

V. RIGHT TO COUNSEL

Judge Kenneth Foster Thompson

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Acknowledgement is also due to Judge Keith Sutherland for his original work on this chapter. Judge Sutherland is currently Circuit Judge, 12th Judicial Circuit Court of Missouri.

CHAPTER V

RIGHT TO COUNSEL

Rules 37.13 and 37.50

5.1 INTRODUCTION

Every defendant in every ordinance violation case has the right to be represented by a lawyer, regardless of the seriousness of the violation charged. The purpose of this chapter is to explain the court's responsibilities when a defendant is or is not represented by counsel, and to explain when the appointment of counsel is required.

DEFENDANT REPRESENTED BY COUNSEL

5.2 RESTRICTIONS ON THE COURT

If a defendant is represented by an attorney, there are no restrictions on the court. If the defendant is found guilty of the ordinance violation charged, either upon a plea of guilty or after trial following a plea of not guilty, the court may impose any sentence authorized — either a fine or a jail sentence or both.

5.3 WHEN PRESENCE OF ATTORNEY IS REQUIRED

The court should not accept a plea from the defendant or conduct a trial without the defendant's attorney being present. There are exceptions to this. For example, an attorney may instruct a client to appear for arraignment, enter a plea of not guilty, and request that the case be set for trial. There is no problem with this because the rights of the defendant have not been prejudiced.

Sometimes a plea agreement will be negotiated between the city prosecutor and the defendant's attorney, but the attorney will not appear at the time the plea is to be entered. It is discretionary with the judge as to whether the defendant should be allowed to plead guilty when the attorney is not present. This should be permitted only for the most minor violations and with the full knowledge and consent of the defendant. It is advisable to have a written plea or a memorandum of the plea agreement signed by both the defendant and the attorney.

5.4 WHEN PRESENCE OF DEFENDANT IS NOT REQUIRED

An attorney may enter a plea of guilty for a client in the absence of the defendant, but with the consent of the defendant, the prosecutor and the court. [See [Rule 37.57](#).] To avoid problems, this practice should be confined to minor violations, and the fine and costs should be paid immediately. A written plea or memorandum of the plea agreement signed by the defendant and the attorney is advisable in this situation.

DEFENDANT NOT REPRESENTED BY COUNSEL

5.5 INFORMING DEFENDANT OF RIGHT TO COUNSEL

Most defendants in municipal courts do not have attorneys. As a matter of good court procedure, the court should inform all defendants that they have the right to counsel as specified in Rule 37.59(b). That Rule and [Rule 37.50](#) also require the judge to inform a defendant of his right to have counsel appointed for him if he is indigent and it is likely that the defendant will be sentenced to jail in the event of a conviction

5.6 WAIVER OF COUNSEL

In cases where a jail sentence is likely, if the defendant does not want an attorney, a written Waiver of Counsel form [see form CR 210 following this chapter] should be obtained from the defendant before trial or entry of a plea of guilty by the defendant. Under no circumstances should a defendant be coerced or tricked into signing a Waiver of Counsel form. A defendant who has not "knowingly, voluntarily and intelligently" waived the right to counsel cannot be put in jail unless the defendant hires an attorney or the court appoints an attorney for the indigent defendant. (See Sections 5.11 - 5.13 for a discussion of indigency.)

5.7 DEFENDANT WHO REFUSES TO HIRE COUNSEL OR SIGN WAIVER

Occasionally, a defendant will appear who fails or refuses to hire an attorney, even though the defendant could afford to do so, and who refuses to waive the right to counsel. In these circumstances, it is proper for the court to hold a hearing to determine whether the defendant is or is not indigent. If the court determines that the defendant is not indigent, a written order or memorandum to that effect should be prepared. If the defendant then fails or refuses to hire an attorney, the court can incarcerate the defendant upon a plea of guilty or a finding of guilty after trial. Extreme caution is advised in a situation such as this, and a defendant who has been found not to be indigent should be given every reasonable opportunity to hire an attorney.

