

FARETTA AND MARSDEN ISSUES

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I. [§54.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the procedures for handling a number of counsel issues, including waiver of right to counsel (*Faretta* motions), substitution of appointed counsel (*Marsden* motions), appointment of co-counsel in capital cases, the granting of co-counsel status to defendants, appointment of advisory and standby counsel, and court removal of counsel. It includes a brief summary of the law, and procedural checklists and forms for handling *Faretta* and *Marsden* motions.

II. PROCEDURAL CHECKLISTS

A. [§54.2] Waiver of Right to Counsel (*Faretta* Hearing)

(1) *Determine if defendant has made an unequivocal request for self-representation. See §54.5.*

(2) *If counsel has not been appointed for defendant, ask if defendant agrees to an initial appointment of an attorney to discuss the case with counsel before deciding to proceed in pro per.*

- *If defendant agrees, appoint an attorney and continue the case for a reasonable period.*
- *If defendant does not agree, proceed to step (3).*

(3) *Ask defendant to fill out a “Waiver of Right to Counsel” form. See §54.37.*

- ☛ **JUDICIAL TIP:** Some courts ask defendants to fill out the waiver form before conducting the hearing because many defendants will withdraw their requests to proceed in pro per after they read it. Further, having defendant complete the form ensures that defendant has received the proper advisements.

(4) *Determine if defendant’s request for self-representation is timely. See §§54.8–54.10.*

- *If the request is made a reasonable time before trial starts, it is timely. Proceed to step (5).*
- *If the request is made close to or after trial starts:*

(a) *Review these factors:*

- The quality of representation afforded to defendant,
- The defendant’s prior proclivity to substitute counsel,
- The reasons for the request,
- The length and stage of the proceedings,
- The disruption or delay that might reasonably be expected if the request is granted, and
- If defendant is ready to present the case without a continuance.

(b) *Deny the request as untimely and proceed to step (7), or continue the hearing and proceed to step (5).*

(5) *Advise defendant of:*

- *The defendant’s constitutional rights, including the right to counsel, against self-incrimination, and a speedy trial. See §54.7.*

- *The case's complexities, including the nature of criminal proceedings, and the possible outcome, defenses, and punishment.* See §54.7.
- *The dangers and disadvantages of self-representation, including that:*
 - Self-representation is unwise and defendant may conduct a defense to his or her own detriment.
 - Defendant must follow the same rules that govern attorneys, including the technical rules of substantive law, criminal procedure, and evidence.
 - Defendant will be opposed by an experienced and professional attorney who holds a distinct advantage in skill, training, and ability.
 - Defendant will receive no help or special treatment from the court or the prosecutor.
 - Defendant will not receive any special library privileges, investigators, or extra preparation time.
 - If the court terminates defendant's right to self-representation in the middle of the proceedings, appointed counsel may be at a strategic disadvantage in presenting the case. See §54.7.
 - If defendant changes his or her mind about proceeding without counsel, the court may refuse the request for appointment of counsel. See §54.12.
- *The court's power to terminate the right to self-representation if defendant engages in serious misconduct.* See §54.18. The court may also deny defendant's motion for self-representation based on any serious misconduct before the motion. See §54.4.
- *Defendant's loss of the right to appeal on the grounds of inadequacy of counsel if defendant proceeds in pro per.* See §54.7.

(6) *Determine if defendant has the mental capacity to waive the right to counsel and exercise the right to self-representation.* If there is any doubt as to defendant's mental capacity, suspend the proceedings and order a psychiatric evaluation. See §54.6. Defendant's competency for self-representation is not the same as competency to stand trial.

(7) *Grant or deny defendant's request to proceed in pro per.*

- *If the request is granted, state on the record these findings:*
 - Defendant is competent to waive the right to counsel.
 - Defendant has been advised of the dangers and disadvantages of proceeding without counsel.

- Defendant has made a voluntary and intelligent waiver of the right to counsel.
- *If the request is denied, state the reason(s) for the denial, e.g., the request was untimely, or defendant is not competent.*

B. [§54.3] Request to Substitute Counsel (*Marsden* Hearing)

(1) *Determine if defendant has clearly requested a substitution of appointed counsel. See §54.23.*

- ✦ **JUDICIAL TIP:** Frequently a defendant represented by private counsel will ask the court for a *Marsden* hearing. However, these hearings only apply to court-appointed counsel.

(2) *Suspend the proceedings and conduct a hearing on the request. See §54.22.*

(3) *Order the exclusion of the prosecutor from the hearing if:*

- *Defendant or appointed counsel requests the prosecutor's absence, or*
- *The court anticipates disclosure of information to which the prosecutor is not entitled (e.g., work product). See §54.27.*

(4) *Ask specifically why defendant is dissatisfied with appointed counsel.*

(5) *Ask counsel to (a) describe his or her criminal practice experience, (b) describe the work done on defendant's case, and (c) respond to each of defendant's allegations. See §54.28.*

(6) *Allow defendant to respond to counsel's statements.*

(7) *Grant or deny the substitution of appointed counsel request.*

- *Grant the request if defendant substantially shows one or both:*
 - *Appointed counsel is not providing adequate representation.*
 - *Defendant and appointed counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely. See §54.24.*
- *When ruling on a substitution request made after trial starts, consider:*
 - *If granting the request would unreasonably disrupt the proceedings.*
 - *If defendant has made a strong showing of appointed counsel's inadequacy.*
 - *If defendant could have earlier raised dissatisfaction with appointed counsel but did not. See §54.25.*

(8) *Order the hearing’s transcript sealed, or direct the court reporter not to transcribe hearing notes until further notice. See §54.27.*

III. APPLICABLE LAW

A. Self-Representation

1. [§54.4] Nature of Right

Constitutional right. Under the Sixth and Fourteenth Amendments, a defendant has a constitutional right of self-representation and may waive the right to counsel in a criminal case. *Faretta v California* (1975) 422 US 806, 819, 95 S Ct 2525, 45 L Ed 2d 562. Current law provides that the court must find that defendant is mentally competent to represent himself or herself. See *Indiana v Edwards* (2008) 554 US 164, 169–178, 128 S Ct 2379, 171 L Ed 2d 345. The court must grant a defendant’s request for self-representation if: (1) defendant is mentally competent and makes the request knowingly and intelligently, having been advised by the court of the dangers of self-representation; (2) defendant’s request is unequivocal; and (3) defendant makes the request within a reasonable time before trial. *Faretta v California, supra*, 422 US at 835; *People v Welch* (1999) 20 C4th 701, 729, 85 CR2d 203. If these conditions are met the court must grant the request regardless of how unwise defendant’s choice may appear. *Faretta v California, supra*, 422 US at 836; see *Godinez v Moran* (1993) 509 US 389, 399, 113 S Ct 2680, 125 L Ed 2d 321. Furthermore, defendant’s technical legal knowledge is irrelevant to the court’s assessment of a knowing exercise of the right to self-representation. *Faretta v California, supra*.

No principle says that the right to a fair trial is more important than the right to self-representation; therefore a court cannot deny self-representation because it might cause defendant detriment or unfairness. *People v Blair* (2005) 36 C4th 686, 739–750, 31 CR3d 485. The law does not require defendant to make a compelling case for self-representation. It is enough that the request is unequivocal and timely. *Moon v Superior Court* (2005) 134 CA4th 1521, 1530, 36 CR3d 854.

Capital cases. The right to self-representation extends to defendants accused of capital offenses, even though Pen C §§686(2), 686.1, 859, and 987(b) provide that defendants in capital cases must be represented in court by counsel at all stages of the preliminary and trial proceedings. *People v Mickel* (2016) 2 C5th 181, 209–210, 211 CR3d 601; *People v Dent* (2003) 30 C4th 213, 218–222, 132 CR2d 527; *People v Joseph* (1983) 34 C3d 936, 196 CR 339; *Thomas v Superior Court* (1976) 54 CA3d 1054, 1057, 126 CR 830 (principles enunciated in *Faretta* supersede statutory law requiring counsel in capital cases). However, a defendant may not plead guilty to an offense punishable by death or life imprisonment without the possibility of parole without the appearance and

consent of counsel. Pen C §1018; *People v Chadd* (1981) 28 C3d 739, 754, 170 CR 798.

2. [§54.5] Unequivocal Request

The right to self-representation must be initiated by a defendant's timely and unequivocal assertion. *People v Valdez* (2004) 32 C4th 73, 97–98, 8 CR3d 271; *People v Barnett* (1998) 17 C4th 1044, 1087, 74 CR2d 121.

A defendant's stated dissatisfaction with counsel's handling of the case is not an unequivocal request. *People v Wright* (1990) 52 C3d 367, 409, 276 CR 731. See also *People v Clark* (1992) 3 C4th 41, 98, 10 CR2d 554 (defendant saying he is "thoroughly capable of handling this case" not unequivocal assertion of right to self-representation); *People v Marlow* (2004) 34 C4th 131, 147, 17 CR3d 825 (in context of defendant's frustration with his inability to obtain chosen counsel, his inquiry—"Is it possible that I just go pro per in my own defense and have someone appointed as co-counsel?"—was request for information, not *Faretta* motion).

A request is not unequivocal if it is not a genuine desire for self-representation, but is made out of anger, frustration, or ambivalence, or to delay or disrupt the court proceedings. *People v Danks* (2004) 32 C4th 269, 295–296, 8 CR3d 767; *People v Marshall* (1997) 15 C4th 1, 23, 61 CR2d 84. A capital defendant who represented himself and refused to argue for mitigation during the penalty phase of trial was not seeking to frustrate the orderly administration of justice; continued self-representation was proper. *People v Burgener* (2016) 1 C5th 461, 471–473, 205 CR3d 540.

In determining if a self-representation request is unequivocal, consider not only if defendant has stated the motion clearly, but also defendant's conduct and other utterances in court. *People v Marshall*, *supra*, 15 C4th at 25. See *People v Snow* (2003) 30 C4th 44, 68–70, 132 CR2d 271 (*Faretta* motion withdrawn before court ruled on it); *People v Hines* (1997) 15 C4th 997, 1027–1029, 64 CR2d 594 (*Faretta* motion properly withdrawn); *People v Scott* (2001) 91 CA4th 1197, 1203–1205, 111 CR2d 318 (request made immediately after denial of *Marsden* motion and motivated by defendant's desire to rid himself of appointed counsel); *People v Carlisle* (2001) 86 CA4th 1382, 1385–1390, 103 CR2d 919 (defendant's repeated requests made over 4-month period to represent himself if he could not have other counsel assigned found unequivocal); *People v Barnett* (1998) 17 C4th 1044, 1087, 74 CR2d 121 (request deemed an equivocal, impulsive response to court's refusal to immediately hear *Marsden* motion); *People v Boyce* (2014) 59 C4th 672, 699–705, 175 CR3d 481 (capital defendant failed to unequivocally request self-representation in penalty phase when he wanted his attorneys removed to

avoid introducing mitigation); *People v Weber* (2013) 217 CA4th 1041, 1061–1062, 159 CR3d 228 (defendant asking for Judge Advocate General’s and his non-attorney uncle’s presence at sentencing hearing is not an unequivocal request for counsel). A finding that defendant has made an unequivocal request does not preclude a later finding that the request has become equivocal. *People v Phillips* (2006) 135 CA4th 422, 429, 37 CR3d 539.

The court has no sua sponte duty to ask about defendant’s intent to move for self-representation when substitute counsel is requested. *People v Webster* (1991) 54 C3d 411, 436, 285 CR 31.

3. Waiving Right to Counsel

a. [§54.6] Competency to Waive Right

Competency standard. Before the court may grant defendant’s request to proceed in pro per, the court must be satisfied that defendant has the mental capacity to voluntarily and intelligently waive the right to counsel. *Godinez v Moran* (1993) 509 US 389, 399, 113 S Ct 2680, 125 L Ed 2d 321. If defendant seeks to enter a guilty or no-contest plea, the competency standard for waiving the right to counsel is the same as for standing trial. A defendant is competent to waive counsel who has the mental capacity to understand the nature and object of criminal proceedings, consult with counsel, and assist in preparing a defense. *Godinez v Moran, supra*; *People v Welch* (1999) 20 C4th 701, 732, 85 CR2d 203. When a defendant is competent to stand trial and seeks to defend himself at trial rather than plead guilty or no-contest, a court may deny self-representation if defendant suffers from severe mental illness and cannot carry out the basic tasks needed to present a defense without counsel’s help. *Indiana v Edwards* (2008) 554 US 164, 169–178, 128 S Ct 2379, 171 L Ed 2d 345; *People v Johnson* (2012) 53 C4th 519, 525–531, 136 CR3d 54 (trial courts may deny self-representation in those cases where *Edwards* permits it); *People v Mickel* (2016) 2 C5th 181, 207–209, 211 CR3d 601 (again declining to adopt more specific standard for competence to waive right to counsel). But the court need not routinely inquire into or investigate the competence of a defendant seeking self-representation. *People v Espinoza* (2016) 1 C5th 61, 80, 203 CR3d 647. See *People v Gardner* (2014) 231 CA4th 945, 960, 180 CR3d 528 (upholding denial of *Faretta* motion in rare situation when defendant’s language disorder “prevented him from coherently communicating with the court or a jury,” and defendant lacked “the higher cognitive abilities necessary to litigate his case”); *People v Miranda* (2015) 236 CA4th 978, 988–990, 186 CR3d 911 (court not required to further inquire and reverse grant of self-representation after learning during trial that defendant had bipolar disorder and schizophrenia).

