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Pro Se Defendants and Advisory Counsel

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PRO SE DEFENDANTS AND ADVISORY COUNSEL

In 1975 the United States Supreme Court in *Faretta v. California* held that implied in the sixth amendment is a constitutional right to represent oneself in criminal trials.[1] Recognition of the right was not startling. It was already protected in federal courts by statute[2] and in most states by constitutional provision.[3] Nevertheless, *pro se* defendants have long created problems for courts and constitutional recognition of the right complicates matters further by allowing *pro se* representation to compete with constitutional rights to the assistance of counsel and the right to a fair trial. One tool courts have used to try to resolve these competing considerations has been "standby" or "advisory" counsel. Unfortunately, the attorney who finds himself cast in this role has few guidelines to follow. Even though appellate courts comment approvingly on a trial judge's appointment of advisory counsel, rarely do they comment on the role itself.

This comment will discuss a variety of matters regarding the rights of the *pro se* defendant and the consequences of his choosing self representation. Two areas derive from the recent Wyoming Supreme Court case *Irvin v. State.*[4] The discussion will examine the status of the *pro se* defendant in order to present an analysis of the context in which standby or advisory counsel operates so that both a general perspective and some particular suggestions can be presented for the attorney who is appointed to act in that capacity. Since there is little law governing his actions, only by understanding the context in which he operates can advisory counsel properly perform his role. The context to be presented consists of two areas. The first, is that the right to appear *pro se* as recognized in *Faretta* often conflicts with the defendant's need for an attorney in order to have a fair trial which was the rationale for extending the right to counsel.[5] The second area encompasses a variety of considerations concerning the status and rights of a *pro se* defendant such as; rules govern-

1. Faretta v. California, 422 U.S. 806 (1975) [hereinafter cited as Faretta].
2. 28 U.S.C. § 1654 (1970).
3. A list can be found in Faretta at 813-14.
4. Irvin v. State, 584 P.2d 1068 (Wyo. 1978).
5. The right to counsel was gradually expanded over many years in a long line of cases. *See,* Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright, 372 U.S. 335 (1963); and Argersinger v. Hamlin, 407 U.S. 25 (1972).

ing his appearance, waiver of counsel, his standard of competency, and his rights to have access to legal materials and time to prepare his case.

I. DISTINCTIONS AS TO THE ROLES OF COUNSEL

"Standby," "advisory," and "co-counsel" are terms which have been used by courts to describe attorneys who have been appointed to perform various duties in regard to *pro se* defendants. However, at present there is little consistency of usage among jurisdictions. For the purposes of this paper and to encourage consistent usage it is important to distinguish these terms at the outset. They designate three different roles in which an attorney, either by choice or judicial appointment, may be cast because a defendant wishes to appear in court on his own behalf. Each raises questions as to the proper attorney-client relationship and the activities the attorney should or should not undertake in the judicial proceedings in which the defendant is involved.

Standby counsel: Specifically "standby counsel" designates an attorney who is instructed by a judge to attend or remain at trial as a spectator to the proceedings, but who will be ordered to take over the defense if the judge should need to remove the defendant from *pro se* status. The use of standby counsel arises from *Illinois v. Allen.*[6] Although the issue in that case was the right of a defendant to be present at trial and confront witnesses, the defendant had appeared *pro se,* became disruptive and abusive during trial, was removed, and later returned with counsel taking over the defense. When the defendant again became disruptive he was removed from the courtroom for the remainder of the trial. As in *Allen* the most frequent reason for removing a *pro se* defendant is that he has become disruptive either as a deliberate tactic intended to create a mistrial or from the frustrations of trying to perform as an attorney without having had the training of one. A court's intention in appointing standby counsel is that a mistrial, and the subsequent time and expense of a new trial, be avoided by having an attorney present who is prepared to take over the defense. The procedure in *Allen* was approved by the Supreme Court in *Faretta.*[7]

