CALIFORNIA JUDGES BENCHGUIDES

Benchguide 54

RIGHT TO COUNSEL ISSUES

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Editorial comments and inquiries: Barry Harding, Senior Attorney 415-865-7745,
fax 415-865-4335

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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 the defendant has made an unequivocal request for self-representation.* For discussion, see §54.5.

(2) *If counsel has not been appointed for the defendant, ask the defendant if he or she will agree to an initial appointment of an attorney so that the defendant can discuss the case with counsel before deciding to proceed in pro per.*

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

(3) *Ask the defendant to fill out a "Waiver of Right to Counsel" form.* See written form in §54.37.

☛ JUDICIAL TIP: Many 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.

(4) *Determine if the defendant's request for self-representation has been timely made*. For discussion, see §§54.8–54.10.

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

(a) *Review the following factors:*

— The quality of representation afforded to the 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 to result if the request is granted, and

— Whether the defendant is ready to present his or her 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 the defendant of the following:*

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

- *The defendant's loss of the right to appeal on the grounds of inadequacy of counsel if the defendant proceeds without counsel.* For discussion, see §54.7.

(6) *Determine whether the defendant has the mental capacity to waive the right to counsel and exercise his or her right to self-representation.* If there is any doubt as to the defendant's mental capacity, suspend the proceedings and order a psychiatric evaluation. For discussion, see §54.6.

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

- *If the request is granted, state on the record the following findings:*
  - — The defendant is competent to waive his or her right to counsel.
  - — The defendant has been advised of the dangers and disadvantages of proceeding without counsel.
  - — The defendant has made a voluntary and intelligent waiver of his or her right to counsel.
- *If the request is denied, state the reason(s) for the denial, e.g., the request was untimely, or the defendant is not competent to waive the right to counsel.*

B. [§54.3] Request for Substitution of Counsel (*Marsden* Hearing)

(1) *Determine whether the defendant has made a clear request for a substitution of appointed counsel.* For discussion, see §54.23.

(2) *Suspend the proceedings and conduct a hearing on the defendant's request.* For discussion, see §54.22.

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

- *The defendant or appointed counsel requests the absence of the prosecutor, or*
- *The court anticipates disclosure of information that the prosecutor is not entitled to (e.g., work product).* For discussion, see §54.27.

(4) *Ask the defendant to specifically state why he or she is dissatisfied with appointed counsel*.

(5) *Ask the defense counsel to (a) describe his or her experience in criminal practice, (b) describe the work that he or she has done on the defendant's case, and (c) respond to each allegation made by the defendant*. For discussion, see §54.28.

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

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

- *Grant the request if the defendant makes a substantial showing of one or both of the following:*
  - — Appointed counsel is not providing adequate representation.
  - — The defendant and appointed counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. For discussion, see §54.24.
- *If the request for substitution of appointed counsel was made after the commencement of trial, consider the following factors in determining whether to grant or deny the request:*
  - — Whether the grant of the request would result in an unreasonable disruption of the proceedings.
  - — Whether the defendant has made a "strong showing" of inadequacy of appointed counsel.
  - — Whether the defendant had earlier opportunities to raise his or her dissatisfaction with appointed counsel and failed to do so. For discussion, see §54.25.

(8) *Order the transcript of the hearing sealed, or alternatively, direct the court reporter not to transcribe the notes of the hearing until further notice from the court.* For discussion, 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. The court must grant a defendant's request for self-representation if three conditions are met: (1) the defendant is mentally competent and makes the request knowingly and intelligently, having been advised by the court of the dangers of self-representation; (2) the defendant's request is unequivocal; and (3) the defendant makes the request within a reasonable time before trial. 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 defendant's request regardless of how unwise the defendant's choice may appear to be. *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, the defendant's technical legal knowledge is irrelevant to the court's assessment of the defendant's knowing exercise of the right to self-representation. *Faretta v California, supra*.

There is no principle that says that the right to a fair trial is more important than the right to self-representation and therefore a court cannot deny self-representation because it might cause detriment to the defendant or even unfairness. *People v Blair* (2005) 36 C4th 686, 739–750, 31 CR3d 485. The law does not require the 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 a defendant in a capital case must be represented in court by counsel at all stages of the preliminary and trial proceedings. *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] Defendant's Unequivocal Request

The right to self-representation must be initiated by a *timely* and *unequivocal* assertion by the defendant. *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 statement that he or she is dissatisfied with defense counsel's handling of the case (*People v Wright* (1990) 52 C3d 367, 409, 276 CR 731), or that he or she is thoroughly capable of handling the case without counsel is not an unequivocal request (*People v Clark* (1992) 3 C4th 41, 98, 10 CR2d 554). See also *People v Marlow* (2004) 34 C4th 131, 147, 17 CR3d 825 (in context of defendant's frustration with his inability to obtain counsel of his choice, the defendant's inquiry—"Is it possible that I just go pro per in my own defense and have someone appointed as co-counsel?"—was a request for information, not a *Faretta* motion).

A defendant's request is not unequivocal if it does not represent a genuine desire for self-representation, but is instead 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. In determining whether a request for self-representation is unequivocal, the court should consider not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other utterances in court. 15 C4th at 25. See

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 four-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). 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 does not have a sua sponte duty to inquire about a defendant's intent to move for self-representation when a defendant requests substitution of counsel. *People v Webster* (1991) 54 C3d 411, 436, 285 CR 31.