Psychiatric evaluation. If the court has any doubts about defendant's competency to waive counsel, it must conduct an inquiry, ordinarily by ordering a psychiatric evaluation. *People v Burnett* (1987) 188 CA3d 1314, 1319, 234 CR 67. When two such evaluations conclude that a defendant is "malingering," the defendant's "frivolous objections" and "bizarre motions" are properly seen as "intentional efforts to thwart the proceedings," and not lack of competence to waive counsel. *People v Weber* (2013) 217 CA4th 1041, 1052, 159 CR3d 228. If the court does not have doubts about competency after observing defendant, and there is no known substantial evidence suggesting that defendant may be incompetent, an evaluation and hearing is not required, even when counsel expresses such doubts. *People v Clark* (1992) 3 C4th 41, 107, 10 CR2d 554. Any court-ordered psychiatric evaluation should be limited to defendant's competency to waive counsel. *People v Wolozon* (1982) 138 CA3d 456, 461, 188 CR 35. Psychiatric reports prepared for a restoration of sanity hearing under Pen C §1026.5 and directed solely to the issue of present dangerousness are insufficient to determine competency to waive counsel. *People v Wolozon, supra*.

Violent tendencies alone do not suggest incompetence to stand trial or waive counsel. *People v Stewart* (2004) 33 C4th 425, 516, 15 CR3d 656 (stabbing fellow jail inmate with pencil not basis to conclude defendant was not competent to waive right to counsel).

- JUDICIAL TIP: The court may consider appointing a mental health expert under Evid C §730 to assist in determining if defendant is competent to waive the right to counsel. See California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER).

Defense counsel's role. Although counsel has a legal and ethical obligation to alert the court to doubts about defendant's competency to waive the right to counsel, counsel should not formally oppose a self-representation request because of counsel's belief that defendant cannot be effective. *People v Kirkpatrick* (1994) 7 C4th 988, 1010, 30 CR2d 818. Without formally opposing a self-representation request, counsel can assist the court and serve defendant's best interests by advising defendant of the risks and disadvantages of self-representation, providing the court with relevant nonprivileged information and legal authority if requested, and correcting any facts defendant misstated. *People v Kirkpatrick, supra*.

Defendant's ability to present defense. A court may not consider the wisdom of defendant's decision to undertake self-representation, or defendant's ability. *Godinez v Moran, supra*, 509 US at 399–400; *People v Welch, supra*, 20 C4th at 733–734. The sole question is if defendant has the mental capacity to knowingly waive counsel while realizing the probable risks and consequences of self-representation. *People v Robinson*

(1997) 56 CA4th 363, 371, 65 CR2d 406. A defendant need not have a certain level of education or particular work experience to invoke the right to self-representation. Nor is the severity of the charges an issue in determining if self-representation is proper. 56 CA4th at 372.

b. [§54.7] Voluntary and Intelligent Waiver

The court must also find that defendant's decision to waive counsel is voluntary and intelligent. *Faretta v California* (1975) 422 US 806, 835, 95 S Ct 2525, 45 L Ed 2d 562. This requirement ensures that defendant understands the significance and consequences of the decision to waive counsel and that the decision is not coerced. *Godinez v Moran* (1993) 509 US 389, 401 n12, 113 S Ct 2680, 125 L Ed 2d 321.

To secure a voluntary and intelligent waiver of counsel the court should:

(1) Advise defendant of these constitutional rights:

- *To counsel.* The court should ensure that defendant understands the alternative right to counsel, including the right to appointed counsel at no cost. *People v Lopez* (1977) 71 CA3d 568, 138 CR 36.
- *Against self-incrimination.* *People v Cervantes* (1978) 87 CA3d 281, 288, 150 CR 819. *Note:* The court is not required to advise defendant of the right to testify. *People v Jones* (1992) 2 CA4th 867, 873, 3 CR2d 602.
- *Speedy trial under Pen C §1382(c).* *People v Byrd* (1991) 233 CA3d 806, 810, 285 CR 128. See also *People v Bolton* (2008) 166 CA4th 343, 82 CR3d 671 (waiver not voluntary when court erroneously relieved counsel 4 days before trial without sufficient cause, and defendant was forced to choose between right to speedy trial and right to counsel).

(2) Discuss the complexities of the case with defendant, including the nature of criminal proceedings, and the possible outcome, defenses, and punishment. *People v Lopez, supra*. Ask if defendant understands the charges and the potential penal consequences. *People v Noriega* (1997) 59 CA4th 311, 319–322, 69 CR2d 127; *People v Mickel* (2016) 2 C5th 181, 212, 211 CR3d 601 (“While many defendants will know the potential sentences they face while waiving representation, it is valuable for trial courts—as a routine practice—to orally review during a *Faretta* colloquy the potential sentence a defendant faces.”). Notifying defendant of the maximum penalty is sufficient. *People v Jackio* (2015) 236 CA4 445, 450, 186 CR3d 662 (defendant need not be given “a breakdown of the full range of sentencing options with respect to the crimes and enhancements charged”). Moreover, a defendant's waiver of the right to counsel was not

invalidated by a court incorrectly agreeing with defendant's statement that a particular charge could not be used as a strike. *People v Fox* (2014) 224 CA4th 424, 434–436, 168 CR3d 615 (no evidence defendant's decision to represent himself "was in any way related to the misinformation that the trial court provided concerning the collateral consequences of a conviction").

(3) Advise defendant of the dangers and disadvantages of self-representation. *Faretta v California, supra*, 422 US at 835. The court is not required to give specific warnings as long as the record shows that defendant understood the disadvantages of self-representation. *People v Lawley* (2002) 27 C4th 102, 140, 115 CR2d 614. See *People v Weber* (2013) 217 CA4th 1041, 1059, 159 CR3d 228 (defendant showed adequate knowledge of dangers of self-representation when he "stated on the record that he understood he would be held to the same standards as an attorney and that because of his lack of legal training he could lose a case he might otherwise have won"). Appellate courts have suggested these advisements:

- Self-representation is almost always unwise and a defendant may conduct a defense to his or her detriment. *People v Lopez, supra*. Explaining that a defendant who chooses self-representation in a death penalty trial is a fool is neither unwarranted disparagement nor a foreclosure of defendant's *Faretta* rights, but an appropriate reminder of the dangers and disadvantages of self-representation. *People v Lancaster* (2007) 41 C4th 50, 68–70, 58 CR3d 608.
- Defendant must follow the same rules as attorneys, including technical rules of substantive law, criminal procedure, and evidence, when making motions and objections, presenting evidence, and during voir dire and argument. *People v Lopez, supra*.
- Defendant will receive no help or special treatment from the court. *People v Noriega, supra*.
- The prosecution will be represented by experienced, professional counsel who will have a significant advantage over defendant in skill, training, education, experience, and ability. *People v Lopez, supra*.
- Defendant will not receive special library privileges, a staff of investigators, or extra preparation time. *People v Lopez, supra*.
- If defendant's right to self-representation is later terminated because of misbehavior, newly appointed counsel may be at a strategic disadvantage in presenting the case. *People v Davis* (1987) 189 CA3d 1177, 1201, 234 CR 859, disapproved on other grounds in 44 C3d 216, 225–226.

- If defendant is incarcerated, pro per privileges, including access to a law library, may be limited or suspended if defendant misbehaves in jail. *Ferrel v Superior Court* (1978) 20 C3d 888, 892 n5, 144 CR 610. See also *People v Butler* (2009) 47 C4th 814, 827, 102 CR3d 56 (custodial limitations on the ability to prepare defense not an impediment to the exercise of *Faretta* rights; while pro per inmates may not be deprived of all means of preparing a defense, the Constitution does not require personal access to legal resources). See §54.17.
- Defendant does not have a right to standby, advisory, or co-counsel. *People v Noriega, supra*. A waiver of right to counsel by a death penalty defendant would not be knowing and intelligent if based on the failure to understand that there is no guarantee of standby counsel. *People v Stanley* (2006) 39 C4th 913, 933, 47 CR3d 420.

(4) Advise the defendant that the court may terminate the right to self-representation for engaging in disruptive conduct. *People v Lopez, supra*. See §54.18.

(5) Advise the defendant that there will be no right to appeal the case on the grounds of ineffective assistance of counsel. *People v Lopez, supra*.

These advisements should be contained in a Waiver of Right to Counsel form for defendant's review and signature. See §54.37. The signed form ensures that defendant has been thoroughly and properly advised.

4. Timeliness

a. [§54.8] In General

Reasonable time before trial. A request to proceed in pro per must be made within a reasonable time before trial. *People v Mayfield* (1997) 14 C4th 668, 809, 60 CR2d 1; *People v Windham* (1977) 19 C3d 121, 127, 137 CR 8. See *People v Wilks* (1978) 21 C3d 460, 468, 146 CR 364 (motion made after trial continuance is timely if it precedes actual start of trial). Timeliness is not based on a fixed or arbitrary point in time, but on the totality of the circumstances when the motion is made. *People v Lynch* (2010) 50 C4th 693, 724, 114 CR3d 63, overruled on other grounds in 52 C4th 610, 636–643. Thus, in determining if a defendant's pretrial motion for self-representation is timely, the court may consider (50 C4th at 726):

- The time between the motion and the scheduled trial date;
- If trial counsel is ready to proceed to trial;
- The number of witnesses and the reluctance or availability of crucial witnesses;

- The case’s complexity;
- Any ongoing pretrial proceedings; and
- If defendant could have earlier asserted the right.

When the request is timely and the court determines that defendant has voluntarily and intelligently waived counsel, the court must grant defendant’s motion. *People v Windham, supra*, 19 C3d at 128. When the motion is not made within a reasonable time before trial, the court may deny the motion as untimely. *People v Windham, supra*. The reasonable time requirement is intended to prevent defendants from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice. *People v Fitzpatrick* (1998) 66 CA4th 86, 91–92, 77 CR2d 634. A motion made the day before or day of trial is generally untimely. 66 CA4th at 92; *People v Rudd* (1998) 63 CA4th 620, 626, 73 CR2d 807; *People v Douglas* (1995) 36 CA4th 1681, 1688–1689, 43 CR2d 129. If the motion is untimely, *i.e.*, not asserted within a reasonable time before trial, defendant must justify the delay. *People v Horton* (1995) 11 C4th 1068, 1110, 47 CR2d 516.

Bifurcated trials. When a defendant is charged with prior convictions and the issue of their truth is bifurcated from the primary trial, a self-representation request is not timely unless made before the start of the trial on the primary offense. *People v Givan* (1992) 4 CA4th 1107, 6 CR2d 339 (request made before trial on prior convictions started but after verdict on primary offense was untimely). See also *People v Rivers* (1993) 20 CA4th 1040, 1048, 25 CR2d 602 (request made after verdict returned but before court adjudication of truth of sentence enhancement allegation was untimely).

Suspended proceedings. A court may not rule on a self-representation request while criminal proceedings are suspended under Pen C §1368 (incompetent defendant or person facing revocation proceedings for violating probation, mandatory supervision, postrelease community supervision, or parole). *People v Horton, supra*, 11 C4th at 1108; *People v Marks* (1988) 45 C3d 1335, 1340, 248 CR 874. If a court declares a doubt about a defendant’s competency to stand trial, counsel must be appointed for the subsequent competency proceedings even if defendant purports to waive counsel. *People v Lightsey* (2012) 54 C4th 668, 682, 690–698, 143 CR3d 589 (violation of defendant’s rights under Pen C §1368 is reversible error).

- ➡ **JUDICIAL TIP:** The issues of competency to stand trial and competency for self-representation may arise simultaneously. You may ask that the court-appointed mental health expert’s report address both issues.

After trial but before sentencing. A *Faretta* motion made after the conclusion of a noncapital trial, but a few months before sentencing, is timely and must be granted as a matter of right. *People v Miller* (2007) 153 CA4th 1015, 1024, 62 CR3d 900.

Probation revocation hearings. There is a right to an attorney at all probation revocation hearings except for at summary ones where a defendant has absconded. *In re Reno* (2012) 55 C4th 428, 515 n39, 146 CR3d 297. The court must inform defendant of the right to counsel and the disadvantages of self-representation at probation revocation and deferred sentencing hearings. *People v Bauer* (2012) 212 CA4th 150, 155–160, 150 CR3d 804.

b. [§54.9] Late Requests

Showing of reasonable cause. A request for self-representation made close to or after the start of trial should not be granted unless defendant can show reasonable cause for its lateness. *People v Windham* (1977) 19 C3d 121, 128 n5, 137 CR 8. The events leading to the request must be recent in origin and provide a reasonable dissatisfaction with counsel. *People v Hernandez* (1985) 163 CA3d 645, 654, 209 CR 809.

Factors. The court must inquire sua sponte into the specific reasons for the late self-representation request, including (*People v Windham, supra*):

- The quality of representation afforded defendant.
- Defendant's prior proclivity to substitute counsel.
- The reasons for the request.
- The length and stage of the proceedings.
- The disruption or delay that might reasonably follow if the request is granted. *People v Mayfield* (1997) 14 C4th 668, 809–810, 60 CR2d 1. See *People v Rogers* (1995) 37 CA4th 1053, 1055–1058, 44 CR2d 107 (court should have granted defendant's *Faretta* motion made just as opening statements were about to begin when defendant did not request a continuance, had a profound disagreement with counsel about how the case should proceed, and did not seek to delay or obstruct proceedings).

In connection with the above factors, the court should consider:

- If defendant is ready to present the case without a continuance. *People v Nicholson* (1994) 24 CA4th 584, 592, 29 CR2d 485 (court abused discretion in denying request made on day trial started when defendant did not ask for continuance). *Moon v Superior Court* (2005) 134 CA4th 1521, 1530, 36 CR3d 854 (request made during preliminary hearing is timely when defendant

expressly rejects a continuance or any other disruption). But see *People v Barnett* (1998) 17 C4th 1044, 1106, 74 CR2d 121 (request denied after weighing these factors even in absence of continuance request).

