

WAIVER OF COUNSEL COLLOQUY¹
(Published Aug. 2016)

To the defendant:

You have indicated that you wish to proceed pro se, meaning you wish to represent yourself. Under our law, you have the right to have a lawyer to defend you, and to have the court appoint a lawyer for you if you cannot afford one. Do you understand?

You may waive that right. But before permitting you to give up that right and proceed as your own lawyer, I must decide whether you fully understand the significance and consequences of doing so. In order to do that I must explain the risks associated with a defendant representing himself/herself, ask you some questions and, of course, listen to and evaluate the answers. If you do not understand the question or hear it, tell me. Do you understand?

How old are you?

How many years did you attend school?

What diploma, or what degree, did you obtain?

What type of work have you done?

[I understand you have previously been convicted of (specify approximate number of misdemeanors and felonies); correct?]

Have you previously been a defendant in a criminal trial?

If yes: Did you represent yourself?

If yes: What was the crime charged and what was the outcome?

Note: If there is a concern about a mental or physical condition:²

Have you ever received treatment for mental illness?

(If yes, when; for what; present condition; medication?)

Have you ever received treatment for a physical condition that affected your ability to understand? (If yes, when; for what; present condition; medication?)

Do you understand that you are charged with (specify) and, if convicted, may be sentenced to (specify)? ²

I will now explain the dangers of proceeding without a lawyer and the reasons our law favors that you be defended by a lawyer.

The average person, regardless of how intelligent or educated, has little knowledge or experience in the field of law. A lawyer is specially trained to know, understand, and apply the rules of law and evidence. A lawyer is specially trained and experienced in the preparation of a defense, jury selection, openings, cross-examination, and summations; in short, a lawyer is an expert in the overall conduct of a trial. The average person cannot hope to be an expert in the trial of a case, as a lawyer. Thus, the average person is at a disadvantage in representing himself/herself. Do you understand?

The law contains terms and concepts that a person who has not studied the law may not understand. Thus, if you represent yourself, you may not understand those terms or concepts and how they may or may not apply to your case. Do you understand?

The law also has rules for the conduct of a trial. In particular, the rules for the presentation of evidence range from how a question may be asked to whether a question may be asked, to whether the answer to a question is properly responsive, and from how evidence may be introduced, to when evidence may be introduced. Thus, by representing yourself, you run a risk of not being able to exclude evidence against you that should be excluded, and you run the risk of not being able to introduce evidence in your favor. Do you understand?

If you choose to represent yourself, you alone will be responsible for representing yourself at all stages of the proceedings, including: making an opening address to the jurors, examining witnesses during the trial, making appropriate objections, explaining in legal terms, if necessary, your objections or requests, and making a closing address to the jurors. Do you understand?

If you are unable to conduct your defense as effectively as a lawyer, you will have to live with the consequences.

In particular, it is difficult to deliver an opening and summation where you will likely have to speak about your alleged conduct and, in doing so, you run the risk of saying something in such a way as to make it appear you are guilty. Do you understand?

Likewise, a defendant who represents himself/herself and must ask witnesses questions about his/her conduct runs the risk that he/she will

frame a question in such a way as to make it appear he/she is guilty.
Do you understand?³

Among lawyers, it is said that a lawyer who is a defendant and represents himself has a fool for a client. In other words, even a lawyer who is a defendant normally hires a lawyer to represent him/her. The lawyer does that because the lawyer fears that he/she is too emotionally connected to the case to have a calm, reasoned, objective approach and he/she fears saying or doing something at trial in front of the jury that may appear to make him/her guilty.⁴ Do you understand?

You will be prosecuted by a lawyer who is trained in the law and trial techniques. Do you understand?

If you choose to represent yourself, you will be expected to conduct yourself in the same appropriate way that a lawyer would. Self-representation is not a license to behave as you choose. If you are disruptive in any manner, shape or form, or conduct yourself in such a way that a fair, orderly, and timely presentation of the issues during the trial is frustrated, then, under our law, you can be removed from the courtroom and the trial continued in your absence. Do you understand?

Do you still wish to waive your right to be represented by a lawyer in this case, and to represent yourself?

Has anyone promised you anything to get you to give up your right to a lawyer?

Has anyone threatened you, or forced you, or pressured you to give up your right to a lawyer against your will?

Have I, or your current lawyer, or anyone else said anything to you to have you give up your right to a lawyer to represent you against your will?

Are you giving up your right to a lawyer voluntarily, of your own free will?

The Court finds that the defendant has knowingly, intelligently, and voluntarily requested to represent himself and, accordingly, grants that request.

¹ A court must make a "searching inquiry" of a defendant who wishes to waive representation by counsel, adequately advising the defendant of the "dangers" and disadvantages" of self-representation (*see People v Crampe*, 17 NY3d 469, 472-473 [2011], *cert denied sub nom. New York v Wingate*, 132 S Ct 1746 [2012]; *see also Faretta v California*, 422 US 806, 835 [1975]). The *Crampe* Court, which concurrently determined the case of *People v Wingate*, further held as follows: "[A] searching inquiry encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity [While] [a] checklist might be helpful as a memory aid . . . there is simply no one-size-fits-all format for a searching inquiry. And while the inquiry conducted by the trial judge in *Wingate* was exemplary, we do not mean to suggest that the colloquy there has created a template to be followed in every instance where a defendant seeks to proceed pro se" (*Crampe* at 482, 483 [internal citations omitted]).

² *People v Rodriguez*, 158 AD3d 143 (1st Dept 2018); *People v Jackson*, ___AD3d___, 2021 NY Slip Op 03288 [1st Dept 2021].

³ *See People v Stone*, 22 NY3d 520, 527 (2014) ("Consistent with [*Indiana v Edwards*] [554 US 164, (2008)], New York courts can, in appropriate circumstances, deny a self-representation request if a severely-mentally-ill defendant who is competent to stand trial otherwise lacks the mental capacity to waive counsel and proceed pro se").

⁴ *E.g. Nance v United States*, 299 F2d 122 (DC Cir 1962) (where a pro se defendant asked a witness, "How do you know it was me when I had a handkerchief over my face").