3. Securing Waiver of Right to Counsel

a. [§54.6] Defendant's Competency To Waive Right

Competency Standard: Before the court may grant a defendant's request to proceed in pro per, the court must be satisfied that the defendant has the mental capacity to make a voluntary and intelligent waiver of the right to counsel. *Godinez v Moran* (1993) 509 US 389, 399, 113 S Ct 2680, 125 L Ed 2d 321. If the defendant seeks to enter a guilty or no-contest plea, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial. That is, a defendant is competent to waive counsel if he or she has the mental capacity to understand the nature and object of the criminal proceedings, to consult with counsel, and to assist in the preparation of a defense. *Godinez v Moran, supra; People v Welch* (1999) 20 C4th 701, 732, 85 CR2d 203. However, when a defendant is competent to stand trial and seeks to conduct his own defense at trial rather than enter a guilty or no-contest plea, a trial court many deny the a motion for self-representation if the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present he defense without the help of counsel. *Indiana v Edwards* (2008) 554 US 164, 169–178, 128 S Ct 2379, 2383–2388, 171 L Ed 2d 345; *People v Johnson* (2012) 53 C4th 519, 525–531, 136 CR3d 54 (California Supreme Court expressly held that trial courts may deny self-representation in those cases where *Edwards* permits it).

Psychiatric Evaluation: If the court entertains any doubts about the defendant's competency to waive the right to counsel, it must conduct an inquiry, ordinarily by ordering a psychiatric evaluation. *People v Burnett* (1987) 188 CA3d 1314, 1319, 234 CR 67. If the court does not have any

doubts about the defendant's competency after observing the defendant and there is no substantial evidence known to the court suggesting that the defendant may be incompetent, an evaluation and hearing is not required, even when defense counsel expresses such doubts before the court. *People v Clark* (1992) 3 C4th 41, 107, 10 CR2d 554. Any psychiatric evaluation ordered by the court should be limited to the defendant's competency to make the required waiver and should not extend to other competency issues. *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 do not by themselves suggest incompetence to stand trial or waive counsel. *People v Stewart* (2004) 33 C4th 425, 516, 15 CR3d 656 (fact defendant stabbed fellow jail inmate with pencil did not provide basis for concluding he was not competent to waive his right to counsel).

☛ JUDICIAL TIP: The court may consider appointing a mental health expert under Evid C §730 to assist the court in determining whether a defendant is competent to waive the right to counsel. For a comprehensive discussion of appointing mental health experts, see California Judges Benchguide 63: *Competence To Stand Trial* (Cal CJER).

Defense Counsel's Role: Although defense counsel has a legal and ethical obligation to alert the court to any doubts about the defendant's competency to waive the right to counsel, defense counsel should not formally oppose a defendant's request for self-representation because of counsel's belief that the defendant cannot effectively represent himself or herself. *People v Kirkpatrick* (1994) 7 C4th 988, 1010, 30 CR2d 818. Without formally opposing a request for self-representation, counsel can assist the court and serve the defendant's best interests by advising the defendant of the risks and disadvantages of self-representation, providing the court, on request, with relevant nonprivileged information and relevant legal authority, and correcting any misstatement of fact by the defendant. *People v Kirkpatrick, supra*.

Defendant's Ability To Present Defense: A court may not consider the wisdom of the defendant's decision to undertake self-representation, or the defendant's ability to represent himself or herself. *Godinez v Moran, supra,* 509 US at 399–400; *People v Welch, supra,* 20 C4th at 733–734. The sole relevant question is whether the 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 whether self-representation is proper. 56 CA4th at 372.

b. [§54.7] Voluntary and Intelligent Waiver

A finding that the defendant is mentally competent to waive the right to counsel is not all that is necessary before the defendant may waive the right. The court must also find the 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. The purpose of the voluntary and intelligent requirement is to ensure that the defendant understands the significance and consequences of his or her 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 take the following steps:

(1) Advise the defendant of the following constitutional rights:

- *The right to counsel.* The court should ensure that the defendant understands his or her alternative right to counsel, including the right to appointed counsel at no cost. *People v Lopez* (1977) 71 CA3d 568, 138 CR 36.
- *The right against self-incrimination*. *People v Cervantes* (1978) 87 CA3d 281, 288, 150 CR 819. (*Note:* The court is not required to advise the defendant of the right to testify. *People v Jones* (1992) 2 CA4th 867, 873, 3 CR2d 602.)
- *The right to a speedy trial as required by 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 (defendant's waiver of right to counsel was not voluntary when forced to choose between right to speedy trial and right to assistance by counsel by trial court's error in relieving defendant's counsel four days before final date for trial without sufficient cause).

(2) Discuss the complexities of the case with the defendant, including the nature of the criminal proceedings, the possible outcome, defenses, and punishment. *People v Lopez, supra*. The court must ask the defendant if he or she understands the charges and the potential penal consequences. *People v Noriega* (1997) 59 CA4th 311, 319–322, 69 CR2d 127.

(3) Advise the 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 or advisements as long as the record demonstrates that the defendant understood the disadvantages of self-

representation. *People v Lawley* (2002) 27 C4th 102, 140, 115 CR2d 614. However, the courts of appeal have suggested the following advisements:

- Self-representation is almost always unwise and the defendant may conduct a defense to his or her own detriment. *People v Lopez, supra.* Explaining to the defendant that he would be a fool if he represented himself in a death penalty trial is neither unwarranted disparagement nor a foreclosure of defendant's *Faretta* rights, but is rather an appropriate reminder of the dangers and disadvantages of self-representation. *People v Lancaster* (2007) 41 C4th 50, 68–70, 58 CR3d 608.
- The defendant will have to follow the same rules that govern attorneys, including the technical rules of substantive law, criminal procedure, and evidence in the making of motions and objections, the presentation of evidence, voir dire, and argument. *People v Lopez, supra*.
- The 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 the defendant in terms of skill, training, education, experience, and ability. *People v Lopez, supra*.
- The 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 defendant's misbehavior, the newly appointed counsel may be at a strategic disadvantage in presenting the defendant's case. *People v Davis* (1987) 189 CA3d 1177, 1201, 234 CR 859, disapproved on other grounds in 44 C3d at 225–226.
- If defendant is incarcerated, defendant's pro per privileges, including access to a law library, may be subject to limitation or suspension 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 a defense is 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). For discussion of pro per privileges, see §54.17.
- The 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 not knowing and intelligent

if it was based on the failure to understand that there is no guarantee of entitlement to 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 if the defendant engages in disruptive conduct. *People v Lopez*, *supra*. For discussion of termination of the right to self-representation, see §54.18.