- If the delay caused by granting the motion would prejudice the prosecutor's case, e.g., witnesses may become unavailable. *People v Ruiz* (1983) 142 CA3d 780, 792, 191 CR 249.
- If the delay would necessitate discharging a sworn jury. *People v Cummings* (1993) 4 C4th 1233, 1321, 18 CR2d 796.

Granting a continuance. If the court grants a late request for self-representation, it must also grant a request for a reasonable continuance to allow the defendant adequate time to prepare a defense. *People v Douglas* (1995) 36 CA4th 1681, 1689, 43 CR2d 129; see Pen C §1049 (defendant entitled to minimum of 5 days to prepare for trial). However, the court may condition a defendant's late request on a waiver of any unnecessary continuance. *People v Clark* (1992) 3 C4th 41, 110, 10 CR2d 554 (not error to deny continuance when defendant who was granted mid-trial pro per request had access to research facilities for many months). If the court concludes that defendant's motion is merely a delay tactic, the court may deny the continuance and require defendant to proceed to trial as scheduled, either with counsel or in pro per. *People v Douglas, supra*.

- **JUDICIAL TIP:** The court should always inquire if defendant needs extra time to prepare the case before granting or denying a pro per request. This need relates to the factor of delay. If a request is granted without any reference to the need for a continuance, a denial of a subsequent continuance request may be an abuse of discretion.

Statement of reasons. If the court denies a motion for self-representation, it should, but is not required to, give reasons for its denial. *People v Windham, supra*, 19 C3d at 129 n6; *People v Morgan* (1980) 101 CA3d 523, 531, 161 CR 664.

c. [§54.10] Capital Cases

To be timely, a self-representation request in a capital case must be made before the trial's guilt phase starts. The court may therefore grant or deny a request made during or after the guilt phase. *People v Hamilton* (1988) 45 C3d 351, 369, 247 CR 31 (request made during guilt phase deliberations denied as untimely after consideration of *Windham* factors; see §54.9). See also *People v Doolin* (2009) 45 C4th 390, 452–455, 87 CR3d 209 (request denied as untimely when made after penalty phase verdict on day set for sentencing); *People v Hardy* (1992) 2 C4th 86, 194, 5 CR2d 796 (request denied as untimely when made after guilt phase

verdicts returned but before start of penalty phase); *People v Mayfield* (1997) 14 C4th 668, 810, 60 CR2d 1 (request made after penalty verdict denied as untimely); *People v Riggs* (2008) 44 C4th 248, 274–278, 79 CR3d 648 (defendant adequately made aware of risks of self-representation in capital case). The court may grant a self-representation request after the guilt phase verdicts are returned (*People v Williams* (2013) 56 C4th 165, 193–194, 152 CR3d 778; *People v Elliott* (2012) 53 C4th 535, 591–593, 137 CR3d 59), even when the request is made for the announced purpose of asking the jury to return a death verdict. *People v Bloom* (1989) 48 C3d 1194, 1220, 259 CR 669; *People v Taylor* (2009) 47 C4th 850, 865–866, 102 CR3d 852.

When the guilt phase ends in a mistrial, a *Faretta* motion is timely if it is made after the guilt phase but before a retrial in front of a new jury. *People v Halvorsen* (2007) 42 C4th 379, 434, 64 CR3d 721.

5. [§54.11] Denying Request Based on Defendant’s Prior Court Behavior

A court may deny a defendant’s motion for self-representation in the first instance when defendant’s pre-motion conduct provides a reasonable basis for believing that self-representation will disrupt the proceedings. *People v Welch* (1999) 20 C4th 701, 734, 85 CR2d 203 (denial of request based partly on defendant’s disruptive behavior during earlier *Marsden* hearings); see also *People v Kirvin* (2014) 231 CA4th 1507, 1515–1517, 180 CR3d 902 (not an abuse of discretion to deny self-representation request after defendant willfully and repeatedly refused to leave cell to attend court). The court must decide if defendant’s actions or words are and will remain so disruptive, obstreperous, disobedient, disrespectful, or obstructionist as to justify denying the right to self-representation. 20 C4th at 735. The court may properly deny a defendant’s self-representation request based on a demonstrated inability during pretrial proceedings to conform behavior to procedural rules and courtroom protocol. *People v Watts* (2009) 173 CA4th 621, 628–630, 92 CR3d 806.

6. [§54.12] Defendant’s Change of Mind; Requesting Counsel During Trial

Once defendant proceeds to trial in pro per, the court has discretion to determine if defendant may withdraw the waiver of counsel and have counsel appointed. *People v Elliott* (1977) 70 CA3d 984, 993, 139 CR 205. The court must look to the totality of the facts and circumstances when ruling on a request to change from self-representation to representation by counsel. *People v Gallego* (1990) 52 C3d 115, 164, 276 CR 679 (refusal of reappointment request upheld when request came late in trial and defendant had exhibited considerable knowledge of trial tactics

and procedure). See *People v Lawrence* (2009) 46 C4th 186, 191–197, 92 CR3d 613 (request for counsel after jury selection properly denied); *People v Lawley* (2002) 27 C4th 102, 148–151, 115 CR2d 614 (failure to reappoint counsel in capital case was not abuse of discretion when request was made on the day penalty phase was to begin and substantial delay would result if request granted); *People v Boulware* (1993) 20 CA4th 1753, 1756, 25 CR2d 381 (*Gallego* rule applies to appointment request made on date of preliminary hearing, which was 9th day of 10-day statutory period; prosecution had no advance notice of defendant's request; prosecution witnesses appeared at hearing, ready to testify).

The court should consider these factors in ruling on a request for withdrawal of a counsel waiver (*People v Elliott, supra*, 70 CA3d at 993):

- Defendant's history in the substitution of counsel and desire to change from self-representation to representation by counsel.
- The reasons for the request.
- The length and stage of the trial proceedings.
- The disruption or delay if the court granted the motion.
- The likelihood of defendant's effectiveness in defending against the charges if required to continue in pro per.

The availability of a public defender who can proceed to trial immediately is not a factor that the court should consider when ruling on a motion to withdraw a waiver of counsel. *People v Hill* (1983) 148 CA3d 744, 761, 196 CR 382.

The *Elliott* factors also apply to a posttrial request for withdrawal of a waiver of counsel. *People v Ngaue* (1991) 229 CA3d 1115, 1125, 280 CR 757 (request for appointment of counsel to represent defendant in motion for new trial).

7. [§54.13] Renewed Waiver

A waiver of the right to counsel obtained at the arraignment on the complaint or at the preliminary hearing does not continue at the arraignment on the information. If defendant desires to proceed in pro per at the arraignment on the information, a new waiver must be taken. *People v McKenzie* (1983) 34 C3d 616, 635, 194 CR 462; *People v Sohrab* (1997) 59 CA4th 89, 97, 68 CR2d 749; Pen C §§859, 987. However, the failure to readvise defendant does not require automatic reversal. *People v Crayton* (2002) 28 C4th 346, 362–363, 121 CR2d 580. In addition, a waiver secured before trial is not sufficient for a subsequent deferred sentencing hearing. *People v Hall* (1990) 218 CA3d 1102, 1106, 267 CR 494. However, a renewed waiver is not required when an information is amended to add an additional charge and prior prison term enhancement allegations. *People v Harbolt* (1988) 206 CA3d 140, 149, 253 CR 390.

Nor is it required when the trial judge relieved previously appointed advisory counsel, at which time defendant expressly stated that he wished to continue representing himself. *People v Goodwillie* (2007) 147 CA4th 695, 723, 54 CR3d 601.

8. [§54.14] Abandoning Self-Representation

The subsequent actions of a defendant who unequivocally requests self-representation may indicate an abandonment or withdrawal of the request. *People v Kenner* (1990) 223 CA3d 56, 62, 272 CR 551. When a court neglects to hold a hearing on defendant's timely request and defendant fails to again raise the issue at a subsequent hearing where counsel is appointed, defendant is deemed to have unequivocally agreed to representation by counsel. *People v Kenner, supra*. The right to self-representation, unlike the right to counsel, can be waived by defendant's mere failure to assert it. 223 CA3d at 60. See *People v Fedalizo* (2016) 246 CA4th 98, 105, 200 CR3d 653 ("Absent evidence that defense counsel misrepresented his authority to appear for defendant and waive his presence, we cannot presume that counsel neglected to obtain defendant's consent before proceeding as his attorney."); *People v Weeks* (2008) 165 CA4th 882, 887–890, 81 CR3d 257 (*Faretta* error waived when defendant later appeared at trial with retained counsel, who asked to be substituted for appointed counsel); *People v Rudd* (1998) 63 CA4th 620, 630, 73 CR2d 807 (defendant waived right by failing to object to order terminating pro per status and acquiescing in counsel's assignment), and *People v Tena* (2007) 156 CA4th 598, 610–612, 67 CR3d 412 (abandonment can be inferred from defendant's failure to reassert the desire for self-representation after the preliminary hearing despite judge's invitation to do so). See generally *People v Trujeque* (2015) 61 C4th 227, 260–264, 188 CR3d 1 (denying defendant's claim that he did not validly sign his self-representation waiver because he misunderstood the effect of his loss of library privileges); *People v D'Arcy* (2010) 48 C4th 257, 283–287, 106 CR3d 459 (rejecting defendant's argument that waiver invalid because trial court misstated that defendant could decide what legal theory counsel presented).

9. [§54.15] Advisory Counsel

No constitutional right to advisory counsel. There is no constitutional right to simultaneous self-representation and representation by counsel, whether labeled co-counsel, advisory counsel, or standby counsel. *People v Moore* (2011) 51 C4th 1104, 1119–1123, 127 CR3d 2; *People v Bradford* (1997) 15 C4th 1229, 1368–1369, 65 CR2d 145. Trial courts may permit the sharing of responsibilities between defendant and attorney

when supported by the interests of justice. *People v Moore, supra*, 51 C4th at 1120.

Discretion to appoint advisory counsel. The court should consider defendant's demonstrated legal abilities and the case's legal complexity. *People v Crandell* (1988) 46 C3d 833, 863, 251 CR 227 (no abuse of discretion to deny request for advisory counsel in capital case when defendant presented case with substantial competence); *People v Bigelow* (1984) 37 C3d 731, 743, 209 CR 328 (abuse of discretion to deny advisory counsel in capital case when defendant had 9th-grade education and was unfamiliar with California law). But see *People v Garcia* (2000) 78 CA4th 1422, 1428, 93 CR2d 796 (no abuse of discretion to deny advisory counsel to noncapital defendant with 9th-grade education when defendant did not request; *Bigelow* not extended to noncapital case); *People v Harrison* (2013) 215 CA4th 647, 656–657, 155 CR3d 632 (no obligation to appoint advisory counsel sua sponte). The court should also consider defendant's reasons for seeking advisory counsel. *People v Crandell, supra*, 46 C3d at 863 (request may be denied when defendant's motive is to manipulate the court). A court should appoint advisory counsel only on a substantial showing that it will promote justice and judicial efficiency. *People v Barnett* (1998) 17 C4th 1044, 1106, 74 CR2d 121.

Court's authority over advisory counsel. When advisory counsel is appointed, the court may exercise its judgment about the extent of advisory counsel's participation. *People v Bradford, supra*, 15 C4th at 1368–1369. Advisory counsel's participation should not (a) interfere with defendant's control of the presentation of the case, or (b) undermine the jury's perception that defendant is in pro per. *McKaskle v Wiggins* (1984) 465 US 168, 178, 104 S Ct 944, 79 L Ed 2d 122; *People v Hamilton* (1989) 48 C3d 1142, 1164 n14, 259 CR 701. Appellate courts allow varied advisory counsel participation at trial. Compare *People v Bradford, supra* (court properly refused to allow advisory counsel to argue, object, respond to court's questions, or instruct him exactly what to say) and *Scott v Superior Court* (1989) 212 CA3d 505, 512, 260 CR 608 (suggesting advisory counsel may question specific witnesses upon proper showing). See also *Brookner v Superior Court* (1998) 64 CA4th 1390, 1393, 76 CR2d 68 (criticizing advisory and standby counsel and stating that defendant has right to self-representation or counsel, but not both).

Court's advisements to defendant. When a defendant's request to proceed in pro per is accompanied by a request for the appointment of advisory counsel, the court must tell defendant that there is no right to advisory counsel. *People v Ebert* (1988) 199 CA3d 40, 46, 244 CR 447. The court is not required to advise a defendant who is assisted by advisory counsel that ineffective assistance of counsel may not be asserted on appeal. *People v Bloom* (1989) 48 C3d 1194, 1226, 259 CR 669.

Restriction or termination of advisory counsel. Although there is no right to advisory counsel, once the privilege is granted, it may not be restricted or terminated without due process. *People v Ebert, supra*, 199 CA3d at 44 (violation of due process to grant advisory counsel's motion to withdraw after holding in camera hearing without defendant).

Appointment of public defender as advisory counsel. There is disagreement about ordering the public defender to serve as advisory counsel. Compare *Brookner v Superior Court, supra*, 64 CA4th at 1398 (yes), and *Ligda v Superior Court* (1970) 5 CA3d 811, 826, 85 CR 744 (yes), with *Dreiling v Superior Court* (2000) 86 CA4th 380, 382, 103 CR2d 70 (no) and *Littlefield v Superior Court* (1993) 18 CA4th 856, 860, 22 CR2d 659 (no). See also *Chaleff v Superior Court* (1977) 69 CA3d 721, 724, 138 CR 735 (public defender may withdraw as advisory counsel if continued service requires violation of ethical duties).

