then the GAL should represent both the child's best interests and legal interests.

#### **5.2.4 Dual Jurisdiction**

Dual jurisdiction occurs when a child is adjudicated as both dependent and delinquent. In this situation, the child needs representation from a GAL and/or legal counsel for the dependency matter and legal counsel for the delinquency matter. While this can get burdensome and complex, the different attorneys represent the differing interests of the child. The GAL represents the child's best interests in the dependency matter; legal counsel represents the child's legal interests in the dependency matter if necessary; and separate legal counsel represents the child's legal interests in the delinquency case.

#### **5.2.5 Counsel for Parents**

All parties in a dependency proceeding have the right to competent representation by legal counsel. Pa.R.J.C.P 1151(E) addresses the requirement to apprise parents and other parties of their right to counsel, as well as the timing of the appointment of counsel:

If counsel does not enter an appearance for a party, the court shall inform the party of the right to counsel prior to any proceeding. If a party requests counsel in any case, the court shall assign counsel for the party if the party is without financial resources or otherwise unable to employ counsel. Counsel shall be appointed prior to the first court proceeding. Pa.R.J.C.P. 1151(E).

The court must make every effort to ensure that parents and other parties to the case are clearly advised of their right to counsel and have legal representation at the beginning of dependency cases. If counsel is absent at subsequent hearings, the court should again advise of the right to counsel.

### **\*Best Practice — Parents' Counsel\***

Parents' counsel should meet with parents immediately upon appointment to the case to appropriately understand their needs and the circumstances of the case. Counsel should maintain regular contact with parents to inform them of the proceedings and get updates regarding progress or changing needs.

The timely appointment of counsel and active representation in the early stages of the case reduces the potential for delay in subsequent proceedings due to scheduling conflicts and/or lack of attorney preparation. Early appointment of counsel also encourages greater participation by parents in shaping and complying with the provisions of service plans.

Often, families that enter the child welfare system have a general lack of understanding of the system, which various disabilities and life struggles can compound. Attorneys for parents should clearly explain in plain language the proceedings and discussions occurring, as well as the potential consequences of noncompliance with court orders or Family Service Plans. Parents' attorneys should appropriately participate in the formulation of Family Service Plans to assist parents in understanding the expectations of the agency as a way to ensure timely compliance with the Family Service Plan. Parents' attorneys should also reiterate timeframes and deadlines related to the child welfare system and the possibility that failure to meet them may ultimately result in their parental rights being terminated. Finally, attorneys should advocate for the services needed by their clients to remedy the reasons that led to the dependency proceeding.

Ideally, the attorney for the parent or parents should remain with the case throughout its life span with the courts to maintain continuity and to help build positive relationships.

### **5.2.6 Meaningful Representation**

In response to a need for consistent statewide legal representation in dependency court practice, the Legal Representation Workgroup, through the Pennsylvania State Roundtable, released a publication addressing standards of practice and accountability titled *Standards of Practice for Parents' Attorneys, Guardians Ad Litem & Legal Counsel for Children in Child Welfare Dependency Cases in Pennsylvania*. Topics covered include client contact outside the courtroom, review of the case file, attendance at family meetings, caseload size, specialized training, and the dual role of the Guardian *ad Litem* as protector of a child's best interests as well as legal interests of the child. Judges should note that, as part of this dual role, GALs should present witnesses, testimony, evidence, and arguments to support the GAL's best interest recommendation and witnesses, testimony, evidence, and arguments necessary to support the child's wishes.

Each judge, in their respective judicial district, should work to identify, maintain, and implement practices and procedures that are uniform and consistent within the context of the particular or unique aspects of dependency proceedings in their court. Adherence to these standards should improve case-flow management and client representation. The standards can be accessed at the following link: <https://ocfcpacourts.us/wp-content/uploads/2020/06/Final-Standards-Of-Practice-Letter-Size-001686.pdf>.

### **5.3 Pro Se Parents**

While best practice dictates that all parties would be represented by appropriate legal counsel in the dependency system as early in the process as possible, it is still possible for parents to knowingly, willingly, and voluntarily waive counsel. (See colloquy in section 5.5 of this chapter.)

Parents who refuse representation in dependency matters should receive the same accommodations as any pro se litigant. Accommodations to be given to pro se parties may include:

- **Notification of the ongoing right to legal representation.** The parent can request attorney representation at any time.
- **Explanation of the court process.** As in any other court proceeding, the pro se litigant in a dependency matter needs to understand that both sides will be heard.
- **Explanation of the elements of the dependency case.** The parent should understand what occurs in dependency matters and the potential consequences of the hearings, including the potential for the court to ultimately terminate the parent's rights to the child.
- **Explanation of the rules of procedure and evidence and the proper forms of questioning.** The court should specify what is and is not admissible in a dependency hearing and explain that if the parent chooses to question witnesses, they are bound by the Rules of Juvenile Court Procedure and the applicable Rules of Evidence.
- **Explanation of the meaning of the court's rulings and orders.** Finally, the court should rule immediately and clearly explain to the parent what the court expects.

Sidebar in cases with self-represented parents should be avoided. If unavoidable, the self-represented parent should be included in the sidebar conversation.