(5) Advise the defendant that he or she will lose the right to appeal his or her 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 written form in §54.37.

4. Timeliness of Request

a. [§54.8] In General

Reasonable-Time-Before-Trial Requirement: 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 is continued is timely if it precedes actual commencement of trial). Timeliness is not based on a fixed or arbitrary point in time, but on the totality of the circumstances that exist in the case at the time 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 whether 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;
- Whether trial counsel is ready to proceed to trial;
- The number of witnesses and the reluctance or availability of crucial trial witnesses;
- The complexity of the case;
- Any ongoing pretrial proceedings; and
- Whether the defendant had earlier opportunities to assert the right of self-representation.

When the request is timely made and the court determines that the defendant has voluntarily and intelligently elected to waive counsel, the court must grant the defendant's motion for self-representation. *People v Windham*, *supra*, 19 C3d at 128. When the motion is not made within a reasonable time before trial, the court has the discretion to 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 on the day preceding trial or the day of trial is generally considered 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, the defendant has the burden of justifying 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 the truth of the prior convictions is bifurcated from the trial on the primary offense, a request for self-representation is not considered timely unless made before the commencement of the trial on the primary offense. *People v Givan* (1992) 4 CA4th 1107, 6 CR2d 339 (request made before commencement of trial on prior convictions but after verdict returned on the 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 request for self-representation while criminal proceedings are suspended under Pen C §1368 (incompetent defendant). *People v Horton*, *supra*, 11 C4th at 1108; *People v Marks* (1988) 45 C3d 1335, 1340, 248 CR 874.

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

b. [§54.9] Late Requests

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

Factors To Consider: In exercising its discretion to grant or deny a late request for self-representation, the court must inquire sua sponte into the specific reasons underlying the request. *People v Windham*, *supra*. The court must consider the following factors:

- The quality of representation afforded the 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 to 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 his 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:

- Whether the defendant is ready to present his or her case without a continuance. *People v Nicholson* (1994) 24 CA4th 584, 592, 29 CR2d 485 (trial court abused its discretion in denying request made on day trial commenced 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 request for continuance).
- Whether the delay of the criminal proceedings 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.
- Whether the delay of the proceedings 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 and opportunity to prepare his or her defense if the defendant requests a continuance. *People v Douglas* (1995) 36 CA4th 1681, 1689, 43 CR2d 129; see Pen C §1049 (defendant entitled to minimum of five 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 after defendant granted mid-trial pro per request when defendant had access to research facilities for many months). Moreover, if the court concludes that the defendant's motion is merely a tactic designed to delay the trial, the court has the discretion to deny the continuance and require the defendant to proceed to trial as scheduled either with his or her counsel or in pro per. *People v Douglas, supra*.

☛ JUDICIAL TIP: The court should always inquire whether the defendant needs extra time to prepare his or her case before granting or denying a pro per request. The need for extra time 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 request for a continuance may be an abuse of the court's discretion.

Statement of Reasons: If the court denies a motion for self-representation, the court should, but is not required to, state the reasons underlying 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 considered timely, a request for self-representation in a capital case must be made before the commencement of the guilt phase of the trial. It is therefore within the court's discretion to 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 (*People v Windham* (1977) 19 C3d 121, 128 n5, 7, 137 CR 8)). 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 the 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). The court has discretion to grant a request for self-representation made after the guilt phase verdicts are returned, even when the request is made for the announced purpose of seeking a death verdict. *People v Bloom* (1989) 48 C3d 1194, 1220, 259 CR 669.

When the guilt phase has resulted 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] Denial of Request Based on Defendant's Prior Behavior in Court

Just as a court may properly terminate the right to self-representation when the defendant deliberately engages in serious and obstructionist misconduct (see §54.18), a court may deny a defendant's motion for self-representation in the first instance when the defendant's conduct before the motion gives the court a reasonable basis for believing that self-representation will disrupt the court 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). The court must decide whether the defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful, or obstructionist in his or her actions or words as to justify denying the defendant the right to self-representation. 20 C4th at 735. The court may properly deny a defendant's request for self-representation based on the defendant's demonstrated inability during pretrial proceedings to conform his behavior to the rules of procedure and courtroom protocol. *People v Watts* (2009) 173 CA4th 621, 628–630, 92 CR3d 806.

6. [§54.12] Defendant's Change of Mind; Request for Appointment of Counsel During Trial

Once a defendant proceeds to trial in pro per, it is within the discretion of the court to determine whether the 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 of the case when ruling on a defendant's request to change from self-representation to representation by counsel. *People v Gallego* (1990) 52 C3d 115, 164, 276 CR 679 (refusal of request for reappointment upheld when request came late in trial and defendant had exhibited considerable knowledge of trial tactics and procedure). See *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 the penalty phase was to begin and substantial delay would result if request was granted); *People v Boulware* (1993) 20 CA4th 1753, 1756, 25 CR2d 381 (*Gallego* rule held applicable to request for appointment of counsel made on date of preliminary hearing, which was ninth day of ten-day statutory period; prosecution had no advance notice of defendant's request; prosecution witnesses appeared at hearing, ready to testify).

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

- The defendant's prior history in the substitution of counsel and in the 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 that would result if the court granted the motion.

- The likelihood of the defendant's effectiveness in defending against the charges if required to continue to act as his or her own attorney.

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 a motion for new trial).