- JUDICIAL TIP: Public defenders' and alternate defenders' offices may have policies against serving as standby or advisory counsel.

10. [§54.16] Standby Counsel

The court may appoint standby counsel, with or without defendant's consent, to be present during the criminal proceedings and become familiar with the case if defendant's right to self-representation is terminated. *Faretta v California* (1975) 422 US 806, 834 n46, 95 S Ct 2525, 45 L Ed 2d 562; *People v Hamilton* (1989) 48 C3d 1142, 1164 n14, 259 CR 701. Standby counsel does not represent defendant, but is ready to take over the case. *Littlefield v Superior Court* (1993) 18 CA4th 856, 860, 22 CR2d 659. See also *Chaleff v Superior Court* (1977) 69 CA3d 721, 731 n7, 138 CR 735 (concurring opinion).

- JUDICIAL TIP: When standby counsel is appointed, advise defendant that the attorney will sit in court, there will be no legal consultations, the only contact will be to familiarize counsel with the case, and the sole purpose for the appointment is for the attorney to take over if pro per status is terminated.

If standby counsel must take over the case, the court is not required to grant a continuance for additional time to prepare. *People v Davis* (1987) 189 CA3d 1177, 1201, 234 CR 859. Accordingly, courts should warn defendants seeking pro per status that, if the pro per status is revoked, new defense counsel may be at a strategic disadvantage in presenting the case. *People v Davis, supra*.

- JUDICIAL TIP: Some courts appoint standby counsel in all pro per cases. Pro per defendants who initially appear cooperative often become unnerved as trial progresses, resulting in disruptions

and other problems. If standby counsel can take over immediately, delay is far less likely.

11. [§54.17] Pro Per Privileges

The right to self-representation includes the right to reasonably necessary defense services. *People v Blair* (2005) 36 C4th 686, 732, 31 CR3d 485. A self-represented defendant must not have to present a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense. But the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under the circumstances. In assessing reasonableness, institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to defendant to prepare a defense. 36 C4th at 733. *People v Moore* (2011) 51 C4th 1104, 1124–1127, 127 CR3d 2.

- **JUDICIAL TIP:** The court should be familiar with the local policies regarding incarcerated defendants' pro per privileges. For recalcitrant defendants it may be advisable to ask jail authorities to record exercised pro per privileges, especially law library access and use. This preserves a record if defendant asserts inadequate access to or improper denial of privileges on appeal.

Privileges may include:

- *Law library access.* *Kane v Garcia Espitia* (2005) 546 US 9, 10, 126 S Ct 407, 163 L Ed 2d 10. Nothing requires that defendant be afforded specific books or access times. *People v Davis* (1987) 189 CA3d 1177, 1195, 234 CR 859, disapproved on other grounds in 44 C3d 216, 225–226. Defendant need not have direct law library access if trained legal research assistants provide defendant with a comprehensive list of legal materials and assist in researching those materials relevant to the defense. *People v James* (2011) 202 CA4th 323, 335–337, 136 CR3d 85.
- *Investigative services.* A defendant seeking the appointment of an investigator at the state's expense must show a need for those services. *People v Fixel* (1979) 91 CA3d 327, 154 CR 132. Similarly, a defendant seeking a law clerk's assistance must show the services are reasonably necessary and not merely convenient. *People v Clark* (1992) 3 C4th 41, 112, 10 CR2d 554.
- *Expert services.* Defendant may receive an expert's services under Evid C §730 if need is shown. *People v Crandell* (1988) 46 C3d 833, 862, 251 CR 227. See also *People v Smith* (1985) 38 C3d 945, 957, 216 CR 98 (legal research team not expert under Evid C §730).

- *Use of legal runners to perform tasks such as procuring legal research materials.* See *People v Smith* (1985) 38 C3d 945, 951, 216 CR 98 (runner obtained materials from county law library).
- *Reasonable telephone use.* See *People v Harbolt* (1988) 206 CA3d 140, 148, 253 CR 390 (telephone access properly denied after defendant made 1703 calls, including 27 to pornographic telephone services).

Privileges available to defendants in capital cases. In capital cases or those where the defendant has served a prior prison term for murder, indigent defendants may ask the court for funds to pay investigators, experts, and others to prepare or present the defense. Pen C §987.9(a). A defendant who requests these funds must show reasonable necessity. Pen C §987.9(a); *Lucero v Superior Court* (1981) 122 CA3d 484, 490, 176 CR 62. On receipt of such a request, a judge of the court, other than the trial judge presiding over the case, must rule on its reasonableness. The ruling must be made in camera. The judge must be guided by the need to give defendant a complete and full defense. Pen C §987.9(a).

Restriction or suspension of privileges. Once pro per privileges are conferred, they may not be restricted or suspended absent due process. *Wilson v Superior Court* (1978) 21 C3d 816, 823, 148 CR 30. Before the disciplinary sanctions of jail can be imposed on an inmate, which may restrict pro per privileges, the inmate must receive notice, an administrative hearing, and an opportunity to seek court review of the administrative decision. If concerns over jail security require that an inmate be segregated from the jail population, and that segregation will restrict the inmate's pro per privileges, such privileges may be restricted only after notice and a hearing, or, in emergency situations, within 72 hours of restriction. 21 C3d at 827.

If pro per privileges are restricted or suspended, the court should allow defendant to reconsider proceeding in pro per or reclaim the right to counsel. *Ferrel v Superior Court* (1978) 20 C3d 888, 144 CR 610.

12. [§54.18] Terminating Self-Representation

The court may terminate a defendant's self-representation right if defendant engages in disruptive conduct that abuses the court's dignity. *Faretta v California* (1975) 422 US 806, 834 n46, 95 S Ct 2525, 45 L Ed 2d 562; see *People v Fitzpatrick* (1998) 66 CA4th 86, 92-93, 77 CR2d 634 (pro per status revoked when defendant feigned mental illness [which caused 4 months' delay], escaped [which caused 7 months' delay], made repeated continuance motions, and stated he would need more than 1 year to prepare for trial); *People v Rudd* (1998) 63 CA4th 620, 632, 73 CR2d 807 (pro per status revoked when defendant appeared in court on last day case could be tried without any trial materials he had been given, and

announced he was unready to proceed as promised); *People v Williams* (2013) 58 C4th 197, 254–255, 165 CR3d 717 (discretion not abused when revoking pro per status after defendant missed ready-for-trial deadline by 5 months and “did not conduct any meaningful investigation or engage in any discovery” in over 10 months of self-representation). But see *People v Becerra* (2016) 63 C4th 51, 519–520, 203 CR3d 400 (reversible error per se for court to terminate abruptly and without explanation defendant’s self-representation for being dilatory, when it previously granted defendant several continuances to complete discovery).

The court’s authority to terminate a defendant’s right to self-representation is not limited to in-court misconduct. The court may terminate that right based on defendant’s out-of-court conduct that seriously threatens the core integrity of the trial, such as witness intimidation. *People v Carson* (2005) 35 C4th 1, 8–10, 23 CR3d 482. But it is improper to revoke a defendant’s self-representation based on out-of-court misconduct such as abuse of pro per privileges without regard to the misconduct’s effect on the court proceedings. *People v Doss* (2014) 230 CA4th 46, 57, 178 CR3d 378 (court did not apply correct standard under *Carson*).

The court may reexamine and terminate a defendant’s right to self-representation when specific and reliable evidence shows that defendant (a) lacked capacity to knowingly and intelligently waive the right to counsel at the time of that decision, or (b) lost this capacity after the initial waiver because of an intervening event. *People v Powell* (1986) 180 CA3d 469, 481, 225 CR 703.

A pro per defendant may not be involuntarily removed from the courtroom during trial for engaging in disruptive behavior, without other defense counsel being present in the courtroom. *People v Carroll* (1983) 140 CA3d 135, 142, 189 CR 327. If this situation arises, the court should do one of these three alternatives:

- Find that defendant is no longer able to proceed in pro per and appoint counsel.
- Initiate contempt proceedings against defendant.
- Keep defendant in courtroom under restraints. *People v Carroll, supra*. Compare *People v Crandell* (1988) 46 C3d 833, 867, 251 CR 227 (court may remove defendant from courtroom after completing evidentiary and argument phases of Pen C §1538.5 hearing but before announcing ruling). See also *People v Soukohlane* (2008) 162 CA4th 214, 233–235, 75 CR3d 496 (pro per defendant’s removal from courtroom, without other defense counsel present, during part of prosecution’s examination of key witness, was denial of right to counsel and error); *People v Ramos* (2016) 5 CA5th 897, 909–913, 210 CR3d 242 (error to remove

self-represented defendant during prosecution’s direct examination of alleged victim).

a. [§54.19] Making a Record

To preserve a chronology of relevant events for possible appellate review, the court should document its decision to terminate self-representation with some evidence reasonably supporting a finding that defendant’s obstructive behavior seriously threatens the trial’s core integrity. *People v Carson* (2005) 35 C4th 1, 11, 23 CR3d 482. The court may need to hold a hearing or may want to solicit the parties’ respective arguments with written points and authorities and evidentiary support. This may be especially important when out-of-court misconduct provides grounds for termination. Because circumstances will vary, the appellate court leaves to the trial court’s discretion the ultimate decision as to how best to make an appropriate record. *People v Carson, supra*.

- **JUDICIAL TIP:** The court reporter’s transcript will only contain defendant’s words. If defendant is engaged in other misconduct such as getting up from counsel table, throwing objects, or making threatening gestures, you must describe these actions in words or they will not be part of the record.

The court should consider and make a record of (*People v Carson, supra*, 35 C4th at 10–12):

- The precise misconduct on which court based decision to terminate;
- How misconduct threatened to impair trial’s core integrity;
- If defendant engaged in antecedent misconduct, and if so, what and why;
- If any misconduct occurred while defendant was represented by counsel, and if so, what the relation was to defendant’s self-representation;
- If defendant intentionally sought to disrupt and delay the trial;
- If defendant was warned that particular misconduct would result in termination of pro per status; and
- Availability and suitability of alternative sanctions.

b. [§54.20] Not Grounds to Terminate

These are not grounds to deny or terminate a defendant’s right to self-representation:

- Defendant stands mute or otherwise elects not to participate actively in the defense, unless defendant’s conduct is motivated by

a desire to disrupt or manipulate proceedings. *People v Stansbury* (1993) 4 C4th 1017, 1063, 17 CR2d 174 (court had no duty to revoke capital defendant's right to self-representation when defendant did not introduce mitigating evidence at penalty phase and stated he would seek death penalty); *People v Clark* (1992) 3 C4th 41, 114, 10 CR2d 554 (after court refused to grant several of defendant's motions, defendant failed to present defense in attempt to invite error or pressure court to reconsider earlier rulings; revocation of pro per status proper).

- Defendant voluntarily chooses to be physically absent from trial. *People v Parento* (1991) 235 CA3d 1378, 1 CR2d 444. But see *People v Brownlee* (1977) 74 CA3d 921, 931, 141 CR 685 (court properly terminated self-representation when defendant announced he would no longer participate in trial and walked out of courtroom).
- Defendant poses an escape and security risks and is subject to physical restraints. *People v Superior Court (George)* (1994) 24 CA4th 350, 29 CR2d 305.
- Defendant is not fluent in English. *People v Poplawski* (1994) 25 CA4th 881, 891 n1, 30 CR2d 760.

13. [§54.21] Erroneous Denial of Self-Representation

An erroneous denial of a timely self-representation motion is reversible error per se. *McKaskle v Wiggins* (1984) 465 US 168, 177 n8, 104 S Ct 944, 950, 79 L Ed 2d 122; *People v Joseph* (1983) 34 C3d 936, 945–948, 196 CR 339. However, at a second trial after reversal, defendant may not exclude the testimony of certain witnesses as a remedy for the violation of the right to self-representation. *People v Jones* (1998) 66 CA4th 760, 769–770, 78 CR2d 265.

An erroneous denial of an untimely self-representation motion is subject to harmless error review. *People v Rogers* (1995) 37 CA4th 1053, 1058, 44 CR2d 107; *People v Rivers* (1993) 20 CA4th 1040, 1050, 25 CR2d 602.

B. Substituting Counsel

1. [§54.22] Appointed Counsel

An indigent defendant represented by court-appointed counsel may be entitled to discharge counsel and substitute another appointed counsel if defendant shows that continued representation by present counsel would substantially impair or deny the right to effective assistance of counsel. *People v Cole* (2004) 33 C4th 1158, 1190, 17 CR3d 532; *People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156. Generally, a defendant

initiates a request for substitution of counsel by making a motion in court, commonly known as a *Marsden* motion. The court must then hold a hearing to allow defendant to explain the grounds for the motion and to relate specific instances of the attorney's inadequate performance. 2 C3d at 124 (denial of motion for substitution of counsel based solely on courtroom observations is abuse of discretion). It was reversible error to tell a defendant that statements made about the offense during a *Marsden* hearing would waive his Fifth Amendment rights and could be used against him in further proceedings, when defendant then "abbreviated his *Marsden* presentation." *People v Knight* (2015) 239 CA4th 1, 8-9, 190 CR3d 364 ("record suggests defendant limited his remarks in response to" court's incorrect statement). The court should ask follow-up questions if further information is needed to assess the merits of the motion. *People v Miranda* (1987) 44 C3d 57, 77, 241 CR 594. A full hearing is not required when defendant's dissatisfaction with counsel is set forth in a letter or handwritten motion of sufficient detail. *People v Terrill* (1979) 98 CA3d 291, 298, 159 CR 360.