**\*Best Practice — Helping Parents Understand Dependency Court\***

In 2016, the State Roundtable’s Legal Representation Workgroup created and released a video aimed at helping parents better understand the dependency court process. The video outlines the dependency courtroom experience, working with parent attorneys, case planning, visitation, and permanency. In many jurisdictions, parents are being encouraged to watch the video to better understand the dependency process. The video can be accessed at the following link: <http://www.youtube.com/watch?v=vOrdjqHPBsY&feature=youtu.be>

## **5.4 County Solicitors**

Unlike counsel for the parents or the child, who is appointed on a case-by-case basis, the solicitor’s appearance can be automatically entered for each dependency case. Pa.R.J.C.P. 1150(A)(3). The solicitor’s primary responsibility is to represent the county child welfare agency in dependency court proceedings. In a broader sense, the solicitor serves as an advisor and counselor as well as the legal representative of the agency. The solicitor is also responsible for ensuring agency staff is prepared for hearings.

Additionally, the solicitor should keep the agency administrator and staff advised regarding current legal developments, including federal and state statutory changes, appellate decisions, and rule changes if they affect the agency and the conduct of dependency hearings.

Before any court proceeding, the solicitor should ensure that the agency staff is well-prepared for the hearing. The solicitor should prepare with the agency for each court appearance. A good way to do this is through a regularly scheduled time to review each case and discuss facts, issues, witnesses, and documents necessary for the hearing. Additional time or open schedules should be kept for emergency hearings and unexpected case developments. One helpful tool for preparing for court is the Permanency Review Hearing Checklist. The checklist was initially created to help judges and hearing officers ensure a thorough hearing. However, it was also found to help prepare for court and prepare a caseworker to testify in court. The tool can be found at the end of Chapter 13: Permanency Hearing and can be modified to suit the needs of the judge.

## **5.5 Waiver of Counsel**

A child may waive legal counsel only. At no time may a child waive the right to a GAL. Parents may waive their right to counsel for any proceeding. A parent who waives the right to counsel may revoke the waiver at any time and must be informed of the right to counsel at all subsequent hearings. Pa.R.J.C.P. 1152.

If the right to counsel is waived, Pa.R.J.C.P. 1152 requires that the court determine if the waiver is “knowing, intelligent, and voluntary.” The comment to Rule 1152 suggests that the court conduct a colloquy with the party on the record regarding the following points:

1. Whether the party understands the right to be represented by counsel;
2. Whether the party understands the nature of the dependency allegations and the elements of each of those allegations;
3. Whether the party is aware of the dispositions and placements that may be imposed by the court, including foster care placement and adoption;
4. Whether the party understands that if he or she waives the right to counsel, he or she will still be bound by all the rules of procedure and that counsel would be familiar with these rules;
5. Whether the party understands that counsel may be better suited to defend the dependency allegations; and
6. Whether the party understands that the party has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the party, the ability to correct these errors may be lost permanently.

**\*Best Practice — Additional Colloquy Question\***

In addition to the colloquy suggested in the comment to Pa.R.J.C.P. 1152, courts may wish to inquire as to whether the party has taken any substance into their body that would make them unable to understand any of the previous questions.

The court may assign standby (also known as back-up) counsel if a party waives counsel at any proceeding or stage of a proceeding. The judge should explain what this is and what to expect from standby counsel. ( See *Commonwealth v. Spatz*, 47 A.3d 63 (Pa. 2012).) Whenever representation is waived, the waiver only applies to the hearing for which it is made. The party may revoke the waiver of counsel at any time, and the court should inform the party of the right to counsel again at each subsequent hearing.



## **5.6 Substitute Counsel**

The court is responsible for setting expectations regarding substitute counsel and holding attorneys to those expectations. Sometimes, assigned counsel needs a substitute for a hearing. This is especially true in the case of emergencies. In anticipation of this need, courts should set expectations for substitute counsel. Courts should expect assigned counsel to thoroughly apprise the substitute attorney of the issues expected to be presented at the pending proceeding and what should be covered. Assigned counsel should also be expected to inform their client of the substitution prior to court and notify the court.

In an emergency situation, given certain circumstances, a case may need to be continued. In non-emergency situations, it is the obligation of the assigned counsel to submit a request for rescheduling in advance of the hearing to minimize disruption of the court calendar and any inconvenience to the parties. Judges and hearing officers should ask the party on the record if they agree to be represented by substitute counsel. If they are not in agreement, the hearing should be continued. Before continuing the hearing, the judge should ask if any emergency or time-sensitive issues need to be handled immediately.

### **\*Best Practice — Substitute Counsel\***

Clearly there are circumstances that occasionally warrant substitute counsel. Some jurisdictions have planned for these inevitable situations through the use of attorney teams, wherein each member of the team is aware of all cases and can easily step into a substitute role. Other jurisdictions require prior approval of the court to send substitute counsel.

When substitute counsel appears, the court should make an inquiry if counsel is prepared to proceed. The party should be asked if they are in agreement to proceeding with substitute counsel. Best practice is to do a full colloquy on the record to ascertain that they understand.

The court can also leave open for reconsideration an issue raised by substitute counsel that is not fully developed.

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