***[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

From: [Law Student Intern]

Re: Standby Counsel

Date: December 16, 2016

**Questions Presented**

1. When and how is standby counsel appointed for pro se parties?

2. What are the duties, obligations, and responsibilities of standby counsel?

**Short Answers**

1. Standby counsel may be appointed for pro se parties at the discretion of the trial judge following the party’s intelligent and voluntary waiver of counsel.

2. Standby counsel has limited duties, obligations, and responsibilities. Standby counsel should be available to the pro se party to answer legal questions, meet with opposing counsel, and ensure court procedure is followed. But standby counsel does not have to protect the interests of, or speak for, the pro se party.

**Facts**

Attorney Michaels has been appointed as standby counsel for Bill Williams, an indigent father (“Father”) who has fired three court-appointed attorneys during his care and protection proceedings. Father engaged in a colloquy with the trial judge, intelligently and voluntarily waiving his right to be represented by counsel. However, over Father’s objection, the judge appointed Attorney Michaels as standby counsel, because the case was complex and the judge was not convinced that Father wouldn’t change his mind about counsel. Attorney Michaels wants to know if her appointment is proper. She also wants to be sure of her duties, obligations, and responsibilities to Father throughout the remainder of the care and protection proceedings and impending trial.

**Analysis**

1. Introduction

Parents are entitled to court-appointed counsel in care and protection and termination of parental rights cases. *See* G.L. c. 119, § 29 (stating that parents in care and protection and other department-initiated custody proceeding have right to counsel); *Dep’t of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 3-4 (1979) (holding that due process requires the appointment of counsel for indigent parents in termination proceedings). Parents are also entitled to waive their right to appointed counsel. See Memorandum entitled “Rules Governing the Duties of, and Treatment of, Pro Se Parents.” For purposes of this memorandum, I will assume that Father’s waiver was appropriate.

2. Rules governing appointment and conduct of standby counsel.

a. Appointment

Following an effective waiver of counsel, a judge may, even over objection by the party, appoint “standby counsel” to aid the party. *See Faretta v. California,* 422 U.S. 806, 834 n. 46 (1975) (holding that a defendant’s Sixth Amendment right to proceed pro se is not violated when a trial court appoints standby counsel, even over the defendant’s objection, “to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.”); SJC Rule 3:10 § 4 (2016) (providing judges with discretion to appoint standby counsel). Note that the appointment of standby counsel is *not* an acceptable substitute for a knowing and intelligent waiver of counsel. *See* *Moore v. Hall*, 62 A.3d 1203, 1211 (Del. 2013).

Standby counsel’s role is to aid the party when he requests help and to be available to represent him in the event that termination of his self-representation is necessary*. See* *United States v. Dougherty*, 473 F.2d 1113, 1124-26 n.19 (D.C. Cir. 1972) (noting that advisory counsel should be appointed in complex cases); ABA Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, § 6.7 (Approved Draft, 1972). If, after the voluntary waiver of counsel, a pro se party changes his mind and requests traditional counsel representation, the judge has discretion in making such an appointment based on the circumstances of the case. *See Commonwealth v. Kenney*, 437 Mass. 141, 149-150 (2002) (explaining judicial discretion in reappointing counsel as lead counsel following defendant’s election to proceed pro se).

Following Father’s waiver, the judge, using his discretion, appointed Attorney Michaels as standby counsel. Since the judge determined that the case was complicated and Father might change his mind later, the judge properly exercised his discretion in appointing standby counsel. *See id*.

b. Role of Standby Counsel

Standby counsel is available only to assist the defendant to the extent, and in the manner, the defendant wishes to call upon such counsel while representing himself. *See* *Commonwealth v. Leonardi*, 76 Mass. App. Ct. 271, 275 (2010). Participation by standby counsel should not substantially interfere with the pro se party’s self-representation. *See* *Commonwealth v. Conefrey*, 410 Mass. 1, 13 (1991) (holding that judge’s insistence that standby counsel question witness violated defendant’s right to self-representation). Standby counsel does not formally represent the defendant and does not protect the defendant’s interests in the same way or to the same extent as counsel. *See* *Leonardi*, 76 Mass. App. Ct. at 275-76; [*Commonwealth v. Molino*, 411 Mass. 149, 152-54 (1991)](https://advance.lexis.com/search/?pdmfid=1000516&crid=c5aa7e41-0a2b-4b93-9906-bcf0e76de075&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=76+Mass.+App.+Ct.+271&pdsearchtype=SearchBox&pdpsf=jur%3A1%3A44&ecomp=rtck&earg=pdpsf&prid=8a1c3972-40ee-489b-9a5e-71cbdc72a9cc) (pro se defendant has no constitutional right to assistance from standby counsel; appointment and reasonable limitations on standby counsel's participation are left to broad discretion of trial judge).

