

### ANSWER TO QUESTION 15

Bob has sought the assistance of trial counsel after his jury conviction but before imposition of his sentence. Bob's newly retained counsel should immediately file a motion for new trial pursuant to MCR 6.431 and MCL 770.1. A motion for new trial in a criminal proceeding may be made at any time before the filing of a claim of appeal. MCR 6.431(A). Here, because the time for filing a claim of appeal has not passed, a motion for new trial would be timely.

The trial court may grant a motion for new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). MCL 770.1 similarly provides that a judge "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done."

Bob has a significant appellate issue relating to his self-representation.

The right to self-representation is implied in the Sixth Amendment to the United States Constitution and expressly guaranteed by Michigan statute, MCL 763.1, and the Michigan Constitution, Const 1963, art 1, §13. However, the right to self-representation must be measured against the right to counsel. Thus, before allowing a defendant to represent himself the trial court must comply with the waiver of counsel procedures set forth by the Michigan Supreme Court in *People v Anderson*, 398 Mich 361, 367-368 (1976). Specifically, a trial court must: (1) make sure the waiver request is unequivocal; (2) make sure the waiver is knowingly, intelligently, and voluntarily made; and (3) be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of court business.

Further, the trial court must comply with MCR 6.005(D), which requires the trial court to inform a would be pro per criminal defendant of the charges, the potential maximum prison sentence and any mandatory minimum sentence required by law; to advise him of the risks inherent in self-representation; and to afford him the opportunity to consult with counsel before deciding to proceed without counsel. Strict compliance with the requirements of the court rule and case law is not required. *People v Russell*, 471 Mich 182, 191 (2004). However, in order to substantially comply

with the requirements of the court rule and case law, "the court [must] disclose the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 191. Courts must indulge every reasonable presumption against the waiver of the right to counsel. *Id.* at 193.

Here, the colloquy between the defendant and the trial court fell far short of the minimum requirements of Michigan law. While the prosecutor will point out the trial court asked defendant one question to see if the request was voluntary, "Is anyone making you say this", the judge did not follow up or ask any questions to determine if the request was knowingly or intelligently made. The trial court failed to test whether defendant's declaration of his right to represent himself was without equivocation. The trial court should have inquired of the defendant the reasons supporting his conclusion that he would be more effective in presenting his defense than would "any lawyer." The court failed to inform the defendant of the dangers of self-representation. The trial court should have informed defendant that the trial is governed by rules of procedure and evidence and that it is exceedingly difficult for a person untrained in the law to comply with these procedural requirements. In failing to discuss these procedural aspects of the trial, the court also lacked any basis to support a conclusion that defendant would "not disrupt, unduly inconvenience, and burden the court or the administration of court business." *Anderson* at 368. The court also failed to inquire whether defendant had a grasp of the substantive aspects of the charges asserted against him or the potential defenses that may be available to him. While the prosecutor will point out that the court reminded defendant he was charged with a felony, the court made no mention of whether defendant understood the ramifications of a felony conviction. There was no discussion of the specific charge asserted against defendant, nor the maximum or potential penalty defendant could face upon a conviction. Defendant was not afforded an opportunity to discuss his decision with his lawyer before the trial court accepted his waiver of the right to counsel and his assertion of his right to self-representation. While defendant stated that he knew his rights, defendant is not a lawyer. Thus, absent inquiry by the court, it would be impossible to determine whether defendant actually was aware of his many rights and intelligently waived those rights when defendant stated, "I am aware of my rights." Simply put, the exchange between defendant and the trial court does not establish that defendant made a knowing and intelligent waiver of his right to counsel and his assertion of his right to self-representation.

Because there exist strong appellate grounds to support reversal of Bob's conviction, the motion for new trial should be granted. Upon the granting of the motion for new trial, Bob's new counsel should move for reinstatement of his release bond. The court should grant such a motion, as a criminal defendant not charged with murder or treason is generally entitled to have a reasonable release bond established pending trial. Const 1963, art 1, §§15, 16; MCL §§765.5, 765.6.