6. Illinois v. Allen, 397 U.S. 25 (1970).
7. Faretta at 834, n. 46.

Advisory counsel: As the term itself suggests, advisory counsel assists a *pro se* defendant in preparing for trial and appears in court, usually at the defense table, ready to answer the defendant's questions as to procedure and strategy and to offer advice. Most courts appointing "standby" counsel intend for the attorney to play both standby and advisory roles.[8] This dual role is consistent with the majority view voiced in *Faretta:*

> Of course, a State may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self representation is necessary.[9]

The American Bar Association's *Standards Relating to the Function of the Trial Judge,* also discusses the use of "standby" counsel. However, given the constitutional status of the right to appear *pro se,* it may contemplate too much.

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion.[10]

While a court may, under any circumstances, appoint advisory counsel and order him to assist the defendant *if the defendant so requests,* counsel's presence at the defense table and his activity in court may be matters beyond the control of the court. The right to appear *pro se* as sanctioned by *Faretta* may include the defendant's right to appear in court as one defending himself, a right which would be infringed if counsel were present or played an active role contrary the defendant's wishes.[11] Of course, if the defendant did not object to counsel's presence, there would be no

8. *E.g.,* United States v. Corrigan, 401 F. Supp. 795, 800 (D. Wyo. 1975).
9. Faretta at 834, n. 46.
10. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, 6.7 (1972).
11. United States v. Dougherty, 154 App. D.C. 76, 473 F.2d 1113, 1125 (1972).

ground upon which to later base a claim. Court directed activity by the attorney such as calling the judge's attention to matters, could constitute an even more serious infringement of the right.

Similarly, Chief Justice Burger's view in *Mayberry v. Pennsylvania*[12] may no longer be applicable given *Faretta.* In a concurring opinion he advised trial judges faced with defendants who refused counsel or wished to discharge their attorneys to appoint "standby" counsel "to perform all the services a trained advocate would perform ordinarily by examination and cross examination of witnesses, objecting to evidence and making closing argument."[13] The Chief Justice's concern was that the integrity of the judicial process be protected. Because a criminal trial involves the public interest in the integrity of the judicial system, he said, "the presence and participation of counsel" was justified "to vindicate the process itself."[14] Although there are circumstances under which the activities listed by the Chief Justice might be performed by advisory counsel, for a court to require that they be performed would effectively make the right to self-representation an empty right.

Chief Justice Burger dissented in *Faretta.* In addition to presenting his disagreements with the analysis of the majority, his dissent is concerned with the problem of insuring that *pro se* defendants receive fair trials and the consequential damage to the integrity of the judicial system if they do not.[15]

Co-counsel: On occasion a defendant will request that the court appoint him as co-counsel. If granted, his attorney then becomes co-counsel with the defendant. The request may be for one of two purposes. First, the defendant may wish to play an active role in the entire trial, acting as a part of the defense "team". This occurs most frequently in "political" trials and the most noteworthy case was that of Angela Davis.[16] More frequently, the defendant requests co-

12. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).
13. *Id.* at 468.
14. *Id.* at 468.
15. Faretta at 838-39 (dissenting opinion).
16. *See,* Note, *Self Representation in Criminal Trials: The Dilemma of the Pro Se Defendant,* 59 CAL. L. REV. 1479, 1498-1507 (1971); *cf.* United States v. Swinton, 400 F. Supp. 805 (D.C.S.D.N.Y. 1975).

counsel status for a specific purpose. That is, he wishes his attorney to represent him, but there is a specific task he wishes to perform either by himself or in addition to his attorney such as questioning witnesses or addressing the jury.

