

## **DUE PROCESS ISSUE/RESOURCE BANK**

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We hope to get all documents referenced below hyperlinked on the CPCS website ([www.publiccounsel.net](http://www.publiccounsel.net)) or MyGideon ([www.mygideon.org](http://www.mygideon.org)) so that parents' and children's counsel can access it easily. Until then, email us and we'll send you Word and/or PDF versions of the documents. While most cases and research are based on Massachusetts law, many of the intern memoranda represent 50-state research. As a caveat, please don't rely on law student memos; use them as a start for your own research.

### **DUE PROCESS –**

- **Due Process – Basic Definitions and Requirements** (Short memo re key case cites and quotes; portion of Adoption of Meaghan *amicus* brief setting forth basic principles)
- **Due Process – Burden-Shifting** (Care and Protection of Erin, 443 Mass. 567 (2005); portion of one brief)
- **Due Process – Continuance** (3 Intern memos; several Massachusetts cases; portions of five briefs) (See also “Due Process – Right to Participate”)
- **Due Process – Counsel Conflict of Interest** (See “Due Process - Right to Counsel, Counsel’s Conflict of Interest”)
- **Due Process – Delay of Decision/Findings** (Short memo re Adoption of Don, 435 Mass. 158 (2001), and Adoption of Rhona, 57 Mass. App. Ct. 479 (2003))
- **Due Process – Delay of Trial** (Intern memo 5-2018; portions of two briefs; model “Motion for Expedited Conclusion of Trial” with out-of-state case law on speedy resolution of case; Juvenile Court Standing Order 1-10 on scheduling of trials)
- **Due Process – Delay of 72-Hour Hearing** (See “Due Process – 72-Hour Hearing”)
- **Due Process – Discovery** (Intern memo 12-2016; Matter of N.L., 476 Mass. 632 (2017) (mental health case on right to continuance for counsel to prepare for hearing, including obtaining a psych. eval.); portion of a brief; model memo of law in support of motion to compel production of DCF adoption assessment)
- **Due Process – Disposition, Choice of** (Short memo re: Adoption of Cadence, 81 Mass. App. Ct. 162 (2012)) (See also “Due Process – Judicial Bias, Judge Making *Sua Sponte* Decisions”)

- **Due Process – Evidence** (Portion of brief in Titus; list of key Mass. cases and copies of highlighted Mass. cases)
- **Due Process – Experts** (Intern memo 5-2018; short portion of brief; short memo 2019)
- **Due Process – Interpreters** (See “Right to Participate – Interpreters”)
- **Due Process – Interstate Compact/ICPC** (Model motion for custody to out-of-state parent with due process, equal protection, and other arguments; In re Courtney R, (Tenn. 2017); In re BS (Cal 2012); 2019 AmJur Article; ICPC cheat sheet re: parents; ICPC case list of issues 2017; Icpc and parents intern memo 2018; Donald W. v. Dep’t of Public Safety AZ 2019;list of cases)
- **Due Process – Judicial Bias**
  - **Conduct, bizarre** (LA case re judge’s bizarre conduct 2016; ABA article 2019: NV case re judge’s bizarre conduct)
  - **Conflict of Interest** (Portions of four briefs; intern memo re judge previously representing DCF 7-2016; intern memo re judge’s personal conflict of interest 11-2015; 2019 ABA article; 2011 NY ethics committee opinion; 2019 ABA Formal Opinion)
  - **Ex Parte Communications** (Intern memos 2011 and 2014; portion of brief; Article and ABA ethics opinion re judges researching case on web)
  - **“Forcing” Settlement** (Intern memo 2014; portion of brief)
  - **Recusal** (Intern chart re Mass. and other state law (2014); BBJ article (2015); short memo on Rippo v. Baker (SCOTUS on new standard for recusal based on bias); Wash. state brief (long) re judicial bias, conflict of interest & recusal (2018); Comm. v. Deconinck (summary) (SJC re recusal); Interest of NM (PA 2018); ABA Journal article 2018; Hilton v. Central Div of Housing (2019))
  - **Judge Asking Questions of Witnesses and Making Comments** (Adoption of Norbert, 83 Mass. App. Ct. 542 (2013); brief in Adoption of Norbert; intern memo re judicial commentary 2016; intern memo re judicial questioning 2015; portions of six briefs; Mass. R. App. P. 16(1) letter with case citations)
  - **Judge Calling Witnesses** (Intern memo 2015)
  - **Judge Interfering with Counsel’s Examination** (In re D.C., PA Super. 2018)
  - **Judge’s Sua Sponte Decisions** (Intern memo 2014; portion of brief)