The court may appoint independent counsel to assist defendant with a *Marsden* motion. *People v Hines* (1997) 15 C4th 997, 1024-1025, 64 CR2d 594. The *Hines* court warned, however, that appointment of independent counsel could cause unnecessary delay and may damage the attorney-client relationship if the trial court denies the motion. *People v Hines, supra*. See *People v Clark* (2011) 52 C4th 856, 917, 131 CR3d 225 (court did not err in appointing independent counsel when there was no delay and motion was based on asserted irreconcilable conflict, not asserted incompetence of defense counsel).

a. [§54.23] Court's Duty to Inquire

The court's duty to conduct a *Marsden* hearing arises when a defendant in some manner moves to discharge his or her current counsel. *People v Roldan* (2005) 35 C4th 646, 681, 27 CR3d 360, overruled on other grounds in 45 C4th 390, 421 n22; *People v Lucky* (1988) 45 C3d 259, 281, 247 CR 1. Courts have recognized a person's due process right to a *Marsden* hearing in proceedings under the Sexually Violent Predator Act and the Lanterman-Petris-Short Act. *People v Hill* (2013) 219 CA4th 646, 652, 162 CR3d 3. A proper and formal legal motion is not required. However, there must be at least some clear indication by defendant, either personally or through counsel, that he or she wants a substitute attorney. 45 C3d at 281 n8; *People v Sanchez* (2011) 53 C4th 80, 89-90, 133 CR3d 564.

A defendant's stated dissatisfaction with certain aspects of counsel's handling of the case absent a request for substitution of counsel does not trigger the court's duty. *People v Montiel* (1993) 5 C4th 877, 906, 21 CR2d 705, disapproved on other grounds in 63 C4th 665, 679; *People v*

Wright (1990) 52 C3d 367, 410, 276 CR 731. In addition, a defendant's request for self-representation (*Faretta* motion) on the ground of dissatisfaction with counsel's performance does not trigger a duty to conduct a *Marsden* hearing or to suggest substitution of counsel as an alternative. *People v Crandell* (1988) 46 C3d 833, 854, 251 CR 227. See also *People v Dickey* (2005) 35 C4th 884, 918–921, 28 CR3d 647 (no *Marsden* error when, during penalty phase, defendant did not clearly state desire for substitute counsel, but instead sought separate counsel's appointment to prepare new trial motion based, in part, on counsel's incompetence during guilt phase); *People v Gonzalez* (2012) 210 CA4th 724, 740–742, 148 CR3d 473 (rejecting argument that self-representation request was a “hybrid *Marsden/Faretta* motion”); *People v Weber* (2013) 217 CA4th 1041, 1056–1057, 159 CR3d 228 (defendant's statement that he did not want public defender representation properly treated as *Faretta* motion; court not required to hold a *Marsden* hearing). Nevertheless, a court must permit a death penalty defendant who is dissatisfied with counsel to explain the basis of his dissatisfaction and must grant the *Marsden* motion if counsel is not providing adequate representation or there are irreconcilable conflicts between defendant and attorney. *People v Abilez* (2007) 41 C4th 472, 487–488, 61 CR3d 526.

Although the court must inquire into all of a defendant's complaints about appointed counsel, the inquiry need not occur at a single hearing. When a court runs out of time to continue hearing a defendant's complaints, the court may deny substitution of counsel based on the stated complaints if defendant is afforded a later opportunity to articulate the yet-unstated complaints. *People v Vera* (2004) 122 CA4th 970, 980–981, 18 CR3d 896. It is a defendant's duty to bring a *Marsden* motion to the court's attention if the court does not hold a hearing; if the defendant fails to do so before the case proceeds to trial, the claim has been abandoned. *People v Jones* (2012) 210 CA4th 355, 362, 147 CR3d 905 (defendant filed *Marsden* motion and later appeared in court a dozen times without mentioning it).

In the absence of defendant's request, the court is not required to hold a *Marsden* hearing when a third party complains about the representation received by defendant. *People v Martinez* (2009) 47 C4th 399, 419–420, 97 CR3d 732 (defendant's sister's letters complaining about counsel). Nor must the court conduct a *Marsden* hearing on its own motion. 47 C4th at 421–423.

b. [§54.24] Grounds

Once the court allows defendant to state the reasons for discharging appointed counsel, the decision to substitute counsel is within the court's discretion unless defendant substantially shows that (a) the first appointed attorney is not providing adequate representation, or (b) defendant and

counsel have become embroiled in such an irreconcilable conflict that ineffective assistance of counsel is likely to result. *People v Clark* (2011) 52 C4th 856, 917, 131 CR3d 225; *People v Smith* (1993) 6 C4th 684, 696, 25 CR2d 122.

Generally, a disagreement between defendant and appointed counsel concerning trial tactics or defendant's right to testify does not require substitution of counsel. *People v Williams* (1970) 2 C3d 894, 905, 88 CR 208 (disagreement over which witnesses to call); see also *People v Barnett* (1998) 17 C4th 1044, 1092, 74 CR2d 121 (disagreement about filing pretrial motions). However, substitution may be warranted if the disagreement signals a breakdown in the attorney-client relationship of such magnitude as to jeopardize defendant's right to effective assistance of counsel. *People v Barnett, supra*, 17 C4th at 1085; *People v Lucky* (1988) 45 C3d 259, 282, 247 CR 1.

A conflict with appointed counsel offered as grounds for substitution of counsel must be genuine. A defendant may not manufacture a conflict with counsel to compel the court to hear a request for substitution of counsel. *People v Hardy* (1992) 2 C4th 86, 138, 5 CR2d 796 (defendant filed federal suit against counsel after denial of two *Marsden* motions).

These are insufficient grounds for substitution of counsel:

- Defendant's refusal to cooperate with appointed counsel or make good faith effort to resolve disagreements. *People v Barnett, supra*, 17 C4th at 1086; *People v Crandell* (1988) 46 C3d 833, 860, 251 CR 227.
- Representation by three different public defenders at different phases of the proceedings. *People v Fierro* (1991) 1 C4th 173, 204, 3 CR2d 426.
- Minimal communication between defendant and appointed counsel. *People v Hart, supra*, 20 C4th at 604 (counsel was well-prepared for trial and did not need to visit defendant on regular basis); *People v Crandell, supra*, 46 C3d at 859 (no communication for several weeks after three consultations); *People v Walker* (1976) 18 C3d 232, 238, 133 CR 520 (no visits to defendant in jail after several meetings).
- Counsel's recommendation that defendant accept a plea bargain. *People v Shoals* (1992) 8 CA4th 475, 497, 10 CR2d 296.
- Setting trial date without conferring with defendant. *People v Avalos* (1984) 37 C3d 216, 231, 207 CR 549.
- Defendant's assertion of not relating well to counsel. *People v Silva* (1988) 45 C3d 604, 622, 247 CR 573.
- Defendant's displeasure with public defender because of dissatisfaction with former public defender's performance in

defendant's earlier case. *People v Smith* (1985) 38 C3d 945, 956, 216 CR 98. But see *People v Cruz* (1978) 83 CA3d 308, 317, 147 CR 740 (defendant's claim that public defender's office has repeatedly failed to investigate defendant's other cases warrants a court inquiry into claim's basis).

- Defendant's allegation that counsel believes defendant is guilty. *People v Williamson* (1985) 172 CA3d 737, 746, 218 CR 550.
- Defendant's lack of confidence in appointed counsel's performance. *People v Bean* (1988) 46 C3d 919, 947, 251 CR 461. See *People v Hart, supra*, 20 C4th at 604 (counsel's decision not to provide defendant with copies of police reports and not to challenge victim's testimony were tactical decisions made in defendant's best interests).
- Defendant's unsubstantiated belief that appointed counsel lied to defendant. *People v McElrath* (1985) 175 CA3d 178, 184, 220 CR 698.
- Defendant's desire to be tried separately from a co-defendant. *People v Zendejas* (2016) 247 CA4th 1098, 1108, 202 CR3d 517 (“[S]ubstitution request had nothing to do with appointed counsel or the quality of his representation.”).

c. Timeliness

(1) [§54.25] Before and During Trial

Requests for substitution of appointed counsel are considered timely if made before trial. If a request is made after trial starts, the court may deny it as untimely. *People v Williamson* (1985) 172 CA3d 737, 745, 218 CR 550 (motion untimely on 3rd day of trial); *People v Maese* (1980) 105 CA3d 710, 723, 164 CR 710 (motion untimely hours before cause submitted to jury);

In ruling on a substitution request during trial, the court should consider:

- If granting the request would result in an unreasonable disruption of the orderly processes of justice.
- If defendant has made a strong showing of appointed counsel's incompetence.
- If defendant could have raised the dissatisfaction with counsel earlier in the proceedings but did not. *People v Whitt* (1990) 51 C3d 620, 658, 274 CR 252; *People v Maese, supra*, 105 CA3d at 723.

➤ **JUDICIAL TIP:** The court should not deny a request for substitution of counsel made during trial on the ground that it is

untimely without first allowing defendant to state the reasons for the dissatisfaction with counsel.

When criminal proceedings have been suspended under Pen C §1368 because there is a question about the defendant's mental competence, the court may hear a request for substitution of counsel before proceeding with the competency hearing. *People v Stankewitz* (1990) 51 C3d 72, 89, 270 CR 817; *People v Harrison* (2001) 92 CA4th 780, 789, 112 CR2d 91 (that defendant had been declared incompetent to stand trial did not entitle court to ignore *Marsden* motions); *People v Solorzano* (2005) 126 CA4th 1063, 1068–1069, 24 CR3d 735 (defendant entitled to new trial where court denied motion for substitution of counsel while competency hearing pending). See also *People v Govea* (2009) 175 CA4th 57, 95 CR3d 511 (court erred in not conducting *Marsden* hearing earlier, even though proceedings had been suspended under Pen C §1368; error found harmless when court conducted *Marsden* hearing before deciding defendant's competency); *People v Taylor* (2010) 48 C4th 574, 599–601, 108 CR3d 87 (after denying defendant's first motion before competency proceedings at which the defendant was found competent to stand trial, court did not err in holding second *Marsden* hearing immediately after conclusion of competency proceedings and appointing new counsel; disagreement between defendant and counsel over competency issues resulted in breakdown in relationship warranting new counsel).

(2) [§54.26] After Trial

A defendant may request posttrial substitution of counsel on the ground that appointed counsel can no longer provide effective representation, either during sentencing or when moving for a new trial based on counsel's incompetency. *People v Dennis* (1986) 177 CA3d 863, 871, 223 CR 236. But see *People v Whitt* (1990) 51 C3d 620, 658, 274 CR 252 (posttrial motion untimely when defendant made request 3 to 4 months after special circumstances retrial). The request may be made by defendant or counsel. *People v Winbush* (1988) 205 CA3d 987, 990, 252 CR 722.

When a criminal defendant who has been convicted wants to withdraw a plea based on ineffective assistance of counsel, the court need only conduct a *Marsden* hearing when there is at least some clear indication by defendant, either personally or through counsel, that defendant wants a substitute attorney. If a defendant requests substitute counsel and shows during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed for all purposes. *People v Sanchez* (2011) 53 C4th 80, 86–90, 133 CR3d 564. The California Supreme Court has disapproved appointing a substitute or conflict attorney solely to evaluate a defendant's complaint that counsel

gave incompetent advice about the entry of a guilty or no contest plea. 53 C4th at 90. The *Sanchez* court viewed the use of specially appointed counsel as the trial court abandoning its responsibility to hear ineffective assistance of counsel claims and exercise its discretion to determine if substitute counsel should be appointed. The *Sanchez* holding applies to cases involving new trial motions. Notably, the *Sanchez* court referred to both new trial and plea withdrawal motions when admonishing the courts to stop appointing conflict counsel rather than holding a *Marsden* hearing. 53 C4th at 89.

d. [§54.27] Excluding Prosecutor From Hearing

Although the court is not required to exclude the prosecutor from a *Marsden* hearing, it should do so when defendant or counsel makes a timely request. *People v Madrid* (1985) 168 CA3d 14, 19, 213 CR 813. If no request is made, the court should exclude the prosecutor on its own motion whenever information might be presented at the hearing to which the prosecutor is not entitled (*i.e.*, work product or privileged information), or which might lighten the prosecutor's burden of proof. 168 CA3d at 19.

- ☛ **JUDICIAL TIP:** To protect the confidentiality of the disclosures made during a *Marsden* hearing that is held outside the prosecutor's presence, the court should order the transcript of the hearing sealed or direct the court reporter not to transcribe the notes of the hearing until further notice.

A defendant's disclosures in the transcript cannot be used against defendant, whether or not the transcript is sealed. *People v Dennis* (1986) 177 CA3d 863, 876, 223 CR 236. (defendant granted use immunity for disclosures contained in unsealed transcript included in record on appeal).

e. [§54.28] Questioning Counsel

Depending on the nature of defendant's complaints, it may be necessary for the court to question counsel. The court must inquire into counsel's state of mind when a satisfactory explanation for counsel's conduct or attitude toward defendant is necessary to determine if counsel can provide adequate representation. *People v Penrod* (1980) 112 CA3d 738, 747, 169 CR 533; *People v Munoz* (1974) 41 CA3d 62, 66, 115 CR 726 (trial court had duty to question counsel when defendant alleged that counsel told him he was guilty and that he did not want to defend him). The court is not required to question counsel when the defendant disagrees with the counsel's trial preparation and strategy. *People v Turner* (1992) 7 CA4th 1214, 1219, 10 CR2d 358. See *In re James S.* (1991) 227 CA3d 930, 935 n12, 278 CR 295 (questioning counsel about trial tactics and strategy was improper).