7. [§54.13] Situations Requiring 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 a 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. 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] Abandonment of Request for Self-Representation

If a defendant makes an unequivocal request for self-representation, his or her subsequent actions 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 a defendant's timely request and the defendant fails to again raise the issue at subsequent hearings during which counsel is appointed, the defendant is deemed to have unequivocally agreed to and acquiesced in being represented by counsel. *People v Kenner*, *supra*. The right to self-representation, unlike the right to counsel, can be waived by the defendant's mere failure to assert it. 223 CA3d at 60. See *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 the assignment of counsel), 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 having been invited to do so by the trial judge).

9. [§54.15] Appointment of Advisory Counsel

No Constitutional Right to Advisory Counsel: A defendant who chooses to exercise his or her right to self-representation does not have a 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. However, trial courts retain the discretion to permit the sharing of responsibilities between a defendant and a defense attorney when the interests of justice support such an arrangement. *People v Moore, supra*, 51 C4th at 1120.

Discretion To Appoint Advisory Counsel: When exercising its discretion on a motion for advisory counsel, the court should consider the defendant's demonstrated legal abilities and the legal complexity of the case. *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 exhibited substantial competence in presenting his case); *People v Bigelow* (1984) 37 C3d 731, 743, 209 CR 328 (abuse of discretion to deny advisory counsel in capital case when defendant possessed ninth-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 defendant with ninth-grade education when defendant did not request counsel and was prosecuted for noncapital murder; court refused to extend *Bigelow* to noncapital case). The court should also consider the defendant's reasons for seeking the appointment of 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 the appointment will promote justice and judicial efficiency in the particular case. *People v Barnett* (1998) 17 C4th 1044, 1106, 74 CR2d 121.

Court's Authority Over Advisory Counsel: When advisory counsel is appointed, the court retains authority to exercise its judgment regarding 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 the defendant's control of the presentation of his or her case, or (b) undermine the jury's perception that the defendant is representing

himself or herself. *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. The courts of appeal vary as to the extent to which they will allow advisory counsel's participation at trial. Compare *People v Bradford, supra* (court properly refused to allow advisory counsel to argue, object, respond to the court's questions, or to instruct the defendant about exactly what to say) and *Scott v Superior Court* (1989) 212 CA3d 505, 512, 260 CR 608 (court suggested advisory counsel may question specific witnesses upon proper showing). See also *Brookner v Superior Court* (1998) 64 CA4th 1390, 1393, 76 CR2d 68 (court criticized concepts of advisory and standby counsel as inconsistent with authority, stating that defendant has the right to represent himself or not to represent himself, 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 advise the defendant that he or she does not have a 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 he or she is precluded from asserting ineffective assistance of counsel on appeal. *People v Bloom* (1989) 48 C3d 1194, 1226, 259 CR 669.

Restriction or Termination of Advisory Counsel: Although a pro per defendant has no right to advisory counsel, once that privilege is granted, it may not be restricted or terminated absent 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 from which the defendant was excluded).

Appointment of Public Defender as Advisory Counsel: The courts of appeal disagree about whether the public defender can be ordered 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 will require him or her to violate ethical duties as an attorney).

10. [§54.16] Appointment of Standby Counsel

The court may appoint "standby" counsel, with or without the defendant's consent, to be present during the criminal proceedings so as to become familiar with the case in the event that the 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 the defendant, but stands ready to step in and take over the case should the occasion arise. *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, the court should advise the defendant that the attorney will sit in court, that there will be no legal consultations, that the only contact will be to familiarize counsel with the case, and that the sole purpose for the appointment is for the attorney to take over if the defendant's pro per status is terminated.

If standby counsel has to take over the case, the court is not required to grant a continuance to allow standby counsel additional time to prepare. *People v Davis* (1987) 189 CA3d 1177, 1201, 234 CR 859. Accordingly, trial 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 routinely appoint standby counsel in all pro per cases. Pro per defendants who appear cooperative in the initial stages of the proceedings often become unnerved as the trial progresses, resulting in disruptions and other problems. If standby counsel is available to take over immediately in the middle of trial, there is far less likelihood of a delay in the proceedings.

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. Thus, a defendant who is representing himself or herself may not be placed in the position of presenting 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 all the circumstances. In assessing the reasonableness of the access, institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her 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 the granting of pro per privileges to incarcerated defendants. In cases involving recalcitrant defendants, it may be advisable to ask the appropriate jail authorities to keep a

record of pro per privileges exercised, especially access to and use of the law library. This will preserve a record on appeal should the defendant assert inadequate access to or improper denial of privileges.

Privileges may include the following:

- *Access to a law library. Kane v Garcia Espitia* (2005) 546 US 9, 10, 126 S Ct 407, 163 L Ed 2d 10. There is no requirement that a defendant be afforded specific books or specific access times. *People v Davis* (1987) 189 CA3d 1177, 1195, 234 CR 859, disapproved on other grounds in 44 C3d at 225–226. A defendant need not have direct access to a law library if trained legal research assistants provide the defendant with a comprehensive list of legal materials and assist the defendant in researching those materials relevant to his or her defense. *People v James* (2011) 202 CA4th 323, 335–337, 136 CR3d 85.
- *Investigative services.* If a defendant seeks the appointment of an investigator at the state's expense, he or she must demonstrate a need for those services. *People v Faxel* (1979) 91 CA3d 327, 154 CR 132. Similarly, a defendant may receive the assistance of a law clerk if he or she shows that the clerk's services are reasonably necessary and not merely convenient. *People v Clark* (1992) 3 C4th 41, 112, 10 CR2d 554.
- *Expert services*. The defendant may receive the services of an expert under Evid C §730 if he or she makes a showing of need. *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 an 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 used to obtain materials from county law library).
- *Reasonable use of telephone.* 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, indigent defendants may request the court for funds for the payment of investigators, experts, and other persons for the preparation or presentation of the defense. Pen C §987.9(a). A defendant who requests these funds must make a showing of reasonable necessity for the funds. 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 the reasonableness of the request. The ruling must be made in camera. In ruling on the request, the judge must be guided by the need to provide a complete and full defense for the defendant. Pen C §987.9(a).

