

## MODEL SCRIPT FOR WAIVER OF COUNSEL

The following script is recommended as a tool to develop a conversation regarding the pitfalls of self-representation with a defendant who has indicated a desire to proceed *pro se*—it is not intended to replace a written waiver of counsel. The script does not incorporate the advice of rights pertaining to the acceptance of a guilty or no contest plea, or questions to determine whether the defendant understands the nature of the charge as required under ORS 135.385, because ORS 135.040 requires the defendant’s right to counsel to be addressed first if the defendant appears for arraignment without counsel. Please refer to the script entitled “*Model Script for Accepting a Guilty or No Contest Plea.*”

*The contents of the script should be tailored to fit the unique circumstances of each individual case.*

### Creating A Colloquy on the Record:

You have indicated your desire to give up your right to an attorney in this matter and represent yourself. You have that right. But before we proceed I want to discuss with you the *risks of going forward without an attorney.*

First, I want to know if you are under the influence of alcohol or drugs? Are you suffering from any injury, illness, or disability of any kind that could affect your ability to think or to make a rational decision?

- » **[If “Yes.”]:** **Note:** *If the defendant answers affirmatively to either of the questions above, the waiver of counsel may not satisfy the requirements of State v. Meyrick, 313 Or 125 (1992).*
- » **[If “No.”]:** Please listen to me carefully as I explain your right to an attorney and the risk of giving up that right.

You have a **constitutional right** to the assistance of an attorney. If you can’t afford your own attorney, this court may provide one for you if you meet certain standards established by the **Public Defense Services Commission**. To determine if you meet these standards, you will be required to provide a financial statement of your assets, debts, income, and other information. Do you understand that you have the right to an attorney, including one provided by this court if you qualify?

- » **[If “No.”]:** *Further explain constitutional right to counsel, including appointed counsel.*

- » Do you have enough money to hire an attorney yourself?
- ◇ [If “Yes.”]: Do you plan to hire an attorney for this case?
- ◇ [If “No.”]: Do you want to fill out the paperwork to find out if you are financially eligible for a court-appointed attorney?

If the defendant insists on proceeding pro se, continue with the following advice:

The consequences of the charge(s) against you may include:

- » Explain to the defendant the potential consequences related to the charge(s), including the following:
  - ◇ **Statutory maximums**;
  - ◇ Maximum possible sentence from consecutive sentences;
  - ◇ **Mandatory minimums**; and
  - ◇ Collateral consequences.

By choosing to proceed without an attorney and represent yourself, you are at a **serious disadvantage**. Here’s why:

- You lack legal training. For example, you may not realize that you have one or more defenses to the crimes you are charged with.
- You lack experience with the rules and procedures that this court will apply to you even though you are not a lawyer.
- The State will be represented by an attorney and will not have any of the disadvantages you will have without an attorney—in a sense, the State will have an advantage over you in this case.

By choosing to proceed without an attorney, you are giving up the following **benefits**:

- An attorney can review the facts of your case and discuss them with you to determine what defenses you may have to the charges against you. An attorney can also identify any problems with the State’s case against you.
- An attorney can advise you on how to plead to the charges against you, and, if appropriate, assist you in entering a **plea agreement**.
- An attorney can advise you on whether you qualify for **release** from jail before trial.
- If you choose to plead not guilty, an attorney would prepare your case for trial, including gathering evidence and interviewing and subpoenaing **witnesses**, preparing to cross-examine the State’s witnesses, and filing pretrial motions.

- An attorney knows the rules and procedures involving **discovery**—that is, how to get information from the district attorney that is important to your case, such as police reports and statements from witnesses.
- An attorney knows how to make sure any **defenses** available to you are investigated and properly raised—some defenses must be raised in a motion before trial, others must be raised at trial.
- An attorney understands the **rules of evidence** and can assist you in questioning witnesses and presenting other evidence that is necessary for your defense, as well as prevent the State from using improper evidence. For example, an attorney will understand how to question the legality of your arrest or raise search and seizure issues.
- An attorney can explain what **sentences** can be imposed if you are convicted of any or all of the charged crimes.
- An attorney can explain other **possible consequences** of a conviction.
- An attorney can help you decide whether you should seek a **jury trial** on the criminal charges or waive your right to a jury and have a judge decide your case.
- An attorney can help you enforce any rights you may have on **sentencing issues** and decide whether to ask for a jury on those issues.
- If you decide to have a jury trial, an attorney can help you select jurors, exercise appropriate challenges to potential **jurors**, and prepare jury instructions.
- An attorney can make legal arguments to the court during trial and present **opening and closing statements** to the jury.

If you choose to proceed without an attorney, you will not be able to rely on the judge, court staff, your interpreter, or the district attorney for legal advice or any assistance in defending yourself at trial.

In light of this information, do you understand that there are disadvantages to representing yourself?

- » **[If “Yes.”]**: Explain to me in your own words some of the disadvantages you will face if you do not have an attorney.
- » **[If “No.”]**: Why do you think you would not be at a disadvantage without an attorney?

Do you have any **questions** about the information I just shared with you?

Has anyone encouraged you to go forward without an attorney?

Has anyone threatened you with any form of punishment if you choose to have an attorney?

Have you previously been charged with any crimes?

- » **[If “Yes.”]:** Were you represented by an attorney in those proceedings? Did you waive your right to an attorney in any of those proceedings?

Do you still wish to proceed without an attorney and represent yourself?

- » **[If “Yes.”]:** Explain to me in your own words why you do not want an attorney in this case.

## **Findings:**

If satisfied with defendant’s understanding of the information, find on the record that the defendant has been informed of the dangers and disadvantages of self-representation as well as the benefits an attorney would provide and knowingly, voluntarily, and intelligently waived his or her right to counsel.

***Ask the defendant to sign a written waiver of counsel.***

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*See generally* Or Const Art I, § 11; ORS 135.040; ORS 135.045; *State v. Meyrick*, 313 Or 125, 132 (1992) (a valid waiver of counsel must be an “intentional relinquishment or abandonment of a known right” that is “voluntarily and intelligently made” by the defendant); *State v. Probst*, 192 Or App 337, 349-350 (2004) (concluding that a defendant’s understanding of the risks of self-representation requisite to a valid waiver of counsel can be established by either the totality of the circumstances or a colloquy on the record) *review allowed by* 337 Or 669 (2004).