



MINNESOTA JUDICIAL TRAINING UPDATE



PRO-SE DEFENDANTS AT TRIAL: EVERYTHING THAT JUDGES (and attorneys) NEED TO KNOW

- All judges eventually find themselves confronted with a defendant who requests or demands the right to represent himself/herself at trial.
- This could occur for a number of reasons; perhaps defendant holds strong anti-government beliefs (i.e. Posse Comitatus), defendant fails or refuses to retain private counsel after the court has denied a request for the public defender, or defendant is simply overconfident and believes he/she doesn't need an attorney, etc.
- Although defendants have a constitutional right to represent themselves at trial, exercising that right creates a host of constitutional and procedural pitfalls that judges must be prepared to overcome. This update will address the following 6 key topics:

1 Three General Principles That Always Apply;

2 The Court MUST Apply the Correct Legal Analysis & Make Two Specific Findings;

3 Appointment of Standby Counsel – Ten Facts You Need to Know;

4 Two Additional Ways a Defendant Can Waive the Right to Counsel;

5 What if Defendant is Mentally Ill?

6 Judge's Authority to Regulate the Trial with a Pro Se Defendant.

Note – Trial vs. Plea of Guilty: This update focuses on the right of self-representation at trial (not for a guilty plea). The waiver standard applicable to the right to counsel at trial is **higher** than the waiver standard applicable to the right to counsel at a guilty plea. *Iowa v. Tovar*, 541 U.S. 77 (2004). See Rule of Crim Pro. 5.04, subd. 1 (3) & (4) & Rule 15.01 & 15.02 (Rule 15 petition to plead guilty).

① THREE GENERAL PRINCIPLES THAT ALWAYS APPLY:

1. **Constitutional Right:** The 6th and 14th Amendments of the Federal Constitution grant criminal defendants the right to represent themselves in state court proceedings. *Faretta v. California*, 422 U.S. 806 (1975) (the “inestimable worth of free choice” was placed on a higher plane than the value of counsel in obtaining a fair trial.)

2. **Reversal of Conviction:** Because the right is designed to protect free choice, a defendant may obtain a reversal of his conviction for a violation of his right to self-representation without showing prejudice. *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990) (but a defendant who exercises his right to self-representation cannot obtain a reversal on the grounds that his performance was ineffective.) See *Faretta*, 422 US at 835 n. 46.

3. **Scope of the Right:** The scope of the defendant’s right includes “...to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and jury at appropriate points in the trial.” *Holt v. State*, 772 N.W.2d 470, 478 (Minn. 2009); *McKaskle v. Wiggins*, 465 US 168, 174 (1984).

② APPLY THE CORRECT LEGAL ANALYSIS - TWO SPECIFIC FINDINGS:

When a defendant asks to represent himself at trial, the court must determine:

1. Whether the request is clear, unequivocal, and timely; and
2. Whether defendant knowingly and voluntarily waives his right to counsel.

a) Is The Request For Self-Representation “Clear, Unequivocal, and Timely”?

- a) **Clear:** The requirement that a request for self-representation be clear and unambiguous is designed to prevent a defendant from taking advantage of the mutual exclusivity of the right to counsel and the right to self-representation. If a trial court were to permit self-representation based on an ambiguous request, a defendant could later claim that he was not really asking to represent himself, and that his right to counsel was denied. 3 LaFave, Israel, King & Kerr, *Criminal Procedure* § 11.5(d) (3d Ed. 2010) (hereafter “LaFave”).
- b) **Unequivocal:** A request for self-representation is not “equivocal” merely because it is a fallback position to a demand for a substitute public defender. *State v. Richards*, 456 N.W.2d at 264. Thus, a defendant’s statement such as, “If you won’t give me a different lawyer, I’ll represent myself,” constitutes a clear and unequivocal request for self-representation when defendant knows the trial court will not appoint a new or different lawyer. *Id.*

Note: See Judicial Training Update 12-03 “*Defendant’s Demand for Substitute Public Defender.*” A trial court need not grant an indigent defendant’s request to appoint a different lawyer except under “exceptional circumstances,” such as ineffective assistance. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998).

- c) **Timely:** Generally, the right to self-representation is “unqualified” if the request is made before trial. If the request is made after the trial begins (i.e. commencement of voir dire), the trial court must balance “the defendant’s legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress.” *State v. Christian*, 657 N.W.2d 186, 191 & 193 (Minn. 2003).

Note: An otherwise timely motion for self-representation may be denied if granting the motion will necessitate a significant continuance of the trial date and defendant offers no explanation for delaying his motion. *State v. Richards*, 456 N.W.2d at 263, n. 2; *State v. VanZee*, 547 N.W.2d 387 (Minn.App. 1996) (motion made on day of trial untimely). See, LaFave, § 11.5(d) n.71.

b) Is Defendant’s Waiver of His Right to Counsel “Knowing & Voluntary”?

