

ANTOMMARCHI WAIVER

Note: The Court of Appeals has held that "a lawyer may waive the Antommarchi right of his or her client." *People v Flinn*, 22 NY3d 599, 602 [2014]. And in "accepting an Antommarchi waiver offered by defense counsel on a defendant's behalf," the Court, in *People v Velasquez*, 1 NY3d 44, 49 [2003], added that "a trial court need not engage the defendant in an on-the-record colloquy to ensure the requisite voluntary, knowing and intelligent nature of the waiver." Thus, whether to engage in the following colloquy or part thereof is in the sound discretion of the trial judge. The following is recommended for those trial judges who do so.

*It should be noted that an Antommarchi waiver does not constitute a waiver of the defendant's presence at a sidebar (or its equivalent) during the trial should that sidebar discuss an issue that requires the defendant's presence. A defendant has a right to be present during a particular proceeding, when there is "the potential for the defendant to meaningfully participate in the subject discussions" *People v Fabricio*, 3 NY3d 402, 406 [2004]. Compare *Fabricio* and *People v. Rodriguez*, 85 N.Y.2d 586 [1995] (The defendant's presence was not required at a sidebar conference to discuss a legal question) with *People v Spofford*, 85 NY2d 593, 596 [1995] (whether to admit evidence per *Molineux* required the defendant's presence); *People v Dokes*, 79 NY2d 656, 661 [1992] (whether to permit cross-examination of the defendant for prior bad acts or convictions required the defendant's presence), and *People v Douglas*, 29 AD3d 47, 52 [1st Dept 2006] (a robing room conference to discuss a justification defense "clearly implicated defendant's peculiar factual knowledge such that his participation might have assisted him in advancing his justification defense to the murder and assault counts."). If required, a defendant's presence at a sidebar may be waived. E.g. *Spofford*, 85 NY2d at 597.*

To the defendant:

You have the right to be present when the Court and the lawyers question prospective jurors about any bias, hostility, or predisposition they may have to believe or disbelieve the testimony of potential witnesses.¹

You may waive that right to be present at the questioning of the prospective jurors.

Include as applicable:

If you do not waive the right to be present, the questioning of the jurors shall take place in your presence [and specify the location].²

Add if the location will be visible to the panel of jurors:

You will be accompanied to that location by a court officer.³

In the Court's Discretion:

For your information, under our law, the decision on whether or not to select a juror belongs solely to defense counsel. You can consult on the selection of a juror with your lawyer, but the ultimate decision is defense counsel's.⁴

Also, for your information, in the exercise of a peremptory challenge, the law forbids the litigants to discriminate. So, your defense counsel is not permitted to do so even if you wish counsel to do so.⁵

To defense counsel:

Does your client wish to waive the right to be present during the questioning of the jurors?⁶

To defendant:

Have you consulted with your lawyer about whether you wish to waive your presence during the examination of prospective jurors?

Do you waive your right to be present?⁷

Do you do so voluntarily, of your own free will?⁸

¹ *People v. Antommarchi*, 80 N.Y.2d 247, 250 [1992]. *See People v Williams*, 15 NY3d 739, 740 [2010] [where the Court advises the defendant of the right to be present at conferences with the jurors but does not state the specific reason for the conferences, the Court of Appeals indicated that a "better practice" is to note that *Antommarchi* rights relate to the right to be present at conferences with potential jurors regarding issues of bias"].

² *People v. Vargas*, 88 N.Y.2d 363 [1996].

³ *Id.*

⁴ *People v. Colon*, 90 N.Y.2d 824, 826 [1997] [the "selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments"].

⁵ *People v Kern*, 75 NY2d 638, 643 [1990] ["racial discrimination has no place in our courtrooms and that such conduct by defense counsel is prohibited"].

⁶ *People v Flinn*, 22 NY3d 599, 602 [2014] ["a lawyer may waive the *Antommarchi* right of his or her client"].

⁷ *People v. Williams [Janvier]*, 92 N.Y.2d 993 [1998] [the *Janvier* trial court erred in refusing to accept the defendant's waiver; the *Williams* trial court did not err in refusing to permit the defendant to rescind the waiver].

⁸ *People v Velasquez*, 1 NY3d 44, 49 [2003] ["In accepting an *Antommarchi* waiver offered by defense counsel on a defendant's behalf, a trial court need not engage the defendant in an on-the-record colloquy to ensure the requisite voluntary, knowing and intelligent nature of the waiver"].