- **Judge’s Use of Social Media** (Intern memo re judges’ use of social media 5-2018; Intern chart - Survey of Judicial Ethics Opinions 2014; ABA article 2013; Boston Bar J. article 2017; ethics opinion – Tenn. 2019)
  - **Structural Error** (Adoption of Norbert, 83 Mass. App. Ct. 542 (2013); short memo with case citations 2009; In re J.K., 2015 Ind. LEXIS 385 (2015))
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- **Due Process – Notice of DCF’s Specific Unfitness Allegations** (Intern memo 2018)
  - **Due Process – Right to Counsel**
    - **Basic Principles** (J.K.B., 379 Mass. 1 (1979); Meaghan amicus brief (Word and PDF); V.V. amicus brief (Word and PDF); L. B. v. Chief Justice (Blouin) amicus brief (Word and PDF); amicus brief in N.H. right-to-counsel case; three charts/memos re source of right to counsel in all fifty states; Intern memo 2014)
    - **Child’s Right to Counsel**
      - **Counsel’s Access to Child** (In re A.S., 936 A.2d 1094 (Pa. Super. Ct. 2007))
      - **Right to Appointment of Counsel** (CPCS amicus briefs in Guardianship of V.V. and L.B. v. Chief Justice (Blouin) in Word and PDF format; Care and Protection of Georgette, 439 Mass. 28 (2003); Balboni v. Balboni, 39 Mass. App. Ct. 210 (1995); In re Christina M., 908 A.2d 1073 (Conn. 2006) (parents’ right to assert child’s right to counsel); Kenny A. v. Perdue, 365 F. Supp. 2d 1353 (N.D. Ga. 2005); three law review articles)
    - **Choice/Change of Counsel** (portions of three briefs; Comm. v. Means, 454 Mass. 81 (2009); Comm. v. Carsetti, 53 Mass. App. Ct. 558 (2002); Adoption of Ulon, 81 Mass. App. Ct. 1113 (2012) (Mass. App. Ct. Rule 1:28); In re C.C., 48 P.3d 244 (Utah Ct. App. 2002) (court must make inquiry re reasons for parent’s dissatisfaction with attorney), Adoption of Raissa (2018, not yet paginated)) (See also “Due Process – Right to Counsel, Denial of Counsel – Waiver/Refusal to Appoint Successor Counsel”)
    - **Competency to Assist Counsel** (In re E.D., 902 N.E.2d 316 (Ind. Ct. App. 2009))
    - **Counsel’s Conflict of Interest** (Intern memo 12-2015; chart/memo re Mass. cases and rules on counsel conflicts 2014; portion of one brief; comm. v. Cousin (2018); Adoption of Ted & FAR; Adoption of Trina, 84 Mass. App. Ct. 1123 (2013) (Mass. App. Ct. Rule 1:28) and FAR)

- **Constructive Denial of Counsel** (Intern memo re concession of unfitness (7-2018); portions of five briefs, two appellant, two appellee; law review article; A.P. v. Commonwealth, 270 S.W.3d 418 (Ky. Ct. App. 2008)) (See also “Due Process – Structural Error”)
- **Denial of Counsel – Non-Indigency/Failure to Pay Fee** (Intern memo 2003; two single justice orders; two single justice petitions; motion to waive fee; motion to vacate order striking counsel (for failure to pay fee); affidavit of parent unable to pay; Comm. v. Mortimer, 462 Mass. 749 (2012); Comm. v. Godwin, 60 Mass. App. Ct. 605 (2004)).
- **Denial of Counsel – Refusal to Appoint Successor Counsel** (Comm. v. Means, 454 Mass. 81 (2009), Adoption of Ulon, 81 Mass. App. Ct. 1113 (2012) (Mass. App. Ct. Rule 1:28) and memo re Means and Ulon; portions of four briefs; Adoption of Raissa (2018, not yet paginated); summaries of five out-of-state counsel waiver cases in child welfare cases) (See also “Due Process – Right to Counsel, Choice/Change of Counsel”)
- **Denial of Counsel – Structural Error** (See “Due Process – Structural Error, Counsel Issues”)
- **Forfeiture of Counsel (by Conduct)** (Intern memo 2016); see also “Waiver of Counsel,” below.
- **Ineffective Assistance of Counsel** (Note: Model new trial motions, motions for leave to file motion for new trial, and supporting affidavits are available in Word format that we can email to counsel.)
  - **Advocating against Client’s Wishes** (Portions of three briefs; motion for new trial; Adoption of Flora, 60 Mass. App. Ct. 334 (2004); summary of McCoy v. Louisiana (SCOTUS) and ABA amicus brief in McCoy; see also “Throwing Client under the Bus,” below.
  - **Appellate Counsel** (Intern memo 2013; staff counsel memo 2011; portion of brief; Comm. v. Aspen, 85 Mass. App. Ct. 278 (2014); Comm. v. Stote, 456 Mass. 213 (2010); State v. O’Neil, 99 A.3d 814 (N.J. 2014))
  - **Basic Principles** (Intern memo 2013 re other states; intern memo 2008; portion of brief; law review article on IAC in termination cases; website resource re IAC; notes from Attorney Jamie Sultan’s lecture re IAC new trial motions; quote from Justice Kagan; In re E.R.W., 528 S.W.3d 251 (Ct. App. Tex. 2017) (non-indigent parent’s right to raise IAC for retained counsel’s poor performance))
  - **Failure to Admit/Object to Evidence** (Staff counsel memo 2016; portions of four briefs; Comm. v. Salyer, 84 Mass. App. Ct. 346 (2013); portion of Comm. v. Sepheus, 468 Mass. 160 (2014); State v. Thompson (NH 2011))