Prior to *Faretta* the rule governing such requests, even in jurisdictions which recognized the right to appear pro se, was that there is no right to "hybrid" representation.[17] Since *Faretta* most courts considering the matter have retained the rule.[18] Support for the rule lies in practical considerations but the reasoning of *Faretta* at least suggests an alternate view. Courts are disinclined to allow "hybrid" representation because they see it as introducing inefficiency, if not chaos, into trial proceedings which should be orderly. The fear is well based. Most trial judges are already all too familiar with the problems posed by defendants who disagree with the tactics chosen by their attorney, particularly their court appointed attorney.[19] Nevertheless, since both the right to counsel and the right to self-representation are constitutional, there is a question as to whether a defendant can be forced to choose between them or whether the dual rights require that he be permitted to apportion them as he sees best. The effect of continuing the "no right to hybrid representation" rule is to place a high price on the exercise of a constitutional right. So far, however, few courts have been willing to view the dual rights as requiring this outcome.[20]

II. CONFLICT OF RIGHTS

The right to counsel and the right to self-representation are separate and distinct constitutional rights.[21] Yet,

17. United States v. Hill, 526 F.2d 1019, 1024 (10th Cir. 1975), *cert. den.* 425 U.S. 940 (1976).
18. United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977), *cert. den.* 431 U.S. 972 (1977); United States v. Williams, 534 F.2d 119 (8th Cir. 1976), *cert. den.* 429 U.S. 894 (1976); Moore v. State, 83 Wis. 2d 285, 265 N.W.2d 510 (1978).
19. Frequently a defendant elects to defend *pro se* because of such disagreements.
20. A pre-Faretta exception is Wake v. Barker, 514 S.W.2d 692 (Ky. 1974). On the basis of the Kentucky Constitution which states that a defendant is entitled to be represented "by himself and counsel" the court concluded that a defendant could make a limited waiver of counsel and specify the duties he wished to have counsel perform. The question was also considered by the Texas Court of Criminal Appeals in Landers v. State, 550 S.W.2d 272 (1977). Initially the court found that the defendant, who had submitted a written statement to the trial judge demanding the right to cross-examine witnesses, had effectively reserved the right for himself, never allocating it to his attorney. On rehearing, however, the court reversed itself and affirmed the conviction. It interpreted the provision of the Texas Constitution which allowed representation "by himself or counsel, or both" to support the "no right to hybrid representation" rule.
21. Faretta at 819, n. 15.

because a defendant is almost invariably either represented by counsel or by himself, both rights cannot be satisfied. One or the other must be forfeited. More important to the role of advisory counsel is that the rationale for broadening the right to counsel was that a defendant without an attorney was unlikely to receive a fair trial.[22] If this rationale still holds, advisory counsel may be the chief protector of a *pro se* defendant's right to a fair trial.

In the face of strong dissent, the United States Supreme Court in *Faretta* held that implied in the sixth amendment is a constitutional right to defend oneself in person at criminal trials. Faretta was charged with grand theft and was appointed a public defender at his arraignment. Well before trial he requested permission to represent himself. The trial judge made a preliminary ruling accepting Faretta's waiver of counsel and allowed him to proceed *pro se.* Several weeks later the judge held another hearing at which he questioned Faretta on his knowledge of the hearsay rule and the challenges of potential jurors at voir dire. After questioning him, the judge ruled that Faretta had not made a knowing and intelligent waiver of his right to counsel, ruled that he had no constitutional right to conduct his own defense (as was the law in California under *People v. Sharp*[23]), and again appointed a public defender. At trial Faretta was represented by an attorney. The California Court of Appeals upheld the trial court's ruling that there was no constitutional violation, affirmed the conviction, and later denied rehearing. The California Supreme Court denied review.

On the basis of the widespread recognition of the right to appear in *propria persona,* a review of English and American history of representation at trial, and the "structure of the Sixth Amendment" the United States Supreme Court held that: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."[24] Although a defendant may choose to allocate his defense to an attorney, "to thrust counsel upon the accused, against his

22. *See,* note 5.
23. People v. Sharp, 7 Cal. 3d 448, 499 P.2d 4893, 103 Cal. Rptr. 233 (1972).
24. Faretta at 819.

considered wish . . . violates the logic of the Amendment."[25] "Unless the accused has acquiesed in such representation, the defense presented is not the defense guaranteed him by the constitution, for, in a very real sense, it is not his *defense.*"[26]