*Restriction or Suspension of Privileg*es: 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 result in restricting pro per privileges, that inmate must be given 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 rest of 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 the restriction. 21 C3d at 827.

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

12. [§54.18] Termination of Right to Self-Representation

The court may terminate a defendant's right to self-representation if the defendant engages in disruptive conduct that abuses the dignity of the court. *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 four months' delay), escaped (which caused seven months' delay), made repeated motions for continuance, and stated he would need more than one 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 the last day the case could be tried without any of the trial materials he had been given, and announced he was unready to proceed as promised).

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 the defendant's out-of-court conduct that seriously threatens the core integrity of the trial, for example, witness intimidation. *People v Carson* (2005) 35 C4th 1, 8–10, 23 CR3d 482.

A defendant's right to self-representation may also be reexamined and terminated by the court when specific and reliable evidence comes to the court's attention that the defendant (a) lacked the capacity to knowingly and intelligently waive his or her right to counsel at the time the defendant made the decision, or (b) lost this capacity after the initial

waiver because of some 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 on grounds that he or she is 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 such a situation arises, the court should exercise one of these three alternatives:

- Find that the defendant is no longer able to represent himself or herself and appoint counsel.
- Initiate contempt proceedings against the defendant.
- Keep the defendant in the 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 completion of evidentiary and argument phases of Pen C §1538.5 hearing but before announcement of court's ruling). See also *People v Soukomlane* (2008) 162 CA4th 214, 233–235, 75 CR3d 496 (involuntary exclusion from courtroom of defendant representing himself, without other defense counsel present, during part of prosecution's examination of key witness was denial of right to counsel and error).

a. [§54.19] Making Appropriate Record

In order to preserve a chronology of relevant events for possible appellate review, the trial court should document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial. *People v Carson* (2005) 35 C4th 1, 11, 23 CR3d 482. To this end, the court may need to hold a hearing or may want to solicit the parties respective arguments with written points and authorities and any evidentiary support on which they may seek to rely. These measures may be especially important when out-of-court misconduct provided the grounds for termination. Because circumstances will vary with the facts of each case, the appellate court leaves to the trial court's discretion the ultimate decision as to how best to proceed in making an appropriate record. *People v Carson, supra.*

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

- The precise misconduct on which trial court based the decision to terminate;
- How the misconduct threatened to impair the core integrity of the trial;

- Whether the defendant had engaged in antecedent misconduct, and if so, what and why;
- Whether any of the misconduct occurred while the defendant was represented by counsel, and if so, what the relation was to the defendant's self-representation;
- Whether the defendant intentionally sought to disrupt and delay the trial;
- Whether the defendant had been warned that particular misconduct would result in termination of his or her pro per status; and
- The availability and suitability of alternative sanctions.

b. [§54.20] What Does Not Constitute Grounds for Termination

The following do not constitute grounds for denial or termination of a defendant's right to self-representation:

- Defendant stands mute or otherwise elects not to participate actively in his or her defense, unless defendant's conduct is motivated by a desire to disrupt or manipulate the 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 absent himself or herself physically 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 that he would no longer participate in the trial and walked out of courtroom).
- Defendant poses an escape risk and a security risk to persons in the courtroom and is subject to physical restraints. *People v Superior Court* (George) (1994) 24 CA4th 350, 29 CR2d 305.
- The defendant is not fluent in the English language. *People v Poplawski* (1994) 25 CA4th 881, 891 n1, 30 CR2d 760.

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

An erroneous denial of a timely motion for self-representation 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 following reversal, the defendant is not entitled to exclude the testimony of certain witnesses as a remedy for the violation of his or her right to self-representation. *People v Jones* (1998) 66 CA4th 760, 769–770, 78 CR2d 265.

An erroneous denial of an untimely motion for self-representation 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. Substitution of Counsel

1. [§54.22] Substitution of Appointed Counsel

An indigent defendant represented by court-appointed counsel may be entitled to discharge his or her counsel and substitute another appointed counsel if the defendant can show that continued representation by present counsel would substantially impair or deny his or her 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, the defendant initiates a request for substitution of counsel by making a motion in court, commonly known as a *Marsden* motion. Once the defendant makes a *Marsden* motion, the court must hold a hearing to allow the defendant the opportunity to explain the grounds for the motion and to relate specific instances of his or her attorney's inadequate performance. 2 C3d at 124 (denial of motion for substitution of counsel based solely on courtroom observations constitutes abuse of discretion). After the defendant makes his or her claims, the court should ask follow-up questions when further information is needed by the court to assess the merits of the defendant's motion. *People v Miranda* (1987) 44 C3d 57, 77, 241 CR 594. A full hearing is not required when the basis of the defendant's dissatisfaction with counsel is set forth in a letter or hand-written motion of sufficient detail. *People v Terrill* (1979) 98 CA3d 291, 298, 159 CR 360.

The court is not required to appoint independent counsel to assist the defendant in making the *Marsden* motion, but the court has discretion to make such an appointment. *People v Hines* (1997) 15 C4th 997, 1024–1025, 64 CR2d 594. The *Hines* court warned, however, that appointment of independent counsel for purposes of a *Marsden* motion could cause unnecessary delay and may damage the attorney-client relationship in those cases in which the trial court ultimately concludes that the motion should be denied. *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 an asserted irreconcilable conflict, not asserted incompetence of defense counsel).

a. [§54.23] Court's Duty To Conduct Inquiry

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. The defendant is not required to make a proper and formal legal motion. However, there must be at least some clear indication by the defendant, either personally or through defense 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 56.

Statements by the defendant that he or she is dissatisfied 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; *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 that the defendant is dissatisfied with the performance of counsel 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 his desire for substitute counsel, but instead was seeking appointment of separate counsel to prepare a new trial motion based, in part, on incompetence of counsel during guilt phase). 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 the defendant and the attorney. *People v Abilez* (2007) 41 C4th 472, 487–488, 61 CR3d 526.

