

JOINT REPRESENTATION OF DEFENDANTS ¹

(Published Aug. 2016)

Address applicable defendants:

Both/All of you are represented by the same attorney.

Under our law, you are entitled to separate attorneys. Indeed, the law does not favor one attorney representing two (or more) defendants who are jointly charged with the commission of a crime(s).

The reason the law does not favor joint representation of codefendants by one attorney is that almost always there is a conflict of interest (among / between) defendants.

A conflict of interest may arise out of differences in the alleged conduct or level of culpability of each defendant, and those differences may be critical in putting forth an appropriate defense at a hearing or trial, or in resolving the case by a favorable guilty plea agreement. When that happens, the lawyer is put in a position of favoring one defendant over the other. Needless to say, that will adversely affect one of you or (all / both) of you at different times over different issues.

(Specify any known possible conflict probably arising out of differences in alleged facts.)

Do you understand?

The law permits, but does not recommend, multiple codefendants to share one attorney. But if you choose to continue to be represented by one attorney and you are prejudiced by that choice, then you must suffer the consequences.

Do you understand?

I will adjourn the case to provide you an opportunity to consider whether you wish to continue with present counsel or another. You may wish to discuss the matter with your current counsel and with a separate counsel. If you cannot afford another counsel to advise you or represent you, I can assign one to represent you. Do you understand?

Note: Continue with an inquiry of the attorney as to whether he/she has considered and discussed with the defendants a

possible conflict of interest. If not, note that the adjournment will provide counsel with an opportunity to do so.

Note: The Clerk should record on the file the date and that the Gomberg warnings were given.

Note: If the defendants elect to continue with representation by the same lawyer, a further colloquy to make sure the decision is voluntary is advisable:

To each defendant:

Has anyone threatened you, or forced you, or pressured you to continue with the same lawyer against your will?

Have I, or your lawyer, or anyone else, said anything to you to have you continue with the same lawyer against your will?

Have you, therefore, chosen to continue with the same lawyer voluntarily, of your own free will and choice?

1. See *People v Gomberg*, 38 NY2d 307 (1975); see also *People v Philip L.S.*, 57 NY2d 820 (1982); *People v Lloyd*, 51 NY2d 107 (1980); *People v Cortez*, 22 NY3d 1061 (2014) where the opinion of Judge Lippman, in which two Judges concurred, recommended following a federal case's protocol, namely:

- (1) advise the defendant of his/her right to conflict-free representation;
- (2) instruct the defendant as to the dangers arising from the particular conflict;
- (3) permit the defendant to confer with his chosen counsel;
- (4) encourage the defendant to seek advice from independent counsel;
- (5) allow a reasonable time for the defendant to make his decision; and
- (6) determine, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risks and freely chooses to run them.