It may be necessary for a defendant to have the right to represent himself in order to assure the defense offered by an attorney is consented to. Problematic, however, is the question of the quality of the *pro se* defense. The rationale for extending the right to counsel has consistently been that a defendant without an attorney is at a severe disadvantage and is most unlikely to receive a fair trial. This idea was simply stated in *Gideon v. Wainwright:* "[I]n our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[27] A fuller rationale had previously been provided in *Powell v. Alabama:*

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[28]

25. Faretta at 820.
26. Faretta at 821.
27. Gideon v. Wainwright, *supra* note 5, at 344.
28. Powell v. Alabama, *supra* note 5, at 68-69. Also cited by Chief Justice Burger in Faretta at 838-39 (dissenting opinion).

If the intelligent as well as the poor man is at a loss in the judicial system without an attorney and "cannot be assured of a fair trial unless counsel is provided for him" what is the fate of the defendant who elects to defend *pro se?* Although he may have waived his right to counsel, there is no reason to think that he has in fact fared any better than the passages from *Gideon* and *Powell* predict that he will, nor that he has been in any less need of counsel.[29] More specifically the question is: if a defendant has a sixth amendment right to represent himself, how can his fourteenth and fifth amendment rights to due process and a fair trial be protected? The majority in *Faretta* was not unaware of the problem, but chose to emphasize the value of individual choice rather than allow the imposition of an attorney on a defendant who does not want one.[30] If *Faretta* is taken literally, the implication is that the rationale of *Gideon* and *Powell* is not to be applied to defendants who *elect* to defend *pro se.* Such an interpretation is extreme. Although it is relatively simple to distinguish between defendants who never had a right to counsel from defendants who have the right but choose to waive it. This distinction provides no guarantee that justice has been better served in the case of the latter, rather than the former.[31]

Appointment of advisory counsel for *pro se* defendants is one indication that courts find this implication distasteful. Frequently a court appoints advisory counsel because making legal advice available is at least a step toward protecting the rights of a defendant who, because of his ignorance of the law, may jeopardize them.[32] Advisory counsel must, then, on the one hand allow the defendant to conduct *his defense,* yet, on the other hand draw from his own experience and learning to protect the defendant's right to a fair trail while, in most cases, not being allowed to take an active part in the trial.[33] There are no penalties if the attorney fails the latter half of his task; his services are provided to the defendant by the court as assistance and not in fulfillment of a right.

29. *See,* United States v. Spencer, 439 F.2d 1047, 1051 (2d Cir. 1971).
30. Faretta at 834.
31. Questions concerning the competency of a pro se defendant to present his defense are discussed further in Section VI.
32. *See,* United States v. Corrigan, *supra* note 8.
33. For a list of other functions advisory counsel serves *see* Note, FARETTA V. CALIFORNIA: THE CONSTITUTIONAL RIGHT TO DEFEND PRO SE, 5 CAPITAL U. L. REV., 277, 287-88 (1976).

III. THE REQUIREMENTS OF A *Pro Se* REQUEST

Rules governing the granting of permission to proceed pro se are relatively straightforward and in most cases have changed little since *Faretta*.[34] However, with one exception they do not clearly derive from United States Supreme Court decisions, so rulings of individual jurisdictions must be consulted. The following rules are widely recognized and have frequently been adopted as a set.

1. The assertion of the right must be timely. Although Faretta had made his request several weeks prior to trial, "most courts of appeals have established the rule that the fundamental right to conduct the case *pro se* must be claimed before the trial begins."[35] This requirement has been adopted by all states which have considered the matter, including California, home of *Faretta*.[36]

The rationale for this requirement is that the defendant must be given "a last clear chance to assert his constitutional right" and since a point must be established "that point should not come before meaningful trial proceedings have commenced."[37] Occasionally courts have found it necessary to draw an exact line. In *Chapman v. United States*[38] the court was faced with deciding whether or not a request which came after the attorneys had announced "ready," but prior to empaneling the jury was valid. The court reasoned that the declaration of "ready could not be considered final because the defense could not be considered "ready" when the defendant was being represented by an attorney he no longer wanted."[39] It is uniformly agreed that once a trial has begun, granting a request to defend *pro se* is within the discretionary powers of the court.[40]

