

# Superior Court of California

## County of Sacramento

### Local Rules

#### **Proposed Amendment to Chapter 4, Part Three**

##### Rule 4.44 (New): Guidelines for Appointment of Counsel

a) Pursuant to Probate Code Section 1471, the court shall make a determination of whether appointment of counsel is necessary to protect the interests of the conservatee or proposed conservatee. In making such a determination, the court shall consider: 1) the right of the conservatee or proposed conservatee to effective communication and meaningful participation in the proceeding as guaranteed by state and federal disability nondiscrimination laws; and 2) the obligations of the court to provide accommodations or modifications for known or perceived disabilities in order to ensure access to justice in a conservatorship proceeding.

b) If counsel is not appointed, the court shall make a determination, on the record, that the actual or perceived disability of the conservatee or proposed conservatee will not prevent effective self representation.

c) In fulfilling its obligations under Section 1471, the court shall be mindful of: (1) the obligations of public entities under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Government Code Section 11135, Welfare and Institutions Code Section 4502, and; (2) the access rights for persons with developmental disabilities as specified in Section 50510 of Title 17 of the California Code of Regulations.

#### Commentary

##### Authority for Local Rules

Trial courts possess inherent rulemaking authority. (Elkins v. Superior Court (2007) 41 Cal.4th 1337) Courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent authority to control pending litigation. That inherent power authorizes the superior court to exercise reasonable control over all proceedings connected with such litigation in order to insure the orderly administration of justice. (Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 967)

The Sacramento Superior Court recognizes its authority to adopt local rules of court. In fact, it has adopted an extensive set of rules governing a variety of court proceedings, including proceedings under the probate code. (<https://www.saccourt.ca.gov/local-rules/docs/local-rules-2017.pdf>) It has also exercised its rulemaking authority on a variety of subjects, including the adoption of local rules

regarding the appointment of counsel. (Rule 8.09) Therefore, the court has authority to adopt local rules regarding the appointment of counsel in probate conservatorship cases, so long as those rules are not inconsistent with state statutes or binding appellate rulings.

Guidelines for the appointment of counsel in other civil law contexts have been provided by local court rules. (In re Jesse C. (1999) 71 Cal.App.4th 1481) For example, a local court rule adopted by the Los Angeles Superior Court for child dependency proceedings states: "At the arraignment and detention hearing, the court shall determine whether a child would benefit from the appointment of counsel. A child four years of age or older, or a child of any age with special needs, or a child who is in an out-of-home placement with a non-relative caretaker, will generally benefit from the appointment of counsel." (Super.Ct. L.A. County Rules, rule 16(b)) "Such appointment shall be made as soon in the dependency case as it is determined that the child would benefit from such counsel."

Just as the Los Angeles Superior Court has acknowledged, by local rule, that children with "special needs" will generally benefit from the appointment of counsel, the Sacramento Superior Court should adopt a rule specifying that adults with significant cognitive and communication disabilities – disabilities known to the court for conservatees and proposed conservatees – are likely to benefit by having counsel appointed to protect their interests.

Local judges will benefit from having guidelines to assist them in the process of evaluating whether appointment of counsel is necessary to protect the interests of a conservatee or proposed conservatee. As the next section of this commentary explains, guidelines for appointment of counsel versus self representation can be gleaned from judicial precedents in other litigation contexts.

### Disability and Self Representation

The United States Supreme Court has recognized that in criminal proceedings there is a class of litigants who are competent enough to stand trial but who have mental disabilities of such a magnitude that "they are not competent to conduct trial proceedings by themselves." (Indiana v. Edwards (2008) 554 U.S. 164, 177-178) The court referred to litigants with such disabilities as "gray area defendants." (Id, at p. 174)

Several years after Edwards was decided, the California Supreme Court adopted a legal standard for courts to use when deciding whether to allow a mentally disabled defendant to represent himself or herself at trial rather than having counsel appointed to provide advocacy and defense services. (People v. Johnson (2012) 53 Cal.4th 519) Looking to Edwards for guidance, the court observed that competence to represent oneself at trial requires that a defendant has the ability "to carry out the basic tasks needed to present [one's] own defense without the help of counsel." Self representation may be denied in favor of appointed counsel for defendants who "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (Id, at p. 530)

The court in Johnson clarified: "[P]ending further guidance from the high court, we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel."

