**Memorandum**

To: CAFL Appellate Panel Support Unit

From: [Law Student Intern (MS)]

Re: Clients at Counsel Table – Is there a Due Process Right to Sit Next to One’s Lawyer?

Date: August 1, 2018

**Question Presented:**

Does a parent client have the right to sit at counsel table with her attorney?

**Brief Answer:**

**A parent client does not have a right to sit at counsel table with her attorney. While it is common practice for criminal defendants to sit with their attorneys at counsel table, seating arrangements in the courtroom are within the trial judge’s discretion. See** United States v. Rodriguez-Duran, 507 F.3d 749, 776 (1st Cir. 2007). **In criminal proceedings, defendants have a right to accessible communication with counsel throughout trial. However, this right is based on the Sixth Amendment, which has not been extended to child welfare proceedings.** See Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179, 187 (2004). While parents’ due process right to counsel may entail the right to accessible communication (and a seat next to or near counsel), no case specifically stands for this proposition.

**Discussion:**

Parents have a constitutionally protected right to participate in trial. See Department of Welfare v. J.K.B., 379 Mass. 1, 3-4 (1979) (holding that due process requires, at a minimum, an opportunity to “be heard at a ‘meaningful time and in a meaningful manner.’” (citing Armstrong v. Manzo, 380 U.S. 545, 550 (1965)); see also Adoption of Douglas, 473 Mass. 1024, 1025 (2016) (concluding that until parental rights have been terminated, parents have the right to participate in proceedings to determine placement and visitation arrangements concerning their children). Whether the right to participate includes the right to sit next to counsel at trial has not been addressed in child welfare proceedings. Criminal proceedings, however, offer insight into the seating of clients at trial.

In criminal proceedings, it is commonplace for defendants to sit with their attorneys at counsel table. See Steven Shepard, Should the Criminal Defendant Be Assigned a Seat in Court, 115 Yale L. J. 2203, 2206 (2006); see also Commonwealth v. Moore, 379 Mass. 106, 111 (1979) (holding that ordinarily a criminal defendant should be permitted to sit with counsel). Two arguments are frequently raised in appeals arguing for a right to sit at counsel table: (1) the Sixth Amendment right to communicate effectively with counsel and (2) the due process right to a presumption of innocence. See, e.g., United States v. Balsam, 203 F.3d 72, 82 (1st Cir. 2000). However, the Massachusetts Supreme Judicial Court has repeatedly held that courtroom seating is within the discretion of the trial judge. See e.g., Commonwealth v. Campbell, **378 Mass. 680, 698 (1979) (concluding that the trial judge did not abuse her discretion in ordering defendants to be seated “some distance from counsel table” because communication between client and counsel remained possible throughout trial).**

**In United States v. Tutkette, 656 F.2d 5, 9 (1st Cir. 1989), the defendant argued that seating him, along with his alleged co-conspirators, in the first row of the spectators’ section (with all others excluded from that section) improperly created a “prisoners’ row” and stripped him of the presumption of innocence. The First Circuit disagreed, noting that the arrangement of seating depends on several factors (e.g., size of the courtroom, number of spectators, number of defendants and lawyers, acoustics, security provisions, etc.). Id. at 10. The trial judge has discretion to weigh these factors, and the appellate court “would be loath to interfere unless there was a clear-cut abuse of discretion.” Id.; see also** Rodriguez-Duran, 507 F.3d at 749; **Balsam, 203 F.3d at 82. Several other federal circuits adopt an analogous approach.** See United States v. Larson, 460 F.3d 1200, 1214 (9th Cir. 2006) (holding that defendants’ rights to a fair trial and due process were not violated when trial court denied a request to seat defendants at counsel table because the jury most likely drew no impermissible inference from the arrangement and the there was no showing that the arrangement interfered with the defendants’ ability to communicate with their attorneys); United States v. Levenite, 277 F.3d 454, 466 (4th Cir. 2002) (concluding that it was not an abuse of discretion for trial judge to seat the defendants behind counsel given the size limitations of the courtroom); United States v. Jones, 766 F.2d 994, 1004 (6th Cir. 1985) (holding that seating eighteen defendants in two rows immediately behind counsel table did not violate the Sixth Amendment).

**While there is no right to sit at counsel table, the Sixth Amendment ensures that defendants have a right to accessible communication with counsel throughout trial. In** Balsam, one defendant argued that the seating arrangement – placing all defendants in the first row of the spectators’ section rather than behind counsel – deprived him of the right to communicate with his attorney. 203 F.3d at 82. The First Circuit disagreed. “[T]he five defendants were seated only four to five feet from the defense table,” and the “trial judge also assured [them] that they could consult freely with their attorneys as they wished, either by walking the short distance to the defense table, or passing written notes.” Id. Thus, the arrangement posed “no significant impediment” to the defendant’s right to communicate with counsel. Id.; see also Turkette, 656 F.2d at 10 (“It is significant that [the defendant] does not claim that he could not communicate effectively with his attorney during the trial, nor has he suggested an alternative seating arrangement. There was no abuse of discretion.”); Campbell, **378 Mass. at 697-8 (concluding that the trial judge did not abuse his discretion in ordering defendant to be seated “some distance from counsel table” because counsel “was not hampered in conferring with his client”).** Thus, while the location of the defendant’s seat is within the discretion of the trial judge, seating arrangements that interfere with a defendant’s ability to confer with counsel violate the defendant’s Sixth Amendment right to effective assistance of counsel.

The criminal defendant’s Sixth Amendment right to effective assistance of counsel does not extend to civil cases. See Calkins, supra, at 187. In Massachusetts, the right to counsel in child welfare proceeding is based upon statute and due process. See G. L. c. 119, § 29 (stating that “[w]henever the department or a licensed child placement agency is a party to child custody proceedings, the parent, guardian or custodian of the child… shall have and be informed of the right to counsel at all such hearings”); J.K.B., 379 Mass. at 3. The Supreme Judicial Court held that the right to the assistance of counsel necessarily implies the right to the *effective* assistance of counsel. Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Similar to defendants’ Sixth Amendment right, parents’ due process (and statutory) right to the effective assistance of counsel should include a right of reasonable communication with counsel during trial. There does not appear to be a civil case law on point. Because the case law addresses only the Sixth Amendment right to communication with/assistance of counsel, parents’ counsel arguing for a due process right to a specific seating arrangement will have to argue by analogy to the criminal cases cited above.