From Hon. Jacqueline Connor (ret.)

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HANDLE PRO PERS JUST LIKE A PRO

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Defendants in criminal cases have the constitutional right to represent themselves. Administering defendants' rights to proceed in pro per is a complicated job that every bench officer and attorney handling criminal cases must know about.

The objective of this article and self-study test is to educate readers about defendants' rights to represent themselves. Readers will learn about the origin of the right, its invocation and its important limits, including the timeliness of its invocation and the defendant's ability to follow protocol. Readers will also learn about courts' duties regarding appointing advisory, stand-by and co-counsel for pro per defendants.

Origin of the Right

A defendant's right to represent himself or herself in a criminal proceeding is the flip side of the right to counsel. *Gideon v. Wainright*, 372 U.S. 335 (1963), firmly established that an indigent defendant has the right to have an attorney appointed to assist him in court. Since a defendant has the right to counsel, it follows that the defendant must be given the right to waive counsel and proceed in propria persona, and that is precisely what the U.S. Supreme Court held in *Faretta v. California*, 422 U.S. 806 (1975).

The right to self-representation exists regardless of the seriousness of a case. *People v. Blair*, 36 Cal.4th 686 (2005). The right must be respected even in a death penalty case where the reason the defendant is invoking the right is to get jurors to impose death.*People v. Bradford*, 15 Cal.4th 1229 (1997).

However, the right to proceed in pro per is not unlimited. For example, the right does not apply in appellate proceedings. *People v. Scott*, 64 Cal.App.4th 550 (1998). More importantly, judges recognize that self-represented defendants are at an extreme disadvantage in court and often will wind up with far worse results than defendants who have lawyers. Judges must alert defendants to these disadvantages prior to conferring pro per status.

The California Supreme Court in *People v. Lawley*, 27 Cal.4th 102 (2002), suggested that defendants be advised, among other things, that:

Self-representation is almost always unwise and that the defense may be conducted to the pro per's detriment; a pro per is entitled to no special indulgence from the court and must follow all technical rules of substantive law, procedure and evidence in making motions, presenting evidence, conducting voir dire and argument; and the prosecution will be represented by experienced, professional counsel who will give no quarter for the defendant's lack of skills or experience, and the case will not be a fair fight.

Invoking the Right

Given the vast disadvantages to the defendant of proceeding in pro per, courts will draw every reasonable inference against the waiver of the right to counsel. *People v. Dunkle*, 36 Cal.4th 861 (2005). A judge must be convinced that the waiver and invocation of the right to proceed pro per is unconditional and not a vehicle for manipulation or abuse.*People v. Dent*, 30 Cal.4th 213 (2003).

Courts commonly have defendants fill out forms that explain the perils of self-representation. These waiver forms, however, are not tests, and the inability of a defendant to understand every matter on a form does not indicate the absence of a knowing waiver. *People v. Silfa*, 88 Cal.App.4th 1311 (2001). The court is not required to inquire about knowledge of penal consequences, as established in *People v. Harboldt*, 206 Cal.App.3d 140 (1988); nor is the court required to query the pro per about blanks left in advisory forms or to determine if the defendant understands the limitations on his ability to investigate or arrange for witnesses or experts. *People v. Jenkins*, 22 Cal.4th 900 (2000).

The key question is whether the record as a whole shows defendant understood the disadvantages, risks and complexities of the particular case. *People v. Marshall*, 15 Cal.4th 1 (1997). Where the record reflects a voluntary waiver, the absence of an advisement is error, but it will be measured by the harmless-error test on appeal. *People v. Wilder*, 35 Cal.App.4th 489 (1995). According to *Harboldt*, the burden on appeal is on the defendant to show that the waivers were not intelligent or voluntary.

The defendant's request for pro per status must also be unequivocal. This rule "is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation."*People v. Roldan*, 35 Cal.4th 646 (2005). According to the court in *Marshall*. motion made out of temporary whim, annoyance, disappointment or frustration is not unequivocal.

Timeliness

Great abuse is possible without a temporal limit on invoking the right to proceed pro per. Witnesses, jurors and attorneys can be greatly inconvenienced when defendants are allowed to represent themselves at the last minute.

The critical issue to be determined in assessing the timeliness of a request for self-representation is the extent to which proceedings will be unduly delayed by the request. When a request is made well in advance of trial, it will generally be timely. See *People v. Valdez*, 32 Cal.4th 73 (2004). On the other hand, if the defendant asserts the right to be pro per within a few days or on the day of trial, and also requests a continuance of the trial in order to prepare, the request for self-representation is untimely and may be properly denied. *People v. Hill*, 148 Cal.App.3d 744 (1983).