If a court has doubts about a defendant's mental competence, it may consider a variety of factors as it weighs whether to allow self representation or to appoint counsel instead. These factors were elaborated in law review articles which the court found instructive and helpful in this context. The court stated: "The discussion in *People v. Burnett*, supra, 188 Cal.App.3d at page 1327, 234 Cal.Rptr. 67, and the standards suggested in the two law review articles quoted above are helpful to the extent they suggest relevant factors to consider." (Ibid.) Trial courts called on to make such decisions may consider these factors in their analysis.

Burnett set forth a test for the minimal "cognitive and communication skills" necessary for self representation. (*People v. Burnett* (1987) 188 Cal.App.3d 1314, 1327) "Such skills are present where the accused: (1) possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any; (2) is able to understand and use relevant information rationally in order to fashion a response to the charges; and (3) can coherently communicate that response to the trier of fact." (Ibid.)

One of the law review articles suggests that a defendant should not be allowed self representation if "a mental disorder or disability would prevent the defendant from achieving a basic understanding of the charges, law, and evidence, from formulating simple defense strategies and tactics, or from communicating with the witnesses, the court, the prosecutor, and the jury in a manner calculated to implement those strategies and tactics in at least a rudimentary manner." (Johnson, supra, at p. 529)

Although *Edwards* involved a criminal case, as did *Johnson*, other courts have applied a similar rationale to evaluate self representation in other contexts where significant liberties are placed at risk. For example, the Wisconsin Court of Appeal explained the self-representation competency standards that should be used before a court allows a parent to represent himself or herself in a proceeding to terminate parental rights – a proceeding where due process procedural protections apply. (In re *Parental Rights to Sophia S* (Wis. Ct. App. 2006) 715 N.W.2d 692)

The court stated: "The determination of self-representation competency requires an assessment of whether a person is able to provide himself or herself with 'meaningful' self-representation." In making this determination, courts must focus on "the practical ability to make arguments, present evidence, and ask effective questions." This includes the ability to communicate effectively, and to challenge the other side to meet its burden of proof. In making this evaluation, the court should consider a litigant's physical disabilities, psychological disabilities, and mental illness, if any.

According to the decision in *Sophia S.*, the key issue is whether the record shows an identifiable problem or disability that may prevent meaningful self representation.

It is noteworthy that the factors identified in *Edwards*, *Johnson*, and *Sophia S.* are remarkably similar to the requirements of Title II of the Americans with Disabilities Act which requires a court to ensure that a person with a known disability that may impair participation in a legal proceeding is given appropriate accommodations designed to ensure effective communication and meaningful participation in the proceeding. Because of this similarity, these precedents are relevant to an analysis by California courts as to whether to appoint counsel as a necessary accommodation or to allow conservatees or proposed conservatees to represent themselves.

Title II of the ADA and its state counterpart (Govt. Code § 11135) require a public entity to ensure that litigants in legal proceedings – regardless of whether they are labeled criminal, civil, probate, family, juvenile, or otherwise – to have effective communication and meaningful participation in the litigation. When a known disability raises a question as to whether such communication and participation will occur without the assistance of counsel, the court has an obligation to inquire further. As Probate Code Section 1171 mandates, the court shall appoint counsel if information from *any source* comes to its attention indicating that appointment of counsel is necessary to protect the interests of the conservatee or proposed conservatee.

The problem in conservatorship proceedings in the Sacramento Superior Court, and many superior courts in other parts of the state, is that despite having actual knowledge that litigants have significant cognitive and communication disabilities, judges are allowing many conservatees and proposed conservatees to represent themselves without conducting any inquiry as to their competence to do so. Allowing such litigants to proceed to judgment without the assistance of counsel, and without such an inquiry, violates their due process right to “access to the courts” as well as their ADA rights to effective communication and meaningful participation in the proceeding.

To comply with Title II of the ADA, a public entity has duty to take affirmative steps to ensure effective communication and meaningful participation in legal proceedings. (Clark v. State (N.D. Cal. 2010) 739 F.Supp. 2d 1168, 1179-1180) State courts are public entities that must comply with the ADA by ensuring meaningful access to legal proceedings. (Tennessee v. Lane (2004) 541 U.S. 509)

In making a determination as to whether the appointment of counsel is necessary to protect the interests of a conservatee or proposed conservatee, the court must take into account a litigant’s right to effective communication and meaningful participation as those rights are protected by the ADA and the state-law equivalent in Government Code Section 11135. A new local rule that provides guidance to judges on this subject would be appropriate. In view of the significant number of litigants with major cognitive and communication disabilities who are allowed to represent themselves in probate conservatorship proceedings, such a rule also appears to be necessary.

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