

COUNSEL ISSUES

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Contents

I.	The Right to Counsel and to Proceed Pro Se.....	1
II.	The Request to Proceed Pro Se	1
III.	Taking a Waiver of Counsel.....	1
IV.	Standby Counsel.....	4
V.	Forfeiture of the Right to Counsel	4
VI.	Substitution of Counsel.....	4
VII.	Conflict of Interest in Cases of Joint Representation.....	4

For a more detailed discussion of these and other issues related to counsel, see Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, ADMIN. OF JUSTICE BULL. NO. 2007/04, UNC School of Government (July 2007), <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0704.pdf>.

- I. **The Right to Counsel and to Proceed Pro Se.** The sixth amendment to the federal constitution guarantees to a defendant who faces incarceration the right to counsel at all critical stages of the criminal process. A defendant who has the right to counsel also has the right to proceed *pro se*.
 The right to proceed *pro se* is not absolute and may be terminated if the defendant engages in serious and obstructionist misconduct. Be cautious when terminating *pro se* representation on this basis. If you do so, make sure that the record reflects the defendant's conduct, and your findings of fact and conclusions of law.
 A defendant has only two choices: appear *pro se* or be represented by counsel. A defendant does not have a right to "hybrid" representation to serve as "co-counsel" or "lead counsel."
 G.S. 7A-451(a) lists the proceedings for which an indigent defendant has a right to appointed counsel. This list includes, among other proceedings, cases when imprisonment or a fine of \$500 or more is likely to be imposed, hearings on petitions for writ of habeas corpus, certain motions for appropriate relief, and probation revocation and extradition hearings.
- II. **The Request to Proceed Pro Se.** A request to proceed *pro se* must be clear and unequivocal in order to trigger a judge's duty to act. However, most judges inquire whenever counsel issues arise.
 Once a defendant makes a clear and unequivocal request to proceed *pro se*, it is reversible error to ignore that request. When such a request is made, the judge should engage in the waiver of counsel inquiry, as outlined immediately below.
- III. **Taking a Waiver of Counsel.**
 - A. **Core Requirement for Waiver.** A waiver of the constitutional right to counsel must be knowing, voluntary, and intelligent.
 - B. **Indigent Defendants.** Indigent defendants must waive two rights before they can proceed *pro se*: the right to assignment of counsel at state expense and the right to assistance of counsel. Sometimes an indigent defendant wishes to waive only

the right to assignment of counsel at state expense. This could occur, for example, when a family member has agreed to hire a lawyer for the defendant.

When an indigent defendant waives the right to assigned counsel with the intention of making arrangements for private counsel, you should afford the defendant a reasonable period of time in which to retain counsel. If the defendant repeatedly fails to obtain counsel after having waived only the right to assigned counsel, you may consider whether the defendant has forfeited the right to assistance of counsel, discussed below.

C. Taking a Waiver. To properly take a waiver, you must make a thorough inquiry of the defendant; simply completing the Waiver of Counsel Form, AOC-CR-227 (included as an appendix to this Chapter), is insufficient and will result in reversible error.

G.S. 15A-1242 provides that a defendant may proceed *pro se* only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;
- Understands and appreciates the consequences of this decision; and
- Comprehends the nature of the charges and proceedings and the range of permissible punishments.

The inquiry must be of the defendant, not defense counsel, and must be on the record.

The N.C. Supreme Court has indicated that the following questions comply with the statutorily mandated inquiry:

- Are you able to hear and understand me?
- Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
- How old are you?
- Have you completed high school? College? If not, what is the last grade you completed?
- Do you know how to read? Write?
- Do you suffer from any mental handicap? Physical handicap?
- Do you understand that you have a right to be represented by a lawyer?
- Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
- Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
- Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?

- Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
- Do you understand that you are charged with _____, and that if you are convicted of this [these] charge[s], you could be imprisoned for a maximum of _____ and that the minimum sentence is _____? [Add fine or restitution if necessary.]
- With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
- Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

- D. Accepting the Waiver.** The only basis for denying a waiver is that it is not knowing, voluntary, and intelligent. A decision to deny a waiver cannot be based on the defendant's ability to present an effective defense, because, for example, he or she has limited education or intellectual functioning.

Memorialize the waiver by completing the Waiver of Counsel Form. If an indigent defendant is waiving only the right to assigned counsel, make sure that only box 1 is checked. If you are taking a waiver from a non-indigent defendant or from an indigent defendant who wishes to waive the right to assigned counsel and to assistance of counsel, box 2 should be checked. A completed Waiver of Counsel form is not a substitute for actual compliance with the waiver procedure, described above.

- E. Competency.** Sometimes, the defendant's responses during the waiver inquiry raise issues regarding competency. If a question regarding capacity is raised, conduct a competency hearing.

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the U.S. Supreme Court held that a state may limit a defendant's right to self representation by insisting on representation by counsel at trial when the defendant is competent to stand trial but lacks the mental capacity to conduct the defense unless represented. However, the Court declined to adopt a standard to guide judges in this determination. The law is evolving in this area, and judges faced with this issue should consult recent case updates.