- ☛ JUDICIAL TIP: Most courts require defense counsel to respond to and comment on each of defendant’s allegations. In addition, courts routinely ask counsel to describe the work that has been done on the case by counsel, other attorneys in the office, and paralegals and investigators.

Any questioning of defense counsel must be conducted in open court and in defendant’s presence. *People v Hill* (1983) 148 CA3d 744, 755, 196 CR 382 (ex parte, off-the-record discussions with counsel were improper).

f. [§54.29] Failure to Hear Request

A court’s failure to hear a defendant’s request for substitution of appointed counsel is prejudicial per se error. *People v Hill* (1983) 148 CA3d 744, 755, 196 CR 382; *People v Mejia* (2008) 159 CA4th 1081, 1087, 72 CR3d 76, disapproved on another ground in 53 C4th 80, 90 n3. However, as an alternative to outright reversal, the appellate court can remand the case to the trial court for a posttrial *Marsden* hearing. If the trial court determines that good cause for appointment of new counsel has been shown, it must appoint new counsel and set the case for retrial. If good cause is not shown, the verdict against defendant must be reinstated. *People v Olivencia* (1988) 204 CA3d 1391, 1400–1402, 251 CR 880; *People v Minor* (1980) 104 CA3d 194, 163 CR 501.

2. [§54.30] Substituting Appointed Counsel for Retained Counsel

A defendant who becomes indigent and wants to discharge retained counsel and obtain appointed counsel need not show inadequate representation or identify an irreconcilable conflict before the court may approve a motion for substitution of counsel. *People v Ortiz* (1990) 51 C3d 975, 984, 275 CR 191 (*Marsden* showing not required). A defendant’s interest in discharging a retained attorney is included within the right to counsel of one’s choice. *People v Lau* (1986) 177 CA3d 473, 478, 223 CR 48. However, a defendant with retained counsel may not “be found to have asserted the right to discharge the attorney without explicitly making such a request.” *People v O’Malley* (2016) 62 C4th 944, 1005–1007, 199 CR3d 1. The court must grant a motion for substitution of appointed counsel for retained counsel unless:

(1) It is not timely and will unreasonably disrupt the orderly processes of justice. Generally, a motion made after the trial has started is untimely. See *People v Jeffers* (1987) 188 CA3d 840, 851, 233 CR 692 (request untimely when made on trial day and continuance would inconvenience prosecution witness); *People v Lau, supra*, 177 CA3d at 479 (request untimely when made just before jury selection was to begin and after codefendant announced he was ready for trial); *People v Dowdell*

(2014) 227 CA4 1388, 1412, 174 CR3d 547 (request untimely when made after 5 days of jury selection and 8 days into trial where “prosecution had already presented the bulk of its evidence”); *People v Maciel* (2013) 57 C4th 482, 512–514, 160 CR3d 305 (request untimely when trial was imminent in case that had been pending for 2 years and new counsel would have had to study records in multiple cases).

(2) It will result in significant prejudice to defendant (e.g., forcing defendant to trial without adequate representation). *People v Turner* (1992) 7 CA4th 913, 918, 9 CR2d 388; *People v Ortiz, supra*, 51 C3d at 983.

If previously discharged counsel is appointed to represent an indigent defendant, the court must, on defendant’s request, hold a *Marsden* hearing to allow defendant to explain why the appointment will impair the right to counsel. *People v Ortiz, supra*, 51 C3d at 990.

In a postconviction situation, as long as the request to discharge retained counsel and substitute appointed counsel is timely and would not cause prejudice to defendant or undue delay, a defendant may discharge counsel with or without cause and without regard to the quality of the representation. *People v Munoz* (2006) 138 CA4th 860, 869, 41 CR3d 842. In any case, even when substitution would appear to cause delay, the court may not deny the *Marsden* motion without conducting an inquiry. *People v Hernandez* (2006) 139 CA4th 101, 108–109, 42 CR3d 513.

3. [§54.31] Substituting Retained Counsel for Appointed Counsel

One element of a defendant’s right to counsel is the right to choose the retained counsel. *US v Gonzalez-Lopez* (2006) 548 US 140, 126 S Ct 2557, 2561, 165 L Ed 2d 409. A court may deny a defendant the right to substitute retained for appointed counsel only if it will significantly prejudice defendant (*People v Ramirez* (2006) 39 C4th 398, 422, 46 CR3d 677) or unreasonably disrupt the criminal proceedings. *People v Courts* (1985) 37 C3d 784, 794, 210 CR 193.

The court must ensure that defendant is fully informed of the proposed counsel’s qualifications and any other relevant factors necessary to make a knowing and intelligent decision. *People v Ramirez, supra*, 39 C4th at 419–420. The court may also appoint an attorney to review the attorney-client contract and provide defendant a chance to speak with an independent attorney at any time. *People v Ramirez, supra*, 39 C4th at 421–422.

The court must grant a defendant’s request to discharge appointed counsel and retain private counsel if the defendant makes a diligent effort to secure private counsel before the trial date and apprises the court at the earliest possible time. *People v Courts, supra*, 37 C3d at 794 (court erred

in denying substitution request first made 8 days before trial and defendant's chosen counsel attempted to calendar a request for continuance 5 days before trial). See also *People v Trapps* (1984) 158 CA3d 265, 271, 204 CR 541 (court erred in denying posttrial substitution request when sentencing had already been delayed 3 months to enable diagnostic study of defendant and request was made immediately after defendant was returned from the study).

When permitting substitution of retained for appointed counsel, the court may require an informed waiver from a defendant when there is a potential conflict of interest. *People v Baylis* (2006) 139 CA4th 1054, 1068, 43 CR3d 559.

4. [§54.32] Court-Initiated Removal

Removal of counsel may be initiated not only by a request from counsel or defendant, but also by the court on its own motion. *People v McKenzie* (1983) 34 C3d 616, 629, 194 CR 462. The court may remove retained or court-appointed counsel on its own motion, even over defendant's or counsel's objections, when removal is necessary to prevent (a) significant prejudice to defendant, (b) potential conflicts of interest, or (c) unreasonable disruption of the orderly processes of justice under the circumstances of the particular case. *Smith v Superior Court* (1968) 68 C2d 547, 561–562, 68 CR 1; *People v Crovedi* (1966) 65 C2d 199, 208, 53 CR 284. These were grounds for court removal of counsel:

- Counsel's refusal to participate in trial beyond appearing in court and sitting next to defendant. *People v McKenzie, supra*, 34 C3d at 628; *People v Shelley* (1984) 156 CA3d 521, 202 CR 874.
- Counsel's refusal to assure the court that he would be ready for trial, and statement declaring himself incompetent. *People v Strozier* (1993) 20 CA4th 55, 62, 24 CR2d 362.
- Counsel's disregard of trial court's order to give sufficient notice of inability to proceed to trial as scheduled, and failure to justify request for 13-week continuance or assure trial readiness after 13-weeks. *People v Lucev* (1986) 188 CA3d 551, 557, 233 CR 222.
- Counsel's unavailability to schedule case for trial for several months because of involvement in pending death penalty cases. *Stevens v Superior Court* (1988) 198 CA3d 932, 244 CR 94.
- Counsel's inability to prepare for a retrial for several months because of lingering ailment that caused numerous delays in first trial. *Maniscalco v Superior Court* (1991) 234 CA3d 846, 285 CR 795.

- Counsel's inability to be ready for trial for at least 4 weeks when a material prosecution witness was being held in custody against her will. *People v Ward* (1972) 27 CA3d 218, 235, 103 CR 671.
- Attorney appointed as co-counsel in ex parte proceeding without notice to prosecutor when prosecutor intended to call attorney as witness. *People v Daniels* (1991) 52 C3d 815, 846, 277 CR 122.
- Appointed counsel's previous representation of potential prosecution witness. *People v Noriega* (2010) 48 C4th 517, 108 CR3d 74 (public defender's conflicting duty of loyalty).
- Appointed counsel's previous representation of a man defense suspected of committing crime with which defendant is charged. *People v Jones* (2004) 33 C4th 234, 240–244, 14 CR3d 579 (potential conflict of interest).

A court's subjective opinion that counsel is incompetent cannot serve as a basis for court removal. *Smith v Superior Court, supra*, 68 C2d at 562 (court abused discretion by removing murder case counsel because counsel had never tried death penalty case). If it appears to the court that counsel is making serious mistakes prejudicing the client, the court should intervene in the proceedings, within reasonable limits, to ensure that the defendant receives a fair trial (e.g., disallowing pleas, controlling examination's scope, commenting on evidence). *People v Escarcega* (1986) 186 CA3d 379, 398, 230 CR 638. In addition, the court may advise defendant of its concerns about counsel's competency and offer to appoint new counsel. 186 CA3d at 399.

The mere possibility of a conflict of interest does not warrant removal over defendant's informed objection. When the possibility of conflict has been brought to the court's attention and that conflict has been disclosed to defendant, he or she may waive the conflict and insist on retaining counsel. *Maxwell v Superior Court* (1982) 30 C3d 606, 619, 180 CR 177, disapproved on other grounds in 45 C4th 390, 421 n22. However, when an actual conflict of interest develops, the court may remove counsel, even over an informed defendant's objection, if necessary to ensure fairness and preserve the credibility of its judgments. 30 C3d at 619 n10. See 5 Witkin & Epstein, California Criminal Law, *Criminal Trial*, §§216–221.

If appointed counsel in a felony case is not prepared to proceed with a preliminary hearing or trial on the date the court set, but at appointment represented that he or she would be ready within statutory time limits, the court may remove counsel and impose sanctions unless counsel shows good cause for being unprepared. Pen C §987.05.

C. [§54.33] Co-Counsel in Capital Cases

A defendant represented by appointed counsel in a capital case may request the appointment of a second attorney to assist in preparing and presenting the case. The granting of a request for second counsel is solely discretionary. *People v Roldan* (2005) 35 C4th 646, 686–687, 27 CR3d 360, overruled on other grounds in 45 C4th 390, 421 n22; *Keenan v Superior Court* (1982) 31 C3d 424, 430, 180 CR 489. However, if defendant factually establishes a genuine need for co-counsel’s appointment, a presumption arises that a second attorney is required. 31 C3d at 434. See *People v Staten* (2000) 24 C4th 434, 447, 101 CR2d 213 (presumption not met when request was little more than bare assertion that second counsel was necessary). Selecting co-counsel is also within the court’s discretion. *People v Ochoa* (1998) 19 C4th 353, 408, 79 CR2d 408.

A request for additional counsel must be made in writing by the first attorney appointed and supported by a confidential and privileged affidavit stating in detail why a second attorney should be appointed. Pen C §987(d). The court must appoint a second attorney if it is convinced by the affidavit’s reasons that the appointment is necessary to effectively represent defendant. Pen C §987(d). If the court denies the request for additional counsel, it must state why on the record. Pen C §987(d).

In deciding whether to grant a request for a second attorney, the court should consider:

- The complexity of the case’s legal and factual issues;
- If defendant is charged with other crimes;
- The number of witnesses;
- If complicated scientific or psychiatric testimony is anticipated;
- If extensive pretrial motions are anticipated; and
- The time between the appointment of first counsel and the trial. *Keenan v Superior Court, supra*, 31 C3d at 432.

The court has discretion, under Pen C §987(d), to appoint co-counsel to assist in the preparation and presentation of posttrial motions in a capital case when defendant factually shows that the appointment is necessary to the defense. *Seaman v Superior Court* (1987) 193 CA3d 1279, 1287, 238 CR 878 (court did not abuse discretion in denying co-counsel request when affidavit was not filed and unsupported allegations did not show need).

These are not grounds for the appointment of additional counsel:

- Abstract assertion that consolidation of robbery charges with capital charges inherently imposes undue burden on defense counsel. *People v Lucky* (1988) 45 C3d 259, 280, 247 CR 1.

- Unsubstantiated statement that case is more complex than anticipated. *Seaman v Superior Court*, *supra*, 193 CA3d at 1289. See also *People v Roldan*, *supra*, 35 C4th at 687–688 (counsel’s claim that coordinating and interviewing additional witnesses “was more than one attorney could handle” did not support appointment of another attorney; case was “quite straightforward,” and trial court believed counsel was fully competent without co-counsel).
- Counsel’s lack of previous death penalty trial, absent evidence that counsel is so inexperienced he or she cannot provide effective assistance. *People v Wright* (1990) 52 C3d 367, 412, 276 CR 731.

Capital defendants who choose to represent themselves may not seek appointment of co-counsel under Pen C §987(d). *Scott v Superior Court* (1989) 212 CA3d 505, 260 CR 608. See also §54.15 (appointment of advisory counsel) and §54.34 (requests for co-counsel status).

Although no appellate court has squarely decided the issue, presumably only those defendants who are charged with a capital offense for which the death penalty is sought may request the appointment of second counsel. See *Sand v Superior Court* (1983) 34 C3d 567, 572, 194 CR 480 (court interpreted term capital case used in Pen C §987.9 to mean only cases in which prosecutor would seek death penalty). See also *People v Ward* (2005) 36 C4th 186, 197–198, 30 CR3d 464 (proper to remove second counsel from initial trial in severed murder case when first case involved no special circumstances allegations).

D. [§54.34] Co-Counsel Requested

Although a defendant represented by counsel has no constitutional right to act as co-counsel, the court may grant defendant co-counsel status. However, such an arrangement is sharply limited and should be considered only if (1) defendant makes a substantial showing that the arrangement will promote justice and judicial efficiency in the particular case, and (2) defense counsel does not object to the defendant’s participation. *People v Hamilton* (1989) 48 C3d 1142, 1162, 259 CR 701. The court may not deny defendant’s request solely on a finding that counsel is competent. *People v Davis* (1984) 161 CA3d 796, 803, 207 CR 846 (abuse of discretion to deny request of defendant, who was an experienced lawyer intimately familiar with case’s facts, without considering whether justice would be served or delay would result).