Although the court is required to inquire into all of a defendant's complaints about his or her 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 as long as the defendant is afforded a later opportunity to articulate his or her yet-unstated complaints. *People v Vera* (2004) 122 CA4th 970, 980–981, 18 CR3d 896.

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

b. [§54.24] Grounds for Substitution

Once the court affords the defendant the opportunity to state the reasons for discharging appointed counsel, the decision to substitute counsel is within the discretion of the court unless the defendant makes a substantial showing that (a) the first appointed attorney is not providing adequate representation, or (b) the 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 the defendant and appointed counsel concerning trial tactics or the 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 whether certain pretrial motions should be filed). However, substitution may be warranted if the disagreement signals a breakdown in the attorney-client relationship of such magnitude as to jeopardize the 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 forwarded as grounds for substitution of counsel must be genuine. A defendant may not manufacture a conflict with counsel in order 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).

The following do not constitute sufficient grounds for substitution of counsel:

- Refusal of defendant to cooperate with appointed counsel or make good faith effort to resolve disagreements with counsel. *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 criminal 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 counsel first conferring with defendant. *People v Avalos* (1984) 37 C3d 216, 231, 207 CR 549.
- Defendant's assertion that he does not relate well to counsel. *People v Silva* (1988) 45 C3d 604, 622, 247 CR 573.
- Defendant's displeasure with the public defender because of dissatisfaction with the performance of defendant's former public defender in a prior 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 the public defender's office has repeatedly failed to investigate defendant's other cases warrants a court inquiry into the basis of the claim).
- Defendant's allegation that counsel believes that the defendant is guilty. *People v Williamson* (1985) 172 CA3d 737, 746, 218 CR 550.
- Defendant's lack of confidence in the performance of appointed counsel. *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 has lied to defendant. *People v McElrath* (1985) 175 CA3d 178, 184, 220 CR 698.

c. Timeliness of Request for Substitution

(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 the commencement of trial, the court has the discretion to deny the request on the ground of untimeliness. *People v Williamson* (1985) 172 CA3d 737, 745, 218 CR 550 (motion made on third day of trial was untimely); *People v Maese* (1980) 105 CA3d 710, 723, 164 CR 710 (motion made hours before cause submitted to jury was untimely);

The court should consider the following in ruling on a request for substitution made during trial:

- Whether the grant of the request would result in an unreasonable "disruption of the orderly processes of justice."
- Whether the defendant has made a "strong showing" of the incompetence of appointed counsel.

- Whether the defendant had opportunities to raise his or her dissatisfaction with counsel at earlier times in the proceedings and failed to do so. *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 not timely made without first allowing the defendant the opportunity to state the reasons for his or her 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 Solorzano* (2005) 126 CA4th 1063, 1068–1069, 24 CR3d 735 (defendant entitled to new trial where trial court denied his motion for substitution of counsel while competency hearing was pending). See also *People v Govea* (2009) 175 CA4th 57, 95 CR3d 511 (trial court erred in not conducting *Marsden* hearing earlier, even though proceedings had been suspended under Pen C §1368; error found harmless when the court conducted the *Marsden* hearing before it decided the issue of 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 confident to stand trial, the court did not err in conducting second *Marsden* hearing immediately after conclusion of competency proceedings and appointing new counsel; disagreement between defense counsel and defendant over competency issues resulted in breakdown in relationship warranting new counsel).

(2) [§54.26] After Trial

A defendant may make a request for substitution of counsel after trial on the ground that the appointed counsel cannot effectively represent him or her, either for the purpose of sentencing or of making a motion to withdraw a plea or a motion for new trial based on ineffective representation. *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 was untimely when defendant waited three to four months after special circumstances retrial to bring motion). The request may be made by defense counsel or by the defendant. *People v Winbush* (1988) 205 CA3d 987, 990, 252 CR 722.

When a criminal defendant indicates after conviction a desire to withdraw his plea on the ground that his current counsel provided

ineffective assistance, the court need only conduct a *Marsden* hearing when there is at least some clear indication by defendant, either personally or through his current counsel, that defendant wants a substitute attorney. If a defendant requests substitute counsel and makes a showing during a *Marsden* hearing that his right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. *People v Sanchez* (2011) 53 C4th 80, 86–90, 133 CR3d 564. In so holding, the California Supreme Court has disapproved of the procedure of appointing a substitute or conflict attorney solely to evaluate a defendant's complaint that defense counsel acted incompetently with respect to advice regarding the entry of a guilty or no contest plea. 53 C4th at 90. The *Sanchez* court viewed the use of such specially appointed counsel as an abandonment by the trial court of its responsibility to hear ineffective assistance of counsel claims and to exercise its discretion to determine whether substitute counsel should be appointed. The *Sanchez* holding is applicable to cases involving new trial motions. Notably, the *Sanchez* court referred to both new trial and plea withdrawal motions when admonishing the courts to abandon the practice of appointing conflict counsel rather than holding a *Marsden* hearing. 53 C4th at 89.

d. [§54.27] Exclusion of Prosecutor From Hearing

Although the court is not required to exclude the prosecutor from a *Marsden* hearing, the court should exercise its discretion and exclude the prosecutor when the defendant or defense counsel makes a timely request to do so. *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 from the court.

Disclosures by the defendant contained in the transcript cannot be later used against the defendant, whether the transcript is sealed or unsealed. *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 Defense Counsel

Depending on the nature of the defendant's complaints, it may be necessary for the court to question defense counsel. The court must inquire into counsel's state of mind in those situations when a satisfactory explanation for counsel's conduct or attitude toward the defendant is necessary to determine whether 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 defendant). The court is not required to question counsel when the defendant disagrees with the trial preparation and strategy adopted by his or her counsel. *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: It is common practice of most courts to require defense counsel to respond to and comment on each allegation made by the defendant. In addition, courts routinely ask defense counsel to describe the work that has been done on the case by counsel, other attorneys in his or her office, and paralegals and investigators.