- a) **Rule of Crim. Pro. 5.04, subd. 1(4) in felony & gross misdemeanor cases states:**

- The defendant **MUST** sign a written waiver. See *Form 11, Proceeding Pro Se*.
- The court **MAY** appoint a public defender for the limited purpose of advising the defendant about the waiver.
- The court **MUST** advise the defendant on the record of the following: (a) nature of the charges, (b) lesser included offenses, (c) potential punishment, (d) there may be defenses, (e) mitigating circumstances may exist, and (f) all other facts essential to defendant understanding the consequences of the waiver, including the advantages and disadvantages of waiving the right to counsel.

- b) **An excellent example of what judges should ask:** The following is an excellent and thorough examination and dialogue between the trial judge and a defendant seeking to represent himself. *State v. Kellogg*, 2004 WL 422703,*2 (Minn.App. March 9, 2004) (unpublished). These questions should be prepared based on facts and legal issues which may arise at trial.

- (1) medications defendant was taking and the effects of those medications;
- (2) educational background;
- (3) right to have an attorney represent him;
- (4) explanation of the charges against him;
- (5) possible punishment if he was found guilty of any or all of the charges;

- (6) he would be held to the same standards as an attorney;
 - (7) he would be required to conduct voir dire, respond to the state's legal arguments, and subpoena witnesses to testify on his behalf;
 - (8) it would be his decision whether to testify;
 - (9) he would be required to make evidentiary objections;
 - (10) he would be required to propose jury instructions and challenge the states proposed jury instructions;
 - (11) he would be his own lawyer;
 - (12) the presiding judge is not his attorney;
 - (13) his learning disability and the effects of the disability may make it more difficult for him to represent himself;
 - (14) the reason for defendant's request to represent himself; and
 - (15) was the decision to proceed pro se his and was he coerced or threatened?
- c) **Risk of Reversal:** Once there is a "knowing waiver" of the right to counsel, the court cannot deny a request for self-representation on the grounds that defendant lacks sufficient skills to conduct his own defense. *State v. Richards*, 456 N.W.2d at 265. Because defendant, and not the court or the state, will bear the consequences of a conviction, the defendant must be free to decide if waiving counsel is to his advantage. *Id.*, (Reversal without showing of prejudice.) See Appointment of Standby Counsel § 3 (5) below:

3 APPOINTMENT OF STANDBY COUNSEL - 10 IMPORTANT FACTS:

- 1) There is no Federal or Minnesota constitutional right to standby counsel. LaFave, § 11.5(f); *State v. Clark*, 722 N.W.2d 460, 466 (Minn. 2006).
- 2) Pursuant to Rule 5.04, subd. 2, a trial court, in the exercise of its discretion, MAY appoint standby counsel, notwithstanding Minn. Stat. § 611.17, subd. 1(b)(4), which provides that "[t]he court must not appoint the district public defender as advisory counsel" *Faretta v. California*, 422 U.S. 806 (1975), recognized the authority of a state trial court to appoint standby counsel to:
 - a) assist the defendant in following courtroom procedures, and
 - b) to be available to take over representation of the defendant if termination of the right to self-representation becomes necessary.
- 3) Standby counsel may be appointed to assist the defendant with courtroom procedures even over the defendant's objection. *McKaskle v. Wiggins*, 465 U.S. at 184; *State v. Richards*, 456 N.W.2d at 266.

- 4) Unwanted participation in the trial by standby counsel does not violate defendant's right to self-representation so long as standby counsel does not interfere with defendant's right to control the presentation of the defense and does not undermine the jury's perception that defendant is in control. *McKaskle v. Wiggins*, 465 U.S. at 183-84; *Holt v. State*, 772 N.W.2d at 478-79 (Minn. 2009).
- 5) The *Strickland* standard of ineffective assistance of counsel does not apply to standby counsel whose role is limited to assisting defendant with courtroom procedures. *State v. Richards*, 552 N.W.2d 197, 207 (Minn. 1996).
- 6) Standby counsel may be appointed to take over representation of defendant if, by disruptive behavior, defendant relinquishes his right to self-representation. *State v. Richards*, 463 N.W.2d 499 (Minn. 1990).
- 7) After trial has begun, the defendant has no right to relinquish self-representation to standby counsel. The trial court should balance defendant's request to relinquish self-representation against the readiness of standby counsel to take over and the possible disruption to the trial. *State v. Richards*, 552 N.W.2d at 206.
- 8) Pursuant to Rule of Criminal Procedure 5.04, subd. 2, a trial court should make an initial determination of whether standby counsel should be prepared to assume representation of the defendant. For example:
 - a) If the court's only concern is about defendant's ability to follow courtroom procedures, the court must advise the defendant that he has the right to decide how to use standby counsel. Rule 5.04, subd. 2(1). Under these circumstances, standby counsel need not be prepared to assume representation of the defendant. Rule 5.04. If, during the trial, the defendant becomes unexpectedly disruptive to the extent that proceeding with the trial would be a manifest injustice, the court may declare a mistrial. See Comment to Rule 5.04; *Id.*
 - b) If the court is concerned the defendant will disrupt or delay a trial, the court must advise defendant and standby counsel that standby counsel may be ordered during trial to assume representation of the defendant. Rule 5.04, subd. 2(2).
- 9) Standby counsel is not required to perform services for a defendant beyond being present during the trial to assist the defendant in exercising his right to self-representation. Standby counsel is not required to provide law clerks, investigators, clerical assistance, or office supplies. The defendant must seek funds for services or items pursuant to Minn. Stat. § 611.21. See *State v. Richards*, 552 N.W.2d. at 202.
- 10) The right to self-representation does not include the right to "hybrid" representation, see e.g., *State v. Richards*, 552 N.W.2d 197 (Minn. 1996), but the trial court may permit it. *McKaskle*, 465 U.S. at 183.