A written waiver of counsel as specified in [Section 600.051, RSMo](#) (1994), is not required for a defendant who is not indigent but refuses to hire an attorney. However, before proceeding with the trial of such a defendant, the judge should make sure that the defendant understands the violation charged, the range of punishment, the advantages of being represented by a lawyer, and the disadvantages of not being represented by a lawyer. A written record should then be made reflecting these things (see form 5-01 following this chapter).

In State vs. Yardley, 637 S.W.2d 293 (Mo.App.S.D., 1982), at 296 the Court of Appeals stated that Section 600.051, RSMo, which requires written waivers of counsel "does not apply to the action of a defendant in refusing to hire a lawyer." In the Yardley case the trial court had inquired specifically about the defendant's financial condition, found him not to be indigent and continued the case several months to give him an opportunity to hire counsel. In State vs. Wilson, 816 S.W.2d 301 (Mo.App.S.D., 1991), at 305, the Court of Appeals agreed that the defendant's inaction "failure to retain an attorney after being afforded ample opportunity to retain one manifested a decision to represent himself, and the trial court properly found an implied waiver of his right to counsel due to his conduct." Nevertheless, the Court of Appeals reversed the conviction in the Wilson case (at 308) on the grounds "that the defendant's implied

waiver of counsel was invalid because it was not made knowingly and intelligently.” In order for the implied waiver to be knowingly and intelligently made, there must be something in the record which establishes that the defendant was informed early enough to do something about it of the perils of self-representation and that he would go to trial without an attorney if he did not hire one.

Every judge should always keep in mind that even though every defendant has the right to counsel, a defendant is not entitled to unlimited continuances in order to hire an attorney. A defendant is entitled to no more than a fair opportunity to hire an attorney and adequate time to prepare a defense. The prosecution has the right to proceed after the defendant has had sufficient time. See the discussion of these issues in State vs. Boyd, 842 S.W.2d 899 (Mo.App.S.D., 1992), at 902.

5.8 NECESSITY OF COUNSEL WHEN DEFENDANT FACES COMMITMENT FOR CONTEMPT

When a defendant has not paid all or a portion of a fine and costs which have been assessed, the court is faced with the question of whether the defendant should be committed for contempt of court for nonpayment. (See Chapter XIII, "Enforcement of Fines and Costs," and Chapter XV, "Contempt of Court.") At this point, a jail sentence for contempt of court is likely, and the defendant should have an attorney or file a Waiver of Counsel for the contempt hearing regardless of whether the defendant had an attorney at the time of the guilty plea or the finding of guilty of the ordinance violation.

5.9 GENERAL CONSIDERATIONS

As stated above, the best procedure is for the judge to inform all defendants that they have the right to be represented by counsel. In addition, although not absolutely required, a Waiver of Counsel form (see form CR 210 following this chapter) should be obtained from all defendants who do not wish to be represented by an attorney.

5.10 REQUIREMENT OF WAIVER

If a defendant is not represented by an attorney and there is the likelihood of a jail sentence, a Waiver of Counsel must be obtained from the defendant before the court can either accept a plea of guilty or proceed with trial. For a Waiver of Counsel to be valid it must be made as follows:

1. Knowingly. The defendant must have been informed of the right to be represented by an attorney and the right to have an attorney appointed in cases of indigency.
2. Voluntarily. The defendant cannot have been tricked or coerced in any manner into signing the Waiver.
3. Intelligently. The defendant must understand the right to counsel. It is the duty of the judge to make sure the defendant understands this right.