- **Failure to Call Witnesses** (Intern Memo 6-2017; portions of two briefs; Anderson v. Butler (1<sup>st</sup> Cir. 1988); portion of Comm. V. Ortega (2004); In Re MJH (Colorado 2007) )
- **Failure to Investigate Case** (Key case cites; portion of motion for new trial; Comm. v. Baker, 440 Mass. 519 (2003); Comm. v. Alvarez, 433 Mass. 93 (2000); In re Mental Health of K.G.F., 29 P.3d 485 (Mont. 2001)).
- **Failure to Participate at Trial** (Intern memo 2016; portion of a brief; Adoption of Azziza, 77 Mass. App. Ct. 363 (2010); Comm. v. Vickers, 60 Mass. App. Ct. 24 (2003); State ex rel. Children, Youth & Families Dep't v. Maria C., 94 P.3d 796 (N.M. Ct. App. 2004); In re Roque, No. 2005-T-0138, 2006 Ohio App. LEXIS 6961 (Ohio Ct. App. Dec. 29, 2006); State ex rel. State Office for Servs. to Children & Families v. Thomas, 12 P.3d 537 (Or. Ct. App. 2000))
- **Failure to Prepare for Trial** (Staff counsel memo 2016; Comm. v. Ly, 454 Mass. 223 (2009); Comm. v. Alvarez, 62 Mass. App. Ct. 866 (2005))
- **Failure to Pursue Crucial Issue/Defense** (Staff counsel memo 2016; intern memo re failure to pursue medical or scientific defense; Comm. v. Owen, 57 Mass. App. Ct. 538 (2003); Comm. v. Harding, 53 Mass. App. Ct. 378 (2001))
- **Failure to Understand the Law** (Comm. v. McCrae, 54 Mass. App. Ct. 27 (2002))
- **Improper Withdrawal** (Three Ohio termination decisions reversing judgment; In re K.A.S.E., 2018 WL 850303 (Missouri, Feb. 14, 2018))
- **Lack of/Suspension of Licensure** (Intern memo 6-2017; portion of Comm. V. Melo (2006))
- **Malpractice/BBO Consequences (for Trial Counsel)** (BBO public reprimand No. 2010-5; Glenn v. Aiken, 409 Mass. 699 (1991); malpractice insur. policies and email from insurer; two intern memos re legal malpractice actions against defense counsel)
- **Roles/Duties of Trial Counsel** (Seven articles, including a law rev. article and articles from Bar Counsel, NACDL, etc.; ABA Formal Op.; Mass. R. Prof. C. 1.16; California State Bar Formal Opinion 1992)
- **Sitting at Counsel Table** (Intern memo re parents' right to sit at counsel table 8-2018)
- **Telling Client Not to Appear** (Portion of brief)
- **Throwing Client Under the Bus** (Intern memo re concession of unfitness (7-2018))
- **Untimely IAC Claim (No New Trial Motion)** (Portions of two briefs)