Even when untimely, a court must inquire into the reasons for the request, with factors to be considered being the quality of representation by counsel, the defendant's prior proclivity for substitution, the reasons for the request, the length of the proceedings and the disruption caused should the motion be granted. *People v. Clark*, 3 Cal.4th 41 (1992).

A judge can properly condition a request to proceed in pro per upon the defendant being ready to proceed to trial. *People v. Rudd*, 63 Cal.App.4th 620 (1998). If pro per status is granted without any reference to the need for a continuance, a denial of a subsequent request for a continuance would likely be error, and, in any event, would not be valid grounds for revoking pro per status. *People v. Sherrod*, 59 Cal.App.4th 1168 (1997).

Defendants are almost never allowed to proceed in pro per once a trial has started, even if no continuance is requested. See *People v. Bradford*, 15 Cal.4th 1229 (1997). This is also true of requests to go pro per upon conclusion of one phase of a trial, such as after a guilty verdict but before the trial on priors. *People v. Givan*, 4 Cal.App.4th 1107 (1992).

Following Protocol

Despite the right to self-representation, courts "are not required to place their dockets and courtrooms at the mercy of obstreperous and unruly defendants with long track records of disruptive behavior." *People v. Howze*, 85 Cal.App.4th 1380 (2001). A defendant's inability to follow basic rules of court decorum and protocol is a valid basis for denying pro per status.

Inability to follow rules can be manifested in extreme cases such as *Howze* by a defendant fighting with deputies, acting as if he was being attacked by imaginary "bugs" and claiming to be possessed by different people. Likewise, in *People v. Welch*, 20 Cal.4th 701 (1999), the trial court properly denied pro per status based on the disruptiveness of the defendant, who denied awareness of court proceedings, turned his back to the court when being addressed, interrupted the court to argue, accused the court of misleading him and refusing to be quiet.

Inability to follow rules can also justify denial of pro per status in milder settings. For example, in *Rudd*, the judge was held to have correctly revoked the pro per status of a defendant who failed to abide by the protocol of the court by claiming not to be ready for trial, after having been granted pro per status on the failed promise that he would be ready.

The inability need not be intentional. The U.S. Supreme Court has held that a defendant's mental problems need not rise to the level where he or she is incompetent to stand trial in order to disallow self-representation. *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), held that the right to self-representation in Faretta does not bar states from insisting on representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Advisory, Stand-By and Co-Counsel

The California Supreme Court in Blair found that a criminal defendant does not have a right to simultaneous self-representation and representation by counsel. None of the "hybrid" forms of representation, such as co-counsel, advisory counsel or standby counsel are constitutionally guaranteed: They are within the discretion of the court. See*People v. Miranda*, 44 Cal.3d 57 (1987).

A pro-per defendant granted co-counsel status agrees to relinquish some control over a case. The attorney

retains control over the case and can prevent the defendant from taking actions "detrimental to the defense." *People v. McArthur*, 11 Cal.App.4th 619 (1992). Delineating precisely where the pro per's rights end and the attorney's begin can become extremely complicated. See *People v. Stansbury*, 4 Cal.4th 1017 (1993). Not surprisingly, co-counsel status is rarely granted, is generally undesirable and is only appropriate on a substantial showing it will promote justice and judicial efficiency. *People v. Frierson*, 53 Cal.3d 730 (1991).

Blair also concluded that advisory counsel's role is to assist a pro per defendant if and when help is requested. It is error to summarily deny the request. *People v. Bigelow*, 37 Cal.3d 731 (1984). Instead, the judge must consider the complexity of the case, the defendant's education and training, the defendant's competence and the defendant's record of manipulation. *People v. Clark*, 3 Cal.4th 41 (1992).

This is a case-specific inquiry. For example, in *Bigelow*, the California Supreme Court held it would have been an abuse of discretion to fail to appoint advisory counsel as requested by a pro per defendant where the defendant had a fourth-grade education and was facing the death penalty and four special circumstances. In contrast, no error was found in failing to appoint advisory counsel in a single special circumstance murder case where the defendant had an 11th-grade education in *People v. Crandell*, 46 Cal.3d 833 (1988).

Stand-by counsel is commonly appointed by a judge, even over a defendant's objection. Stand-by counsel does not represent the defendant, but stands ready to take over should the occasion arise. *Littlefield v. Superior Court*, 18 Cal.App.4th 856 (1993). This appointment is highly useful to minimize possible disruptions in a trial.

When stand-by counsel is appointed, the defendant should be advised that the attorney will sit in court, that there will not be any 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.

Despite its advantages of having stand-by counsel, the defendant must understand that it is an imperfect safety net. A defendant should be advised that, in the event of termination of pro per status, stand-by counsel will not be given a continuance and that the defendant, due to his own behavior, will be placing himself at a disadvantage that will not be recognized on appeal. *People v. Davis*, 189 Cal.App.3d 1177 (1987).

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