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

f. [§54.29] Failure To Hear Request for Substitution of Appointed Counsel

The trial court's failure to hear a defendant's request for substitution of appointed counsel is treated as prejudicial per se error. *People v Hill* (1983) 148 CA3d 744, 755, 196 CR 382. 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, the trial court must appoint new counsel and set the case for retrial. If good cause is not shown, the verdict against the 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] Substitution of Appointed Counsel for Retained Counsel

A defendant who becomes indigent and desires to discharge his or her retained counsel and obtain appointed counsel is not required to demonstrate inadequate representation by his or her retained counsel, or to 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. The court must grant a motion for substitution of appointed counsel for retained counsel unless:

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

(2) It will result in significant prejudice to the defendant (*e.g.*, forcing the 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 the defendant's request, hold a *Marsden* hearing to allow the defendant to explain why he or she believes the appointment will impair his or her 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 the 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] Substitution of Retained Counsel for Appointed Counsel

One element of a defendant's right to counsel is the right of a defendant to choose his or her own 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 his or her right to substitute retained for appointed counsel only if it will result in significant prejudice to defendant (*People v Ramirez* (2006) 39 C4th 398, 422, 46 CR3d 677) or an unreasonable disruption of the criminal proceedings. *People v Courts* (1985) 37 C3d 784, 794, 210 CR 193.

In such a case, the court must ensure that defendant is fully informed of his proposed counsel's qualifications and any other relevant factors so that he or she may make the decision knowingly and intelligently. *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 he or she wishes. *People v Ramirez, supra,* 39 C4th at 421–422.

The court must grant a defendant's request to discharge appointed counsel and to retain private counsel if the defendant makes a diligent effort to secure private counsel before the trial date and apprises the court of his or her wishes at the earliest possible time. *People v Courts, supra,* 37 C3d at 794 (court erred in denying request for substitution when first request made eight days before trial and defendant's chosen counsel attempted to calendar a request for continuance five days before trial). See also *People v Trapps* (1984) 158 CA3d 265, 271, 204 CR 541 (court erred in denying posttrial request for substitution when sentencing had already been delayed three 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] Removal of Counsel Initiated by Court

Removal of counsel may be initiated not only by a request from counsel or the defendant, but also by the court on its own motion. *People v McKenzie* (1983) 34 C3d 616, 629, 194 CR 462. The court has discretion to remove retained or court-appointed counsel on its own motion, even over the objections of a defendant or defense counsel, when removal is necessary to prevent (a) significant prejudice to the 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. The following have been found to constitute grounds for court removal of counsel:

- Refusal by counsel 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.
- Refusal by counsel to assure the court that he would be ready for trial, accompanied by counsel's 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 subsequent failure to justify request for a 13-week continuance or assure readiness for trial at the end of the 13-week period. *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 a lingering physical ailment that was the cause of numerous delays in the first trial. *Maniscalco v Superior Court* (1991) 234 CA3d 846, 285 CR 795.
- Counsel's inability to be ready for trial for at least four 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 an ex parte proceeding without notice to the prosecutor and the prosecutor promptly informed the court of his or her intention to call that attorney as a prosecution witness. *People v Daniels* (1991) 52 C3d 815, 846, 277 CR 122.
- Appointed counsel's previous representation of a 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 whom the defense suspected of committing the crime of which the 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 of counsel. *Smith v Superior Court*, *supra*, 68 C2d at 562 (court abused its discretion in removing counsel in a murder case because counsel had not previously tried a death penalty case). If it appears to the court that counsel is making serious mistakes to his or her client's prejudice, the court should intervene in the proceedings, within

reasonable limits, to ensure that the defendant receives a fair trial (*e.g.*, disallowing pleas, controlling scope of examination, commenting on the evidence). *People v Escarcega* (1986) 186 CA3d 379, 398, 230 CR 638. In addition, the court may advise the defendant of its concerns about defense 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 of counsel over the defendant's informed objection. When the possibility of conflict has been brought to the court's attention and that conflict has been disclosed to the defendant, the defendant may waive the conflict and insist on retaining his or her 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 the objection of an informed defendant, if necessary to ensure fairness and preserve the credibility of its judgments. 30 C3d at 619 n10. For more discussion of conflicts of interest, 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 set by the court, and counsel made representations that he or she would be ready to proceed with the hearing or trial within the statutory time limits at the time of his or her appointment, the court may remove counsel and impose sanctions unless counsel shows good cause for his or her lack of preparedness. Pen C §987.05.

C. [§54.33] Appointment of 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 the preparation and presentation of the case. The granting of a request for second counsel is solely within the discretion of the court. *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 the defendant can factually establish a genuine need for the appointment of co-counsel, 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 consisted of little more than bare assertion that second counsel was necessary). The decision of whom to appoint as 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 must be supported by an affidavit, which is confidential and privileged, stating in detail the reasons why a second attorney should be appointed. Pen C §987(d). The court must appoint a

second attorney if it is convinced by the reasons contained in the affidavit that the appointment is necessary to provide the defendant with effective representation. Pen C §987(d). If the court denies the request for additional counsel, it must state its reasons for denial on the record. Pen C §987(d).

The court should consider the following factors in deciding whether to grant a request for a second attorney:

- The complexity of the legal and factual issues of the case;
- Whether the defendant is charged with other crimes;
- The number of witnesses;
- Whether complicated scientific or psychiatric testimony is anticipated;
- Whether extensive pretrial motions are anticipated; and
- The period of time between the appointment of first counsel and the trial date. *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 the defendant makes a factual showing that the appointment is necessary to the defendant's defense. *Seaman v Superior Court* (1987) 193 CA3d 1279, 1287, 238 CR 878 (court did not abuse discretion in denying request for co-counsel when required affidavit was not filed and unsupported allegations in the request did not meet requisite showing of need).