Standby counsel can be available to a party to meet with opposing counsel, ensure discovery procedures are followed and motions are filed, and to otherwise assist with matters the party would be unable to do for himself. *See* *United States v. Spencer*, 439 F.2d 1047, 1051 (2d Cir. 1971). However, this does not mean that the defendant can pick and choose what legal functions standby counsel performs. “A defendant does not have a constitutional right to choreograph special appearances by counsel.” [*McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=60de9692-fee6-4f8f-9292-346602046adf&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-3PN0-003B-S0CW-00000-00&pdpinpoint=PAGE_183_1100&pdcontentcomponentid=6443&pddoctitle=McKaskle+v.+Wiggins%2C+%C2%A0%5B153%5D%C2%A0+465+U.S.+168%2C+183+%281984%29&ecomp=r9vfk&prid=cb744609-0938-4511-aef5-733f3f5b0d92). According to the SJC, “there is no constitutional right to the so-called “hybrid” form of representation where one is represented “in part by counsel and in part by oneself.” *Molino*, 411 Mass. at 152. The judge may hold standby counsel to a strict “seen but not heard” role. *See* *id.*. at 154 n. 7. But the judge also has discretion to permit standby counsel to participate in the proceedings. *See id.* at 155 n.9 (judge has discretion to bar standby counsel from addressing court or witnesses); *see also* *Commonwealth v. Kenney*, 437 Mass. 141, 149-50 (2002) (upholding trial judge's decision, made with the defendant's assent, to allow standby counsel to participate by engaging in sidebar discussions, voicing objections, and helping defendant prepare his cross-examination); *Commonwealth v. Santry*, 87 Mass. App. Ct. 1109 at n. 6 (Rule 1:28) (Mar. 9, 2015) (explaining judge’s discretion to permit standby counsel to provide occasional legal arguments and confer with defendant).

But standby counsel can go too far and improperly tread on the party’s right to proceed pro se. In *McKaskle*, the United States Supreme Court said: “[T]he pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . If standby counsel’s participation over the defendant’s objection effectively allows the counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the [self-representation] right is eroded.” 465 U.S. at 178 (emphasis in original); *see also* *Commonwealth v. Conefrey*, 410 Mass. 1, 13 (1991).

Although no Massachusetts case specifically addresses standby counsel roles in child welfare cases, the case law suggests that parents can have standby counsel in care and protection and termination proceedings. *See Adoption of Simone*, 427 Mass. 34, 40-41 (1998) (discussing pro se mother’s ability to consult standby counsel during proceedings); *see also Care & Protection of Stella*, 87 Mass. App. Ct. 1126 (Rule 1:28) (June 3, 2015); *Adoption of Bjorn*, 84 Mass. App. Ct. 1101 (Rule 1:28) (July 3, 2013). In other states, courts have appointed standby counsel for parents in child welfare cases. *See, e.g.*, *Moore v. Hall*, 62 A.3d 1203, 1211 (Del. 2012) (reversing; judge’s appointment of standby counsel not appropriate substitute for knowing and intelligent waiver of counsel); *In re Bryce T.*, 764 A.2d 718 (R.I. 2001) (suggesting that discharged court-appointed counsel should serve as standby counsel to pro se parent during termination proceedings). On the other hand, courts in other states have also held that the judge’s refusal to appoint standby counsel was warranted when a parent indicated an intention to proceed pro se. *See, e.g.*, *In re Mitchell W.W.*, 74 A.D. 3d 1409, 903 N.Y.S. 2d 553 (3rd Dep’t 2010) (holding that judge did not abuse his discretion in failing to appoint standby counsel to assist father at removal hearing where father elected to proceed pro se); *In re A.A.C.P.*, 132 P.3d 644 (Okla. Civ. App. 2006) (holding that judge did not abuse discretion in failing to appoint standby counsel to assist parents at termination trial after parents elected to proceed pro se).

Commentators have suggested that, whenever possible, judges should aim to protect the rights of parents by appointing standby counsel when a parent waives the right to court-appointed counsel but fails to understand the undertakings of self-representation. *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 191, n. 63 (2004). At the very least, courts should appoint standby counsel to answer parents’ legal questions and guide them through trial procedures. *See id*.

**Conclusion**

Attorney Michaels, as Father’s standby counsel, should do nothing for Father (other than appear at court and maintain some physical proximity to him) if Father does not request help. If Father does request help from Attorney Michaels, she should support Father when he requests assistance. She may explain the law to him, explain the form of direct and cross-examination questions, meet with opposing counsel, and/or gather necessary discovery. She may also help Father formulate objections, guide Father through the procedural rules of trial, and advise him regarding the admission of evidence. The judge has discretion to permit her to make an opening or closing argument and/or examine witnesses. But the judge may also narrowly tailor that role or refuse to permit her to participate in that manner.

Well before trial, Attorney Michaels should make it clear to the court what role Father wishes for her play at trial. She should also ask the court to rule as to what she can and cannot do if Father wants her to participate more directly.