- **Privately-Initiated Adoption Proceedings** (Adoption of Meaghan, 461 Mass. 1006 (2012); Meaghan amicus brief; cert petition in Texas case; chart re parents’ right to counsel in private cases; memo re other cases 2014)
- **Stand-by Counsel** (Intern memo 2016; intern memo re Mass. and out-of-state cases; Moore v. Hall, 62 A.3d 1203 (Del. 2013))
- **Timing/Stages** (Portions of three briefs; Lavallee v. Justices in the Hampden Super. Ct., 442 Mass. 228 (2004); E.W. v. Jefferson Cty. Dep’t of Human Res., 872 So. 2d 167 (Ala. Civ. App. 2003); R.V. v. Ky. Dep’t for Health & Fam. Servs., 242 S.W.3d 669 (Ky. Ct. App. 2007))
- **Unrepresented Parties; Can Parents’ or Children’s Counsel Speak to DCF Social Workers or Foster Parents without the Permission of DCF Counsel?** (Intern memo 2015)
- **Waiver of Counsel (by Conduct)** (Intern Memo 7-2016; Adoption of Raissa and Raissa FAR application with detailed analysis of issue); see also “Forfeiture of Counsel,” above.
- **Due Process – Right to Notice**
  - **Adequacy of Publication Notice (Errors in Content/Choice of Publication)** (Intern memo 2016; Brown v. Malloy, 546 S.E.2d 195 (S.C. Ct. App. 2001); CML v. BEL (Ala. 2014))
  - **Basic Principles** (Summary chart of MA statutes, regulations and court rules pertaining to notice; New Bedford Hous. Auth. v. Olan, 50 Mass. App. Ct. 188 (2000); Andover v. State Fin. Servs., Inc., 432 Mass. 571 (2000))
  - **Diligence/Efforts to Identify and Locate Parent before Publication Permitted** (Intern memo 2017)
  - **Failure to Provide Notice** (Portion of brief; In re A.H., 86 P.3d 745 (Utah Ct. App. 2004); Mayberry v. Flowers, 65 S.W.3d 418 (Ark. 2002) (setting aside adoption decree); summary of CML v. BEL (AL 2014))
  - **Nature of Hearing Noticed** (Short memo re due process requires notice of *trial* when court holds trial, notice of some other kind of hearing is insufficient; summary of In re GB (CA 2018))
  - **Notice to Incarcerated Parent** (Adoption of Jacqui, 80 Mass. App. Ct. 713 (2011) (See also “Due Process – Right to Participate, Incarcerated Parent”))
  - **Sufficient Time** (Intern memo 2016; J.B. v. Fla. Dep’t of Children & Fam. Servs., 768 So. 2d 1060 (Fla. 2000))
- **Due Process – Right to Participate**

- **Children – Right to Attend or Testify** (A Child’s Voice ACNJ (2011); Intern Memo (unfinished 2016); Cumberland L. Rev. article (2013/2014); Nat’l Counc. of Juv. Ct. & Fam. Ct. Judges policy statement and “Seen, Heard” tech. assist. bull. 2012; “Seen and Heard” ABA article; two emails with resources (*not to post*))
- **Interpreters** (Three intern memos; portion of law treatise; short memo on Comm. v. Lujan (wrong language/informal interp.))
- **Parent - Detained for Immigration Purposes** (ICE Policy on Parental Participation; intern memo 2013; memo re habe’ing defendants from ICE custody)
- **Parent - In Other State or Other Country** (Intern memo 2014; Article re use of videoconferencing; Juvenile Court Uniform Practice re videoconferencing; Bonaparte v. Devoti, 93 Mass. App. Ct. 603 (2018), and case summary)
- **Parent - Incarcerated** (Intern memos 2016 and 2005; eight out-of-state cases; portions of two briefs; ABA ChildLaw Practice article 2001; intern memo with resources to locate incarcerated parents 2005; ABA article 2019)
- **Parent - Unable to Participate for Reasons beyond Parent’s Control (E.g., Illness, Accident, Mistake of Date/Time)** (Intern memo 2015; Comm. v. Carey, 55 Mass. App. Ct. 908 (2002)) (See also “Due Process – Continuance” and “Continuance”; summary of In re Sean P.H. (NY 2014))
- **Right to Evidentiary Hearing Generally** (In re Armando L., 1 Cal. App. 5<sup>th</sup> 606 (2016))
- **Right to Testify, Present Evidence, Cross-Examine Witnesses** (C.O. v. M.M., 442 Mass. 648 (2004); summary of Morgan v. Getter (2014); summary of In re Daniela G. (CA 2018))
- **Due Process – Seventy-Two-Hour Hearing**
  - **Burdens, Evidence, Timing** (List of important Mass. cases; sample “Motion for Timely 72-Hour Hearing” with out-of-state case law; list of other out-of-state cases; ALR article on emergency removals in other states; intern memo 2013)
  - **Harm to Child (from Removal)** (Five clinical articles. *Note that this will soon be a much larger memo and/or collection of annotated articles*)
- **Due Process – Structural Error**
  - **Basic Principles** (Intern memo 2010; list of key SCOTUS and Mass. cases)
  - **Counsel Issues** (Adoption of Rory, 80 Mass. App. Ct. 454 (2011); brief in Adoption of Rory; PowerPoint page on structural error; two briefs in Michigan structural error appeal; chart

with cases in other states re structural error for denial of counsel; In re Torrance P., 724 N.W.2d 623 (Wis. 2006))

- **Interpreter Issues** (See “Due Process – Interpreters”)
- **Judge Issues** (See “Due Process – Judicial Bias”)
- **Participation Issues** (See “Due Process – Right to Participate”)
- **Due Process – Visitation** (Portion of Adoption of Rhona, 57 Mass. App. Ct. 479 (2003))