

**SM-32B ACCEPTING A PLEA OF GUILTY: USE OF WRITTEN FORM**

The following questions are suggested for use when a written form is employed to furnish a record that a plea is made voluntarily and understandingly.

Many courts have developed written forms for accepting guilty pleas. A sample form is provided as Appendix I to this Special Material. It includes all the questions that are included in the full oral acceptance procedure recommended in SM-32.

The use of a written form was approved in State v. Moederndorfer, but the court added that the trial court should personally question the defendant concerning the form. The court referred to "making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one."<sup>1</sup>

The sample questions that follow are intended to comply with the Moederndorfer decision. Also included are questions to be directed at defense counsel.

**THE COURT TO THE DEFENDANT:**

(Mr.) (Ms.) \_\_\_\_\_, I have here a form entitled (state caption on form). It appears to have your signature on the last page (and your initials on each paragraph).

1. Did you sign and initial this form?
2. When did you do that?
3. Have you read the form?
4. Do you believe you understand what is in the form?
5. Do you have any questions about it?
6. Have you used any drugs, alcohol, or medication today?

[AT THIS POINT REVIEW THE FORM AND FOLLOW UP ON ANY ITEMS THAT MAY RAISE A QUESTION ABOUT THE UNDERSTANDING OF THE PLEA]

7. Did you talk this over with your lawyer?
8. Did you discuss what is in this form and what is being recommended here?
9. Do you understand that by pleading guilty you are giving up the constitutional rights detailed in the form?
10. Did you have enough time to talk with your lawyer?
11. Do you have any questions now about the form or about your plea of guilty?

THE COURT TO DEFENSE COUNSEL:

12. (Mr.) (Ms.) \_\_\_\_\_, as the lawyer for the defendant, have you had ample opportunity to confer with the defendant with regard to this plea of guilty?
13. Have you reviewed the (state caption on form) with the defendant?
14. Are you satisfied that the defendant understands the charge(s), the elements thereof, and the possible consequences of an adjudication of guilt?
15. And, are you satisfied the defendant is knowingly, intelligently waiving (his) (her) constitutional rights?
- [16. And are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?]
17. Based upon your own independent investigation, are you satisfied that there is an ample factual basis to warrant the court's acceptance of the tendered pleas?

THE COURT TO THE DEFENDANT:

18. (Mr.) (Ms.) \_\_\_\_\_, you have heard what your lawyer has told me. Is there anything that you wish to disagree with or ask questions about?
19. Are you satisfied with the representation you received from your lawyer up to this point?
20. And is there anything that I may have asked you that you now upon reflection wish to modify or change in any way?
21. Do you want the court to accept your plea(s) of guilty at this time?

#### COMMENT

Special Material 32B was originally published in 1985. This revision was approved by the Committee in August 1992.

1. The use of a written plea acceptance form was approved in State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987):

Personal colloquy by verbally following the provisions of SM-32 is not mandatory. The trial court may instead refer to some portion of the record or some communication between defense counsel and defendant. Any one of these alternatives is proper so long as the alternative used exhibits defendant's knowledge of the constitutional rights waived.

141 Wis.2d 823, 827

The court found that the written form used in the case was sufficient, that the court conducted a full personal inquiry about the defendant's understanding of the form, and that there is nothing inherently wrong about using a form – to the contrary, using a form may be preferable:

People can learn as much from reading as listening, and often more. In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting. A trial court can accurately assess a defendant's understanding of what he or she has read by making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one.

141 Wis.2d 823, 828

A guilty plea was vacated despite the use of a written form in State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). The defect was the trial court's failure to address the defendant personally to ascertain his understanding of the constitutional rights being given up by the guilty plea:

... the colloquy was limited to whether Hansen had gone over the Moederndorfer form with his attorney before he signed it and whether Hansen understood the form. We conclude that such limited personal colloquy is not the substantive kind of personal exchange between the trial court and the defendant which Bangert, sec. 971.08, Stats., and Moederndorfer require.

While our approval of the Moederndorfer form certainly lessened the extent and degree of the colloquy otherwise required between the trial court and the defendant, it was not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding that the plea results in the waiver of the applicable constitutional rights. The record made in Moederndorfer is demonstrative. Although the personal colloquy there was also brief, it nonetheless established the defendant's understanding that, by entering the plea, he was giving up the rights detailed in the form. Moederndorfer, 141 Wis.2d at 828-29 n.1, 416 N.W.2d at 630. This is a subtle, but important, requirement.

168 Wis.2d 749, 755-56

Question number 9 above is believed to satisfy the Hansen requirement.