The required showing was not met in these cases:

- Defendant was concerned that counsel would need assistance; the court advised that it would appoint a second attorney upon request and counsel planned to request the assistance of an associate attorney. *People v Clark* (1992) 3 C4th 41, 97, 10 CR2d 554.

- Defendant’s request to be appointed co-counsel so he could assist in developing trial strategy and locate witnesses when defendant was already represented by two attorneys. *People v Andrews* (1989) 49 C3d 200, 220, 260 CR 583.
- Defendant’s contention that his accounting expertise would result in more thorough cross-examination of witness when case involved simple accounting procedures easily understandable by counsel. *People v Hutton* (1986) 187 CA3d 934, 942, 232 CR 263.

The court may, but need not, warn a defendant who has been granted co-counsel status of the potential problems. *People v Jones* (1991) 53 C3d 1115, 1142, 282 CR 465. Unlike a defendant who elects self-representation, a defendant acting only as co-counsel does not waive the right to counsel. The defense attorney retains control over the case and can prevent defendant from taking actions that may seriously harm the defense. *People v Jones, supra*. However, if the court anticipates that defendant is going to play a dominant role in presenting the defense, it should advise defendant of the dangers of self-representation. *People v Jones, supra*; *People v McArthur* (1992) 11 CA4th 619, 624, 14 CR2d 203.

- JUDICIAL TIP: *Faretta* warnings should be given to each defendant who requests co-counsel status. Over the course of the criminal proceedings, defendant’s and counsel’s roles may change, and defendant may take control of the defense and relieve counsel of major responsibilities.

E. [§54.35] Counsel’s Withdrawal

Counsel of record may withdraw from a case if defendant and counsel mutually consent, or the court orders withdrawal on either party’s application. CCP §284; *Mandell v Superior Court* (1977) 67 CA3d 1, 4, 136 CR 354 (CCP §284 applies to criminal proceedings). Counsel may not abandon representation of defendant at will or for personal considerations. Counsel must continue representation until released by defendant or the court. *People v Massey* (1955) 137 CA2d 623, 626, 290 P2d 906. See also *People v McLeod* (1989) 210 CA3d 585, 589, 258 CR 496 (counsel did not abandon defendant by advising him that he could not represent defendant in motion to withdraw guilty plea, and in requesting another attorney’s appointment; counsel’s failure to suggest legal or tactical reasons why motion should not be made was consistent with attempt to withdraw on ethical grounds and provide for defendant’s ongoing representation).

The court has discretion to grant or deny a request to withdraw. *People v Sapp* (2003) 31 C4th 240, 256, 2 CR3d 554; *Lempert v Superior*

Court (2003) 112 CA4th 1161, 1173, 5 CR3d 700; *People v Prince* (1968) 268 CA2d 398, 406, 74 CR 197. The court should grant the request when counsel shows good cause. *People v Cohen* (1976) 59 CA3d 241, 249, 130 CR 656. A total breakdown in the relationship between defendant and counsel may be adequate grounds for the court to relieve counsel. *People v Cohen, supra*. The court may grant a request to withdraw based solely on counsel's statement that there has been a complete breakdown in the relationship if counsel cannot disclose details without violating attorney-client privilege, and the court accepts the good faith of counsel's representations. *Aceves v Superior Court* (1996) 51 CA4th 584, 591, 59 CR2d 280.

Failure or refusal of a client to pay or secure the attorney's proper fees or expenses after a reasonable request is grounds for the attorney to withdraw. *Lempert v Superior Court, supra*.

If counsel's request to withdraw is based on defendant's intent to commit perjury, the court may deny the request unless the disagreement results in a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel. *People v Brown* (1988) 203 CA3d 1335, 1341, 250 CR 762. See Cal Rules of Prof Cond 3–700(B) and (C) (grounds for permissive and mandatory withdrawal). The court may deny counsel's request to withdraw if withdrawal would work an injustice or cause unduly delay the proceedings. *Mandell v Superior Court, supra*, 67 CA3d at 4. A withdrawal request may be denied as untimely if made after completion of jury selection or the case is set for trial. *People v Mickey* (1991) 54 C3d 612, 661, 286 CR 801; *People v Murphy* (1973) 35 CA3d 905, 920, 111 CR 295. See also *People v Prince, supra*, 268 CA2d at 406 (court properly permitted withdrawal when request made before trial setting and withdrawal did not prejudice defendant, prosecution, or smooth course of administration of justice); Cal Rules of Prof Cond 3–700(A)(2) (counsel must take reasonable steps to avoid foreseeable prejudice to defendant's rights before withdrawing).

Preliminary hearing counsel must continue to represent a defendant who has been ordered to stand trial for a felony until the date the information sets for arraignment, unless the court relieves counsel on the substitution of other counsel or for cause. Withdrawal cannot be by mutual consent. Pen C §987.1.

F. [§54.36] Forfeiting Counsel Due to Defendant's Misconduct

A defendant who engages in unprovoked serious misconduct intended to cause counsel to withdraw and to delay or disrupt proceedings may forfeit the right to counsel. *King v Superior Court* (2003) 107 CA4th 929, 943–945, 132 CR2d 585 (defendant assaulted and threatened a succession of appointed counsel). Before declaring a forfeiture of counsel,

the court should first take intermediate steps to protect counsel and curtail the misconduct. For example, a defendant may be physically restrained in the courtroom and during any meeting between defendant and attorney, or noncontact meetings may be arranged. *King v Superior Court, supra*. Only in the rare case where measures to control defendant are inadequate or futile may the right to counsel be forfeited. *King v Superior Court, supra*.

King advises that a court take these steps before determining defendant has forfeited the right to counsel (107 CA4th at 944):

- Give explicit warnings that if defendant persists in the misconduct, he or she will forfeit the right to counsel and have to proceed in pro per;
- Conduct a colloquy in which defendant is told the dangers of self-representation;
- Make a clear ruling of forfeiture; and
- Provide factual findings supporting the ruling.

A proceeding for forfeiture calls for considerable procedural protections, including the right to a hearing. At the hearing defendant has the right to: 1) be present if not disruptive; 2) assistance of counsel; 3) produce evidence; and 4) cross-examine witnesses. 107 CA4th at 946–947. The court should exclude the prosecutor when attorney-client confidences are involved. A redacted transcript may be released to the prosecution and may be the basis of additional charges. 107 CA4th at 947–948. Defendant is not entitled to immunity for other criminal conduct testified about at the forfeiture hearing. The court must make factual findings supporting forfeiture on the record and by clear and convincing evidence. 107 CA4th at 948–949.

IV. SAMPLE FORMS

A. [§54.37] Written Form: Advisement and Waiver of Right to Counsel

SUPERIOR COURT OF CALIFORNIA, COUNTY OF	<i>Reserved for Clerk's File Stamp</i>	
PLAINTIFF: PEOPLE OF THE STATE OF CALIFORNIA		
DEFENDANT:		
ADVISEMENT AND WAIVER OF RIGHT TO COUNSEL (Faretta Waiver)	CASE NUMBER:	DEPT:

Instructions:

Fill out this form if you wish to act as your own attorney (*in propria persona* or “pro per”). Initial the box for each applicable item only if you understand and agree with it, and sign and date the form on page 4. If you have any questions about anything on this form, ask your attorney, if you have one, or the judge.

CONSTITUTIONAL RIGHTS

Initials

- | | |
|--|--------------------------|
| 1. I am the defendant in the above-entitled case, and I certify to the Court that I can read and write. I understand that my constitutional rights include the following: | <input type="checkbox"/> |
| A. Right to an Attorney — I understand that I have the right to be represented by an attorney at all stages of the proceedings and, if I cannot afford to hire an attorney, one will be appointed for me by the Court. | <input type="checkbox"/> |
| B. Right to a Speedy Trial and Public Jury Trial — I understand that I have a right to a speedy trial and a public trial by a jury of twelve citizens. | <input type="checkbox"/> |
| C. Right to Subpoena Witnesses and Records — I understand that I have the right to the reasonable use of the subpoena power of the Court to subpoena any witnesses or any records that I may need in my defense. | <input type="checkbox"/> |
| D. Right to Confront And Cross-Examine Witnesses — I understand that I have the right to confront in open court all witnesses who will be called to testify against me, and I have the right to cross-examine those witnesses at the time of trial. | <input type="checkbox"/> |
| E. Right Against Self-Incrimination — I understand that I have the right to testify at my trial, but that I cannot be compelled to testify at the trial unless I so desire. | <input type="checkbox"/> |
| F. Right to be Released on Bail — I understand that I may have the right to be released from jail on reasonable bail pending the trial. | <input type="checkbox"/> |
| G. Right to Self-Representation — I understand that I have a right to act as my own attorney and may waive my right to assistance of an attorney. I further understand that if I am permitted to represent myself, I will have to conduct my own defense without the assistance of an attorney. | <input type="checkbox"/> |

BACKGROUND

2. In support of my petition to proceed in propria persona (also referred to as “pro per”), I offer the Court the following biographical information:

A. Age: _____ Year of Birth: _____

B. Education:

(1) High School Attended:

(2) High School Graduate: Yes No

(3) Additional Formal Education (if any):

(4) Legal Education (if any):

C. Employment Experience:

D. I have previously acted as my own attorney in the following criminal matters:

Case	Court	Year	Result
Case	Court	Year	Result

DANGERS AND DISADVANTAGES TO SELF-REPRESENTATION

Initials

3. I understand there are many dangers and disadvantages in representing myself. Among those dangers and disadvantages of not having an attorney are the following:

A. I understand that if I am permitted to represent myself it will be necessary for me, without the assistance of an attorney, to follow all the rules of criminal law, criminal procedure, the law of evidence, and rules of court.

B. I understand the case against me will be handled by a prosecutor who is an experienced trial attorney, and that I will not be entitled to special consideration or assistance by the prosecutor during the course of the trial.

C. I understand that if I am permitted to represent myself, it will be necessary for me without the assistance of an attorney, to conduct my own trial consisting of, but not limited to: making pretrial motions; selecting a jury; making an opening statement; cross-examining the witnesses for the prosecution; subpoenaing and presenting my own witnesses; making appropriate objections and motions during the course of the trial; preparing and presenting proposed jury instructions to the Court; making the final argument; and in the event of a conviction, making appropriate motions after trial and representing myself at the time of the probation and sentencing hearing.

D. I understand that I cannot and will not receive any special consideration or assistance from the Court. I further understand that the Court is not permitted to and will not answer any questions I have concerning how I should proceed, what law might apply, or the correct procedure.

E. I understand that if I wish to ask the Court for funds to be used in my defense, I will have to show good cause.

Initials

- F. I understand that if I ask for any additional money over the initial amount granted by the Court, I will be required to keep and show the Court receipts for anything I have purchased with the money granted to me.
- G. I understand that if I am in jail, it will be difficult for me to contact witnesses and investigate my case. I understand that I will have limited access to a telephone, which will make preparations for trial more difficult, and that I will be provided no more access to legal research or legal information than any other inmate who acts as his or her attorney, and that access is limited.
- H. I understand that no continuance of the trial will be allowed without a showing of good cause, and that such requests made just before trial will most likely be denied.
- I. I understand that depending on the stage of my case, if I change my mind and request an attorney to handle my case, the Court may deny this request and I may have to proceed with trial without an attorney.
- J. I understand that in conducting the trial, I may be limited in my movements in the courtroom. All documents, for example, will be handed to witnesses when necessary through the bailiff, I may be required to remain in my seat at counsel table and may not have free movement in the courtroom.
- K. I understand that I must not act disrespectfully in court. I understand that the Judge may terminate my right to act as my own attorney in the event that I engage in serious misconduct or obstruct the conduct and progress of the trial. I understand that if my right to act as my own attorney is terminated, I may have to be represented by an attorney, appointed by the Judge, who will then take over the case at whatever stage the case may be in.
- L. I understand that if at some point an appointed attorney does take over my case, that attorney may be in a disadvantaged position and that such a disadvantage will not be considered an issue on appeal.
- M. I understand that misconduct occurring outside of court may result in restriction or termination of my right to act as my own attorney. I also understand that my right to act as my own attorney will not shield me from disciplinary actions within the jail, and that I will be subject to the same disciplinary measures as all other inmates for misconduct occurring in the jail.
- N. I understand that a defendant who is represented by an attorney before being convicted may complain as part of a timely appeal that the attorney's assistance was ineffective. I understand that by acting as my own attorney, I am giving up any right to claim on appeal that I had ineffective assistance of counsel.

CHARGES AND CONSEQUENCES**Initials**

4. I understand that I am giving up having an attorney explain to me what crime(s) I am charged with, and any possible legal defenses I might have to those charges.
5. I understand that I am giving up having an attorney explain to me which charges require proof of general criminal intent, which charges require proof of specific intent or mental state, and which state of mind may apply to any defenses I may have.
6. I understand that I am giving up having an attorney determine what facts must be proved before I can be found guilty.
7. I understand that I am giving up having an attorney determine, if I am convicted, what post-trial motions and sentencing options I may have, and to present these motions and options to the Court.

COURT'S ADVICE AND RECOMMENDATION

Initials

- 8. I understand that it is the advice and recommendation of this Court that I do not act as my own attorney and that I accept a court-appointed attorney. I understand that if I accept a court-appointed attorney, a trial attorney will be assigned to defend me. I understand that the attorney would be able to investigate my case, file pretrial motions, conduct the trial, and generally advise me on what to do.

