

Introduction

The Juvenile Court Procedural Rules Committee is planning to recommend modifications to Rule 152 to the Supreme Court of Pennsylvania.

The Committee has debated the issue of waiver of counsel since its inception as a committee in 2001. The unfortunate circumstances that came to light in Luzerne County brought this subject to the forefront more recently. The Committee then re-opened its debate on the important issue of waiver of counsel, which is complex in nature and has potential implications on the juvenile's constitutional rights.

The Committee is soliciting public input on the following proposal. The Committee is reserving its Report until after public comment has been received.

The Committee requests that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel, Christine Riscili at juvenilerules@pacourts.us. Email is the preferred method for receiving comments in an effort to conserve paper and expedite the distribution of Comments to the Committee. Emailed comments need not be reproduced and sent via hard copy. The Committee will acknowledge receipt of your comment.

For those who do not have access to email, comments may be faxed to the Committee at 717-231-9541 or written comments may be mailed to:

Christine Riscili, Esq., Counsel
Supreme Court of Pennsylvania
Juvenile Court Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave, Suite 6200
P.O. Box 62635
Harrisburg, PA 17106-2635.

All comments shall be received no later than April 27, 2011. No deadline extensions will be granted.

February 15, 2011

BY THE JUVENILE COURT PROCEDURAL RULES
COMMITTEE:

Cynthia K. Stoltz, Esq., Chair

Christine Riscili, Esq.

Counsel

RULE 152. WAIVER OF COUNSEL

- A. **Waiver requirements.** A juvenile may [not] waive the right to counsel [unless: 1) the waiver is knowingly, intelligently, and voluntarily made; and]if:
- 1) the attorney for the Commonwealth or the juvenile probation officer is not seeking overnight placement outside of the home as a case disposition;**
 - 2) the petitioned offense(s) is not murder, any other felony, or enumerated first-degree misdemeanor that affects a future prior record score; and**
 - [2]3) the court conducts an on the record colloquy with the juvenile [on the record;] and determines that the waiver is knowingly, intelligently, and voluntarily made.**
- B. **Colloquy of the juvenile.** **In determining whether the waiver of counsel is knowingly, intelligently, and voluntarily made pursuant to paragraph (A)(3), the court, on the record, shall ask the juvenile questions to elicit:**
- 1) the reasons why the juvenile wants to waive counsel;**
 - 2) information regarding the juvenile's:**
 - a) age;**
 - b) maturity;**
 - c) education;**
 - d) mental health issues, if any; and**
 - e) any current alcohol or drug issues that may impair the juvenile's decision-making skills;**
 - 3) the juvenile's understanding of the:**
 - a) right to an attorney, including the provisions of Rule 151;**
 - b) juvenile's role when proceeding *pro se*;**
 - c) allegations in the petition against the juvenile;**
 - d) possible consequences if the juvenile is found delinquent;**
and
 - 4) the juvenile's opportunity to consult with the juvenile's guardian and an attorney.**

C. Stand-by counsel. The court may assign stand-by counsel if the juvenile waives counsel at any proceeding or stage of a proceeding.

[C]D. [Notice and] Applicability, revocation, and notice of waiver. [If a juvenile waives counsel for any proceeding, the waiver only applies to that proceeding, and the juvenile may revoke the waiver of counsel at any time.]

- 1) At any subsequent proceeding, the juvenile shall be informed of the right to counsel.**
- 2) Revocation of waiver. The juvenile may revoke the waiver of counsel at any time.**
- 3) Where the juvenile has waived counsel and the case has proceeded to adjudication and disposition, and the court at the dispositional hearing declines to accept the Commonwealth's and/or juvenile probation officer's recommendation that disposition not include overnight placement outside of the home, or the Commonwealth or juvenile probation officer seeks overnight placement outside of the home, upon the juvenile's written or on the record oral request, the juvenile shall be awarded new adjudicatory and dispositional hearings before a different judge and with counsel. The court should notify the juvenile of the availability of this relief prior to entering the dispositional order.**
- 4) If at a modification or revocation proceeding, or whenever the Commonwealth, juvenile probation officer, or the court seeks a change in the dispositional order that could result in overnight placement outside of the home, in accord with paragraph (A)(1), the juvenile may not waive counsel.**

COMMENT

[It is recommended that, at a minimum, the court ask questions to elicit the following information in determining a knowing, intelligent, and voluntary waiver of counsel:

- 1) Whether the juvenile understands the right to be represented by counsel;
- 2) Whether the juvenile understands the nature of the allegations and the elements of each of those allegations;
- 3) Whether the juvenile is aware of the dispositions, community service, or fines that may be imposed by the court;
- 4) Whether the juvenile understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
- 5) Whether the juvenile understands that there are possible defenses to these allegations that counsel might be aware of, and if these defenses are not raised at the adjudicatory hearing, they may be lost permanently;
- 6) Whether the juvenile understands that, in addition to defenses, the juvenile 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 juvenile, these errors may be lost permanently;
- 7) Whether the juvenile knows the whereabouts of absent guardians and if they understand they should be present; and

- 8) Whether the juvenile has had the opportunity to consult with his or her guardian about this decision.]

Because of the ramifications of a juvenile record, it is important that every safeguard is taken to ensure that all constitutional and procedural guarantees and rights are preserved. Juveniles should not feel pressured to waive counsel or be the subject of any proactive pursuit for obtaining a waiver.

Therefore, the court may not allow the juvenile to waive counsel when: 1) the attorney for the Commonwealth or the juvenile probation officer is seeking overnight placement outside of the home as a case disposition; or 2) the offense(s) petitioned is a felony or one of the enumerated first-degree misdemeanors, including, as enumerated in 204 Pa. Code § 303.7, the following: a) Possessing Instruments of Crime; b) Prohibited Offensive Weapons; c) Use or Possession of Electric or Electronic Incapacitation Device; d) Possession of a Weapon on School Property; e) Possession of a Firearm or other Dangerous Weapon in Court Facility; f) Violations of the Pennsylvania Uniform Firearm Act; g) Involuntary Manslaughter (child victim); h) Luring a Child into a Vehicle; i) Indecent Assault (Complainant less than 13 years of age); j) Indecent Exposure (persons present are less than age 16); k) Endangering the Welfare of Children; l) Dealing in Infant Children; m) Corruption of Minors (of a sexual nature); n) Unlawful Contact or Communication with a Minor; and o) Driving Under the Influence (2nd and subsequent offense); and p) Operating a Watercraft Under the Influence of Alcohol or a Controlled Substance (except for a first lifetime conviction or adjudication).

In other cases, the court may allow waiver of counsel if it is knowingly, intelligently, and voluntarily made. However, there are an overwhelming number of articles, research, and statistics that conclude most juveniles, especially those under the age of fourteen, may not have the capacity to understand fully the waiver of a constitutional right. For these reasons, the court is to explore thoroughly the capacity of the juvenile to make a knowing, intelligent, and voluntary waiver to ensure the juvenile does understand the implications of giving up the right to an attorney and is competent to proceed *pro se*.

As provided in paragraph (B), the court is to conduct a colloquy with the juvenile. The court is encouraged to use plain and developmentally appropriate language that the juvenile can understand. There is to be a dialogue between the court and the juvenile. This dialogue should not be limited to questions from the court that can be answered “yes” or “no,” but should attempt to elicit responses from the juvenile to help the court ascertain the competency and maturity of the juvenile in determining if the waiver is knowingly, intelligently, and voluntarily made. A juvenile’s knowledge of the law should not be confused with competency or the ability to make an informed decision.

Pursuant to paragraph (B), the first question that the court is to ask the juvenile is why the juvenile wants to waive counsel. Juveniles have many misperceptions about their right to counsel, the role of counsel, and the consequences and future ramifications of a delinquency adjudication. The judge can dispel those misperceptions. For example, if the juvenile states that he did not obtain an attorney because his parents will not pay for or cannot afford an attorney, the court can inform the juvenile that the court will provide an attorney. Another example could be that if the juvenile states that she does not need an attorney because it is only a juvenile offense, the court can explain the complexity of the proceedings, the consequences and future ramifications of a delinquency adjudication, and that it might be helpful to the juvenile to have an attorney. If, at any time, the juvenile requests an attorney or the court believes the waiver is not knowingly, intelligently, and voluntarily made, the court shall appoint counsel pursuant to Rule 151.