4 TWO ADDITIONAL WAYS THE RIGHT TO COUNSEL CAN BE WAIVED:

In addition to a “knowing and voluntary” waiver, the right to counsel can be relinquished in two other ways: (1) waiver by conduct, and (2) forfeiture. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). These cases typically involve defendants who refuse or are ineligible for public defender services but then fail to retain private counsel. See *State v. Hawanchak*, 669 N.W.2d 912, 914-15 (Minn.App. 2003).

1. **Waiver by conduct** occurs if defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel. *Jones*, 772 N.W.2d at 505. A trial court has the duty to ensure that a waiver by conduct is knowing and intelligent. *Id.*
2. **Forfeiture** occurs when a defendant engages in extremely dilatory conduct. Delaying a case for one year without hiring a lawyer may be forfeiture. *Id.* at 506. Forfeiture does not require a trial court to inquire about a knowing and intelligent waiver. *Id.* at 505.

5 WHAT IF THE DEFENDANT IS MENTALLY ILL?

General Rule: In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court held that each state has the authority to allow its trial courts to deny self-representation to a mentally ill defendant, even where the defendant (i) was mentally competent to stand trial and (ii) understood the advantages and disadvantages of self-representation, if the trial court finds that the defendant is not competent to conduct a trial without a lawyer’s assistance. The Court reasoned:

1. **Rationale:** The nature of mental illness is such that a person may be competent to assist a lawyer but not competent to play the expanded role of defending himself at trial.
2. **Dignity & Fairness:** The goal of affirming the dignity of a defendant by recognizing the right to self-representation is undermined by allowing a mentally ill person to humiliate himself during a criminal trial. The appearance of fairness is also diminished under these circumstances.

Important Distinction: Mentally Ill vs. Lack of Skill: Since *Edwards*, courts have limited the higher standard of competence restriction on the right to self-representation to defendants suffering from a mental illness. The right to self-representation has not been restricted simply because a defendant, who does not suffer from a mental illness, lacks the skill to conduct a trial. LaFave, § 11.5(d).

Best Practice: If a mentally ill defendant who has been found competent to stand trial asks to represent himself at trial, the trial court should consider ordering a second competency evaluation which applies a higher standard of competency related to the defendant's capacity to conduct a trial.

6 AUTHORITY TO REGULATE TRIAL WITH A PRO SE DEFENDANT:

a) Bench Conferences: Absent a waiver, a pro se defendant has a right to be present at bench conferences with the prosecutor and standby counsel if the conference is a critical stage of the trial. *Holt v. State*, 772 N.W.2d at 480 (Minn. 2009). However:

- The pro se defendant's right to be present at a bench conference is subject to the trial court's authority to preserve the safety of those present in the courtroom. *State v. Richards*, 495 N.W.2d 187, 196 (Minn. 1992).
- The defendant's absence from a bench conference does not violate the right to self-representation so long as the defendant retains control of presenting the defense, and it does not interfere with the jury's perception that the defendant is in control. *Holt v. State*, 772 N.W.2d at 479-80.
- Although not constitutionally required, when a pro se defendant is not present at a bench conference, a record should be made about what transpired during the conference. *Id.*

b) Complying With Rules of Procedural and Substantive law: The right of self-representation does not give a defendant the right to ignore or fail to comply with relevant rules of procedural and substantive law. *McKaskle v. Wiggins*, 465 U.S. at 184 (1984). A trial court may rebuke and admonish a pro se defendant during trial if the defendant fails to follow court rules. *State v. Richards*, 495 N.W.2d at 197.

c) Taking Appropriate Measures to Ensure a Fair Trial: "When a litigant undertakes to represent him or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial." *ABA Standards for Criminal Justice* § 6-3.6(b) (1986). "Where a litigant represents himself, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigant's presentation of the case." *ABA Standards Relating to Trial Courts as Amended* § 2.23 (1987). (Chief Justice Douglas Amdahl, Chair, Committee on Standards of Judicial Administration).

RESOURCES: This update was prepared based on materials authored by Retired Hennepin County Judge Mark Wernick; Hon. Shawn Bartsh, Ramsey County, Shawn.Bartsh@courts.state.mn.us (Judge Bartsh has prepared an excellent script for use in trials involving pro-se defendants. She is happy to share her script on request.); Attorney Steve Yasgur; U of M law extern Jeff Phillips.