- 9. I understand that this written request to act as my own attorney will be filed with and become part of the court case file. I further understand that on any appeal that may be taken from a conviction, or on the filing of a petition for an extraordinary writ, this request will be forwarded to any court of appeal and will be considered by that court in determining whether I knowingly and intelligently waived my right to an attorney.

- 10. I understand all that I have read and understood all that the Court has told me. Having in mind all that I have been advised and all of the dangers and disadvantages of acting as my own attorney, it is still my request that I act as my own attorney.

I hereby certify that I have read, understood, and considered all of the above warnings included in this petition, and I still want to act as my own attorney. I freely and voluntarily give up my right to have an attorney represent me.

Dated: _____ Signed: _____
Defendant's Signature

INTERPRETER'S STATEMENT (if applicable)

I, having been duly sworn or having a written oath on file, certify that I truly translated this Advisement and Waiver of Right to Counsel (*Faretta* waiver) form to the defendant in the language indicated below. The defendant stated that he or she understood the contents on the form, and then initialed and signed the form.

Spanish Other (specify) _____

Dated: _____ Signed: _____
Court Interpreter

Type or Print Name

The court finds that the defendant has been advised of his or her constitutional rights and the dangers and disadvantages of self-representation. The defendant has made a voluntary, knowing, and intelligent waiver of the right to counsel. The court grants the defendant's request for self-representation.

Dated: _____ Signed: _____
Judge of the Superior Court

B. [§54.38] Script: Hearing Motion to Proceed in Pro Per (*Faretta* Hearing)

Note: The following spoken form sets out sample language that the judge can modify to his or her own style. It is recommended that the examination of a defendant requesting pro per status be informal, thorough, and frank. The judge should explain the risks and disadvantages of proceeding in pro per in clear, everyday language.

[The defendant has made an unequivocal request to represent himself or herself]

[Mr./Ms.] [name of defendant], why don't you want the court to appoint a lawyer for you?

[Mr./Ms.] [name of defendant], you are charged with a serious crime and it would be contrary to your best interests to refuse to accept the services of the Public Defender's Office. The lawyers in the Public Defender's Office are highly qualified to handle any type of criminal case assigned to them. They possess a good knowledge of criminal law, criminal procedure, and the intricate workings of this court. Why don't you let me appoint one for you so that you can meet with him or her to discuss your case. After you discuss the case with the lawyer, you can evaluate your situation, see how you get along with the attorney, and then decide if you still want to act as your own lawyer.

[If defendant agrees, appoint counsel and continue the case for short period. If defendant insists on self-representation, continue]

Before I can allow you to represent yourself, you must convince me that you know what you are doing. I will go over with you the dangers and disadvantages of your proceeding without a lawyer and what could happen if I let you act as your own lawyer. You must convince me that you are knowingly and intelligently giving up your constitutional right to have this court appoint a lawyer to represent you. Can you read and write? How much schooling do you have?

[Defendant confirms literacy]

The court clerk will hand you a form called an "Advisement and Waiver of Right to Counsel." Please read it and fill it out, and then sign it. This form explains the disadvantages and responsibilities of self-representation. The form also requests information on your education and employment background. After you have completed the form, I will go over it with you and we will see if this is really the way you want to proceed.

[The court should read over the form and verify that the defendant can read and write]

[Mr./Ms.] [name of defendant], I have your Advisement and Waiver form before me and I would now like to go over it with you to make sure there is no misunderstanding as to what you are giving up and that you are doing so against the advice and recommendation of this court.

Let's review some of your constitutional rights. You have the right to be represented by an attorney at all stages of the proceedings and, if you cannot afford to hire an attorney, one will be appointed for you at no cost. Do you understand that right?

You have the right to a speedy and public trial, that is, a right to a trial by jury. You have the right to have your case tried within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. Do you understand this right?

You have the right to use the process of the court to subpoena any witnesses or records that you may need on your behalf or in your defense. Do you understand that right?

You have the right to confront in open court all witnesses who will be called to testify against you and to cross-examine those witnesses at the time of trial. Do you understand that right?

You have the right to testify at trial, but you cannot be compelled to testify unless you desire to do so. Do you understand that right?

You have the right to present evidence on your behalf in defense of the charge(s). Do you understand that right?

Do you understand that you will be up against an experienced prosecuting attorney who will try your case and that neither he nor she nor the court will assist you or otherwise provide special treatment to you?

Do you understand that you will have to follow all the technical rules of substantive law, criminal procedure, and evidence, just as a lawyer must?

Do you understand that you will not receive any more library privileges than those available to any other person representing himself or herself?

Do you understand that you will not receive any extra time to prepare your case for motions or for trial?

Do you understand that a special investigator will not be assigned to your case unless you can demonstrate to the court that the services of an investigator are necessary to the preparation of your case?

Do you understand that, depending on the stage of the proceedings, should you decide that you no longer want to represent yourself, the court may deny you the opportunity to change your mind and have a lawyer appointed?

The right to act as your own lawyer is not a license to abuse the dignity of this court. If the court determines that you are doing that, by engaging in deliberate misbehavior that is causing disruption in the trial proceedings, the court will terminate your right to self-representation. Do you understand that?

Suppose that should happen. Do you understand how difficult it will be for a lawyer to be appointed in the middle of your case and represent you with any degree of success?

Do you still want to represent yourself?

[If defendant answers yes, continue]

Let's discuss the charge(s) that *[is/are]* filed against you. Do you know what the elements are of the crime(s) that you are charged with? Do you know whether you are charged with a general intent crime or specific intent crime?

Do you understand that without knowing the answers to these questions, you are going to be helplessly lost in attempting to identify and prepare possible defenses to the charge, to say nothing about making objections about the admissibility of irrelevant evidence?

Let's discuss the three phases of your case: (1) proceedings before trial, (2) the trial itself, and (3) proceedings after a conviction, should that happen. With regard to proceedings before trial, do you understand that motions for dismissal, change of venue, disqualification of a judge, severance of counts, discovery, and suppression of evidence are just some of the possible pretrial matters that have to be considered, and that each, if asked for, must be in the form of a motion that must be technically proper and made on time or the motion will be waived?

Let's discuss negotiating a guilty plea to any of the counts charged against you or to a lesser charge. Do you understand that it will be almost impossible for you to do so if you represent yourself?

As to the actual trial, are you aware that you must pose proper questions on voir dire in selecting a jury, know when and how to exercise challenges for cause or peremptory challenges, and know how many of each type of challenge you are entitled to?

Do you understand that damaging evidence, such as hearsay evidence, may be admitted against you during the course of the trial unless you know what you are doing and make proper objections?

Do you understand that you may have to deal with such problems as prior felony convictions that may be pleaded against you, the admissibility of evidence of uncharged crimes, and the use of prior felony convictions to impeach a witness, and that if you do not make timely and proper objections, evidence highly detrimental to your case may come before a jury?

Do you understand that if you do not question a witness properly, objections will be sustained, and by your personally asking those questions, the jury may well wonder what your knowledge is of the events that are the subject of your questions. Do you understand that the jury may read into the questions an admission on your part, and this problem will not occur if you allow the court to appoint a lawyer for you?

Do you still want to act as your own attorney?

[If defendant answers yes, continue]

Suppose you are convicted of the charge by a jury. Do you know what the possible sentences are that you can receive as a result of your conviction?

[If defendant is accused of narcotics offense]

Do you understand that as a result of a conviction, you may ultimately be declared to be a drug addict or in imminent danger of becoming a drug addict and that you may be committed to the California Rehabilitation Center? Do you know how long that commitment may be?

[If defendant pleads not guilty by reason of insanity]

Do you understand that in the event of a finding of not guilty by reason of insanity you may be committed to a state hospital? Do you know how long that commitment may be?

[If enhancement pleaded]

Do you understand how your possible sentence may be affected if the enhancement is proved against you?

[If defendant has prior convictions]

Can you explain to me the significance of the prior convictions pleaded against you on your possible sentence? Are you aware that if you are convicted in this case and the priors are proved, you may be declared a habitual offender? Do you know what the possible sentence would be if you are declared a habitual offender?

Let's suppose that you are convicted. One of the possible grounds for appealing a conviction is the kind of defense a defendant received. That is, if a lawyer does such a poor job of representing a defendant that it amounts to a denial of the constitutional right to the effective assistance of counsel, the case will be reversed on appeal. If you insist on representing yourself, you will give up this right on appeal. Do you understand that?

Now, for the last and final time, do you give up your right to be represented by a lawyer and insist upon your right to represent yourself?

C. [§54.39] Script: Granting Motion to Proceed in Pro Per

The defendant in this case, [Mr./Ms.] [name of defendant], is granted the right to represent [himself/herself] in pro per. The court specifically finds that the defendant is mentally capable to do so. Further, [he/she] is literate and has been fully informed about [his/her] right to counsel. The court finds that the defendant fully understands the implications of waiving [his/her] right to be represented by counsel, and has voluntarily and rationally done so. I am satisfied that the defendant, in taking this action against the advice of this court, is fully advised and aware of the pitfalls, dangers, and consequences of acting as [his/her] own lawyer. The defendant is granted those rights while incarcerated in the county jail that are necessary to the exercise of [his/her] right to proceed in pro per.

D. [§54.40] Script: Denying Motion to Proceed in Pro Per

The defendant's motion to represent [himself/herself] in pro per is denied. [State reasons, e.g., defendant has engaged in serious conduct, request untimely, or defendant not mentally competent.] The public defender [is appointed/shall continue] to represent the defendant.

E. [§54.41] Script: Hearing Motion to Substitute Appointed Counsel (Marsden Hearing)

(1) *Make opening statement—state parties that are present.*

This is a closed courtroom hearing. The parties present are the defendant, [Mr./Ms.] [name of defendant], the attorney for the defendant, [Mr./Ms.] [name of attorney], and courtroom personnel. The prosecuting attorney, [Mr./Ms.] [name of attorney], is not present.

(2) *Question the defendant.*

[Mr./Ms.] [name of defendant], this is a closed hearing. Any statements you make to me will be held in confidence. Do you understand?

[Mr./Ms.] [name of defendant], do you request that [Mr./Ms.] [name of defense attorney] be relieved as your attorney and that another attorney be appointed to represent you?

Do you feel that [Mr./Ms.] [name of defense attorney] has not properly represented you? Tell me why you feel that way? Please be specific.

Is there anything that [Mr./Ms.] [name of defense attorney] has not done in [his/her] representation of you that you feel [he/she] should have done? Please explain.

Is there anything that [Mr./Ms.] [name of defense attorney] has done in [his/her] representation of you that you feel [he/she] should not have done? Please explain.

Do you have anything else to tell me in connection with your request for a new attorney?

(3) *Question the defense attorney.*

[Mr./Ms.] [name of defense attorney], please describe your experience in criminal practice?

How long have you represented [Mr./Ms.] [name of defendant] in this case?

Briefly explain what work you have done to represent [Mr./Ms.] [name of defendant] [e.g., obtain police reports, confer with client, interview witnesses, prepare and present motions].

You have heard [Mr./Ms.] [name of defendant] make some allegations concerning alleged deficiencies in your representation. How do you respond to these allegations? [Note: Make sure the defense attorney responds to each point raised by the defendant.]

(4) *Ask defendant to respond to the statements of counsel.*

[Mr./Ms.] [name of defendant], do you have anything you wish to say in response to your attorney's statements?

F. [§54.42] Script: Granting Motion to Substitute Appointed Counsel

To the extent there are conflicts between the statements made during this hearing, I believe [Mr./Ms.] [name of defendant] for the following reasons: [State reasons].

I find that [Mr./Ms.] [name of defense attorney] has not properly represented [Mr./Ms.] [name of defendant], and continued representation by [Mr./Ms.] [name of defense attorney] will deprive [Mr./Ms.] [name of defendant] of [his/her] right to effective assistance of counsel.

[If personality conflict raised as an issue]

I find that there has been a complete breakdown in the relationship between [Mr./Ms.] [name of defense attorney] and [Mr./Ms.] [name of defendant] which would make it impossible for [Mr./Ms.] [name of defense attorney] to effectively represent [Mr./Ms.] [name of defendant].

The motion is granted. The recording of this proceeding will be sealed.

G. [§54.43] Script: Denying Motion To Substitute Appointed Counsel

To the extent that there are conflicts between the statements made during this hearing, I believe [Mr./Ms.] [name of defense attorney] for the following reasons: [State reasons].

I find that [Mr./Ms.] [name of defense attorney] has properly represented [Mr./Ms.] [name of defendant] and will continue to do so.

[If personality conflict raised as an issue]

I find that there has not been a breakdown in the relationship between [Mr./Ms.] [name of defense attorney] and [Mr./Ms.] [name of defendant] that would make it impossible for [Mr./Ms.] [name of defense attorney] to effectively represent [Mr./Ms.] [name of defendant].

[Add as appropriate]

I find that any deterioration in the relationship has been caused by the willfully recalcitrant and defiant attitude of [Mr./Ms.] [name of defendant], and there is no reason why, in the future, [Mr./Ms.] [name of defendant] cannot be effectively represented by [Mr./Ms.] [name of defense attorney].

The motion is denied. The recording of this proceeding will be sealed.

V. [§54.44] ADDITIONAL REFERENCES

California Criminal Law Procedure and Practice, chap 3 (Cal CEB).

5 Witkin & Epstein, California Criminal Law, *Criminal Trial*, §§211–222, §§262–268 (change of counsel), §§290–311 (waiver of counsel) (4th ed 2012).

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