After the court has determined why the juvenile wants to waive counsel, the following types of questions should be asked: 1) Did you have the opportunity to talk with a lawyer about your desire to waive your right to a lawyer and what was the outcome of that consultation? 2) What do you understand about your right to have a lawyer? 3) What would you be required to do when acting as your own lawyer? 4) What is the nature of the allegations petitioned against you and what are the elements of each of those allegations? 5) What are the possible dispositions or fines that the court may impose if you are found delinquent? 6) What ramifications will a delinquency adjudication have in your future? 7) Are your guardians present with you, have you had the opportunity to consult with them about your decision to waive the right to counsel, and what are their concerns?

When discussing a question about acting as your own lawyer, the court is to address the following: 1) the requirements to know when to make motions, make

objections, enter evidence, and raise possible defenses; 2) understanding the Rules of Juvenile Court Procedure, statutory authority, and case law; 3) knowing the burden of proof and upon whom it is imposed; and 4) knowing how to preserve issues for appeal.

When discussing a question concerning possible dispositions or fines, the court is to address the following: 1) depending upon subsequent conduct, the juvenile may be detained in a placement facility even if the juvenile is originally placed on probation or in a day treatment program; 2) the court has jurisdiction over the juvenile until the juvenile is twenty-one years of age; 3) the juvenile's driving privileges may be suspended or will be suspended in the future; and 4) the juvenile may be expelled from school.

When discussing a question concerning the possible ramifications of a delinquency adjudication, the court is to address the following: 1) the juvenile may have difficulty in obtaining a job, enlisting in military service, or getting accepted into college; 2) juvenile records are not automatically expunged when the juvenile becomes an adult; and 3) that the juvenile's eligibility for public benefits and housing may be affected; 4) the juvenile may not be able to carry a firearm in the future; and 5) the juvenile may not be able to serve as a juror.

From the totality of all the information received, the court is to determine if the waiver is knowingly, intelligently, and voluntarily made pursuant to paragraph (A)(3). The court, on the record, is to state its findings and conclusion that formed the basis of its determination.

If it is determined that the juvenile has not knowingly, intelligently, and voluntarily waived counsel, the court immediately is to appoint counsel for the juvenile. If it is determined that the juvenile has made a knowing, intelligent and voluntary waiver, the court may appoint stand-by counsel for all proceedings provided in paragraph (C).

The role of stand-by counsel is to: 1) offer legal advice on all issues; 2) step in to represent the juvenile for any issue that the juvenile requests assistance; and 3) take over representation if the court determines at any point that the juvenile is unable to adequately continue representation.

Paragraph (D)(3) of this rule recognizes that a juvenile may waive counsel in reliance upon the Commonwealth's and/or juvenile probation officer's assertion that neither is seeking overnight placement outside of the home as a case disposition, but the court at a dispositional hearing may reject such recommendations and order that the juvenile be removed to overnight placement outside of the home. Under such circumstances, the juvenile is to be permitted to revoke the waiver of counsel and to proceed to a new adjudicatory and dispositional hearing before a different judge and with counsel. However, there are potential double jeopardy implications to awarding the juvenile a new proceeding after completion of the adjudication of delinquency. For this reason, the rule explicitly requires that the juvenile request such relief on the record through oral or written motion. The rule's intent is to ensure that when the juvenile affirmatively requests a new adjudicatory and dispositional hearing, the juvenile waives any right to assert double jeopardy.

This rule is not meant to preclude the guardian's presence at any hearing. Indeed, the presence and active participation of a guardian should be welcomed. During the colloquy which is the subject of this rule, the court should feel free to elicit information from the guardian. As provided in Rule 131 and the Juvenile Act, 42 Pa.C.S. §§ 6310, 6335(b), and 6336.1, the court can order the guardian's presence if the court determines that it is in the best interest[s] of the juvenile. When conducting the colloquy, the court should also keep in mind the age, maturity, intelligence, and mental condition of the juvenile, as well as, the experience of the juvenile, the juvenile's ability to comprehend, the guardian's presence and consent, and the juvenile's prior record.

This rule requires the juvenile to waive the right to counsel. A guardian may not waive the juvenile's right to counsel. To implement this rule, Rule 800 suspends 42 Pa.C.S. § 6337 only to the extent that the right to waiver of counsel belongs to the juvenile and the guardian may not waive the right for the juvenile.

Official Note: Rule 152 adopted April 1, 2005, effective October 1, 2005.

Committee Explanatory Reports:

Final Report explaining the provisions of Rule 152 published with the Court's Order at 35 Pa.B. 2214 (April 16, 2005).