A finding that a defendant is competent to waive counsel is not the same as a finding that a waiver is knowing, voluntary, and intelligent. Once a defendant is found to be competent to waive counsel, the court should engage in a standard waiver of counsel procedure, discussed above.

- F. The "Life" of a Waiver.** A waiver is valid until the proceedings are terminated or until the defendant makes known to the court that he or she desires to withdraw the waiver and have counsel assigned. If a waiver was taken in district court—either at first appearance or at trial—take another waiver in superior court. If a superior court judge took a waiver

pre-trial, that waiver remains valid for trial, even if another judge tries the case.

- G. Withdrawal of a Waiver.** Although the defendant bears the burden of moving for withdrawal of a waiver, because of the difficulties of trying a *pro se* case many judges inquire if it appears that the defendant is reconsidering a waiver.

There is some authority suggesting that you can require a showing of good cause to support a motion to withdraw a waiver made “late in the game.”

When you allow a defendant to withdraw a waiver, it may be necessary to grant a continuance, or a recess, to allow counsel to prepare for trial.

- IV. Standby Counsel.** When a defendant elects to proceed *pro se*, you have discretion to appoint standby counsel. Standby counsel assists the defendant when called upon to bring to the judge’s attention matters favorable to the defendant upon which the judge should rule upon his or her own motion. You may appoint standby counsel over the defendant’s objection. If you failed to take a proper waiver of counsel, appointment of standby counsel will not save the case.

- V. Forfeiture of the Right to Counsel.** Waiver of counsel is a knowing, intelligent, and voluntary relinquishment of a right; forfeiture of counsel is an involuntary relinquishment. Forfeiture arises when the defendant’s misconduct warrants termination of the right to counsel. The N.C. appellate courts have warned that judges must engage every reasonable presumption against forfeiture of the right to counsel. If you find forfeiture, make sure that the record clearly reflects the defendant’s conduct and your findings of fact and conclusions of law.

VI. Substitution of Counsel.

- A. Non-Indigent Defendants.** Non-indigent defendants are entitled to counsel of their own choice and should be afforded a fair opportunity to retain counsel. This right may not be exercised in a way that frustrates the administration of justice. Thus, it is not error to deny a motion to continue made on the day of trial by a non-indigent defendant who wishes to replace private counsel for no valid reason. When a defendant timely exercises the right to select counsel and then appears for trial without counsel through no fault of the defendant’s (e.g., because counsel has been detained in another court proceeding), a continuance should be granted.
- B. Indigent Defendants.** Indigent defendants do not have the right to choose their lawyers. However, an indigent’s appointed counsel should be replaced if continued representation will deprive the defendant of the right to effective assistance of counsel (e.g., when counsel is laboring under a conflict of interest).

- VII. Conflict of Interest in Cases of Joint Representation.** When the defense raises a conflict of interest objection due to joint representation of co-defendants, it is reversible error for you to fail to act. In this situation, you must either appoint separate counsel or

determine, on the record, that the conflict of interest is too remote to warrant separate counsel.

When a conflict exists, a defendant may waive the right to counsel unimpeded by a conflict of interest. Many judges ask the following questions to make a record of such a waiver:

- Do you understand that you are entitled to the right to have the independent judgment of an attorney who is free of any possible conflicts of interests?
- Do you understand that, because your attorney is jointly representing you and other defendants, your attorney may be prevented from opening possible plea negotiations on your behalf and from a possible agreement for you to testify for the prosecution in exchange for a lesser charge or a recommendation for leniency?
- Do you understand that you and the other defendants could possibly occupy opposing positions at the trial?
- Do you understand that your attorney's joint representation may cause the jury to link you with one or more of the other defendants?
- Do you understand that one or more of the other defendants may choose to testify in his or her defense, and, if so, your attorney will not be able to cross-examine such defendant on your behalf?
- Do you understand that your attorney may fail or refrain from cross-examining a state's witness about matters helpful to you but harmful to another defendant; and that your attorney may fail to object to the admission of evidence that might otherwise be inadmissible because it helps another defendant but is harmful to you; and that your attorney may fail or refrain from objecting to evidence harmful to you, but of help to another defendant?
- Do you understand that your attorney may be prohibited from attempting to shift the blame from you in the crime charged to a codefendant because your attorney represents both of you?
- Do you understand that if you are convicted, the same attorney will be representing you at the sentencing hearing where aggravating and mitigating circumstances will be considered by the court as they may apply to you and any co-defendants also represented by the same attorney?
- Do you understand that one of the other defendants may plead guilty and thereafter reveal to the state information damaging to you that the attorney received as a result of joint representation?
- I also advise you that it is not possible for me to enumerate all the possible conflicts of interest that might occur between you and your attorney by virtue of your attorneys' joint representation of you and others. Do you understand that there might be other conflicts of interests?
- With these things in mind do you have any questions that you want to ask me about any of these things I have said to you?
- Do you now of your own free will, understandingly and voluntarily waive your right to representation by an attorney who is unhindered by a possible conflict of interest?

- With this in mind are you now satisfied to have Attorney [name of attorney] represent you and also represent [name(s) of codefendant(s) in this case]?

Memorialize any such waiver and ensure that a complete record is made, including your findings of fact and conclusions of law.