At a minimum the appellate courts have required that a defendant must be advised of the perils of self-representation and given an opportunity to retain an attorney in sufficient time before

having to go to trial that the right becomes meaningful. The court can only determine if a Waiver of Counsel is knowingly and intelligently made if the court makes inquiry of the defendant. In State vs. Yeargin, 926 S.W.2d 883 (Mo.App. S.D. 1996) at 886 the Court of Appeals reversed the defendant's convictions because there was "nothing in the record . . . That reveals defendant was advised of the perils of self-representation by the trial court. There is no showing of any investigation to determine that defendant made a knowing and intelligent waiver of counsel." Similarly, in State vs. Davis, 934 S.W.2d 331 (Mo.App. E.D., 1996), at 334, reversed defendant's conviction because "There is nothing in the record to indicate that defendant understood the dangers and disadvantages of self-representation. The (335) trial court did not inform defendant of the elements of the charged offense, the range of punishment nor the possible defenses and mitigating defenses and mitigating circumstances. Further, the trial court did not inform defendant that he would be at an extreme disadvantage by appearing *pro se*. The trial court simply informed the defendant that he would have to represent himself if he failed to obtain counsel."

If a defendant makes a valid Waiver of Counsel, the court may then assess any punishment authorized following a plea of guilty or a finding of guilt after trial, including a jail sentence.

Caution should be used in obtaining a written Waiver of Counsel (or any other preprinted form) from defendants. A surprising number of people cannot read well enough to truly understand documents such as the Waiver of Counsel form. Therefore, the best procedure is either to read the form to them or to explain it to them before they sign.

Affiliated form: See form MBB 5-01 following this chapter. (That defendant has refused to hire lawyer and refused to sign waiver of counsel form.), OSCA MBB 5-01

INDIGENCY AND THE APPOINTMENT OF COUNSEL

5.11 REQUIREMENT OF APPOINTMENT OF COUNSEL

Under Rule 37.50, an attorney must be appointed for any indigent defendant charged with an ordinance violation, the conviction of which would likely result in confinement, unless that defendant knowingly, voluntarily and intelligently waived his right to have counsel. An indigent defendant is one who is "unable to employ counsel."

5.12 DETERMINING "INDIGENCY"

Indigency is a term of art, not science, and must be judged on the circumstances of each defendant individually. For state offenses, defendants are entitled to the appointment of a public defender to represent them if they are "unable, without substantial financial hardship to [themselves] or [their] dependents, to obtain a lawyer." [Section 600.048.1\(2\), RSMo \(1994\)](#).

All of a defendant's assets — house, motor vehicles, etc. — should be taken into account in determining whether he or she is indigent, not just income. Financial responsibilities — support for dependents, mortgage or rent payments, etc. — should also be considered.

5.13 ARRANGING FOR APPOINTMENT OF COUNSEL

If a defendant wants to be represented by an attorney but is unable to afford one, and the court is unable or unwilling to appoint an attorney, the defendant cannot be sentenced to a term of confinement under any circumstances. As there are certain defendants whose violations justify confinement but who are indigent, it is incumbent upon the judge to make arrangements for the appointment of counsel. Because the state public defender does not represent defendants in municipal ordinance violation cases, a municipal judge must make other arrangements for appointed counsel. There are two ways to do this. First, the municipality can hire and pay appointed counsel. Second, the court or the local bar association can maintain a rotating roster of volunteer local attorneys who will accept appointments to represent indigent defendants. Attorneys who regularly appear before the municipal court should be willing to accept appointment.

5.14 DRUG AND ALCOHOL RELATED OFFENSES

[Section 577.023, RSMo](#) (1994), has significantly increased the importance of obtaining a written waiver of counsel from unrepresented defendants charged with either drug or alcohol-related offenses (DWI, DUI, BAC) in municipal courts.

Among many other things, the statute provides that, effective July 1, 1992, a plea of guilty or finding of guilt after trial of a municipal ordinance violation of DWI, DUI, BAC, or driving under the influence of drugs shall count as a prior offense for purposes of enhancing punishment for subsequent offenses. The Abuse and Lose Law, Sections [577.500](#) to [577.530](#), RSMo (1994) also applies to these municipal ordinance violations. However, only those municipal ordinance violations “where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney in writing” can be used as prior offenses or under the Abuse and Lose Law. If the municipal judge is not an attorney or if the defendant is not represented by counsel and does not sign a written waiver of counsel, these provisions do not apply.

For a discussion of the Abuse and Lose Law, see Chapter XII - Judgment and Sentencing.