The following do not provide grounds for the appointment of additional counsel:

- Abstract assertion that consolidation of robbery charges with capital charges inherently imposes an undue burden on defense counsel. *People v Lucky* (1988) 45 C3d 259, 280, 247 CR 1.
- Statement that case is more complex than first anticipated absent facts substantiating that claim. *Seaman v Superior Court*, *supra*, 193 CA3d at 1289. See also *People v Roldan*, *supra*, 35 C4th at 687–688 (defense 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 to proceed without co-counsel).
- Fact that defense counsel has not tried a death penalty case absent some 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. However, pro per defendants may be entitled to the services of appointed advisory counsel or personally serve as co-counsel. See §54.15 for discussion of appointment of advisory counsel, and §54.34 for discussion of 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 the phrase "capital case," as used in Pen C §987.9 (funding of ancillary services in capital cases), to mean only those cases in which the prosecutor would seek the death penalty).

D. [§54.34] Defendant's Request for Co-Counsel Status

Although a defendant represented by counsel has no constitutional right to act as co-counsel, the court has the discretion to grant the defendant co-counsel status. However, such an arrangement is sharply limited and should be considered only if (1) the 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 a defendant's request solely on a finding that defense 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 the facts of his case without considering whether justice would be served or whether delay would result).

The required showing was not established in the following cases:

- Defendant's concern that his counsel would need assistance when 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 counsel 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 expertise in accounting would result in more thorough cross-examination of witness when case involved simple accounting procedures that were easily understandable by defense 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 problems of being co-counsel. *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 the defendant from taking actions that may seriously harm the defense. *People v Jones, supra.* However, if the court anticipates that the defendant is going to play a dominant role in the presentation of the defense, it should advise the 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, the roles of the defendant and defense counsel may change, and the defendant may take control of the defense and relieve his or her counsel of major responsibilities.

E. [§54.35] Withdrawal of Counsel

Counsel of record may withdraw from a case if the defendant and counsel mutually consent to the withdrawal, or the court orders the withdrawal on application of either party. CCP §284; *Mandell v Superior Court* (1977) 67 CA3d 1, 4, 136 CR 354 (CCP §284 is applicable to criminal proceedings). Counsel may not abandon representation of the defendant at will or for personal considerations. Counsel must continue representation until released by the 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 his motion to withdraw his guilty plea, and in requesting appointment of another attorney; counsel's failure to suggest legal or tactical reasons why the motion should not be made was conduct consistent with an attempt to withdraw on ethical grounds and to provide for the defendant's ongoing representation).

The granting or denying of a request to withdraw lies within the discretion of the court. *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 demonstrates good cause for the withdrawal. *People v Cohen* (1976) 59 CA3d 241, 249, 130 CR 656. A total breakdown in the relationship between the defendant and counsel may provide 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 with the defendant if counsel is unable to disclose the details of the conflict without violating the 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 proper fees or expenses of the attorney after being reasonably requested to do so will furnish grounds for the attorney to withdraw from the case. *Lempert v Superior Court*, *supra.*

If counsel's request to withdraw is based on a defendant's intent to give perjured testimony, the court has the discretion to deny the request unless the disagreement between the defendant and counsel over the defendant's right to testify 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 has the discretion to deny counsel's request to withdraw if the withdrawal would work an injustice or cause undue delay in 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 after 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 was made before case was set for trial and no showing that withdrawal prejudiced defendant, prosecution, or smooth process of justice); Cal Rules of Prof Cond 3–700(A)(2) (counsel must take reasonable steps to avoid foreseeable prejudice to rights of defendant before withdrawing).

Counsel at the preliminary hearing must continue to represent a defendant who has been ordered to stand trial for a felony until the date set for arraignment on the information unless the court relieves counsel on the substitution of other counsel or for cause. Withdrawal by mutual consent of the defendant and counsel is not effective under these circumstances. Pen C §987.1.

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

A defendant may forfeit the right to counsel if he or she engages in serious misconduct that is unprovoked and intended to cause counsel to withdraw and to delay or disrupt proceedings. *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 defendant's misconduct. For example, a defendant may be physically restrained in the courtroom and during any

meeting between the defendant and the attorney, or noncontact meetings may be arranged. *King v Superior Court, supra*. Only in those rare cases where measures to control the defendant are inadequate or futile may the right to counsel be forfeited. *King v Superior Court, supra*.

The *King* case advised that a court take the following steps before determining whether a 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 will have to proceed pro se;
- Conduct a colloquy in which the defendant is made aware of dangers of self-representation;
- Make a clear ruling of forfeiture; and
- Provide factual findings to support the ruling.

A proceeding for forfeiture of counsel calls for constitutionally mandated procedural protections, including a right to a hearing. At the hearing the defendant has the right to be present if he or she is not disruptive, the right to assistance of counsel, the right to produce evidence and cross-examine witnesses. 107 CA4th at 946–947. The court should exclude the prosecutor from the hearing when attorney-client confidences are involved. However, a redacted transcript of the hearing may be released to the prosecution and may serve as the basis of additional charges. 107 CA4th at 947–948. The defendant is not entitled to immunity for other criminal conduct about which the defendant testifies at the forfeiture hearing. The court must set forth its factual findings in the record of the hearing, and any facts supporting forfeiture must be found 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	*Reserved for Clerk's File Stamp*	
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: ☐

   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. ☐

   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. ☐

   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. ☐

   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. ☐

   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. ☐

   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. ☐

   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. ☐

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 ☐

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

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.

Language: ☐ Spanish ☐ Other (specify) _____

Dated: _____ Signed:_____
Court Interpreter

_____
Type or Print Name

The court finds that the defendant has been advise 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 of the fact 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 of the fact 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: Grant of 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: Denial of 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: Grant of 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: Denial of 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 2012).

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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