34. For pre-Faretta cases *see:* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. den. sub. nom.* DiBlasi v. McMann, 384 U.S. 1007 (1966); United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973); and particularly United States v. Plattner, 330 F.2d 271 (2d Cir. 1964).
35. Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977), *see also,* the discussion at 893-95.
36. People v. Windham, 19 Cal. 3d 121, 560 P.2d 1187, 137 Cal. Rptr. 8 (1977), *cert. den.* 434 U.S. 848 (1977), *reh. den.* 434 U.S. 961 (1977).
37. Chapman v. United States, *supra* note 35, at 895.
38. *Id.* at 895.
39. *Id.* at 895; *Acccord,* United States v. Price, 474 F.2d 1223 (9th Cir. 1973), (motion was timely when made before the jury was sworn).
40. *E.g.,* Sapienza v. Vincent, 534 F.2d 1007 (2d Cir. 1976).

2. The assertion of the right of self-representation must be unequivocal. "Unequivocal" means that the request must be for *pro se* status in contrast to a request to act as co-counsel.[41] At present there is no requirement that a defendant be informed he has a right to conduct his own defense.[42] Courts have resisted such a requirement for fear that complications may arise similar to those associated with the right to counsel. Unfortunately, since there is no right to be informed, a defendant who vaguely understands that he may represent himself but is unaware that he is not entitled to "hybrid" representation may find his legitimate request denied if he has not phrased it properly. Similarly, if the defendant does not understand the distinction between "defense" and "advisory" counsel, he may hesitate to assert his right to self-representation because he does not wish to appear in court without assistance from an attorney. Rather than requiring that defendants be informed of the right, the solution seems to be that courts, as well as defendants' attorneys whether retained or appointed, make careful inquiry and advise defendants when the need arises.

If a request is not unequivocal, *pro se* status can be denied.[43] The effect of an unequivocal assertion is to preclude later claims that the defendant was denied the assistance of counsel. The assertion by itself, however, is not sufficient for this purpose, but must be accompanied by a finding by the court that the defendant is competent.

3. A defendant who wishes to appear *pro se* "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' "[44] Most jurisdictions which have considered the matter have adopted the same language as that quoted from *Faretta*.[45] The content of the warnings to be given varies somewhat but usually includes statements about the

41. *See*, United States v. Bennett, 539 F.2d 45 (10th Cir. 1976), *cert. den.* 429 U.S. 925 (1976).
42. Tuckson v. State, 364 A.2d 138 (D.C. 1976); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), *cert. den.* 433 U.S. 907 (1977); People v. McIntyre, 36 N.Y.2d 10, 324 N.E.2d 322, 36 N.Y.S.2d 837 (1974).
43. Meeks v. Craven, 482 F.2d 465 (9th Cir. 1973).
44. Faretta at 835, quoting Adams v. United States *ex. rel.* McCann, 317 U.S. 269, 279 (1942).
45. *E.g.*, People v. Anderson, 398 Mich. 361, 247 N.W.2d 857, 860 (1976); *but see* People v. Anthony, 42 Ill. App. 3d 102, 355 N.E.2d 680 (App. Ct. 1976).

seriousness of the charge the defendant is facing, his lack of knowledge of the law, and that he will receive no favor or special treatment from the court.[46]

This requirement serves to insure a finding by the court that the defendant is making an intelligent choice and is competent to represent himself. Inquiry may be made into the general intelligence and mental capacities of the defendant, as is required by *Johnson v. Zerbst* in regard to a waiver of the right to counsel.[47] The competence in question, however, is mental capacity to knowingly act and not knowledge of the law or competence in legal skills.[48]

Whether finding that a defendant is competent to appear *pro se* is the same as finding that he is competent to stand trial or whether it requires a finding of greater competence is not uniformly agreed upon. The New York Court of Appeals in *People v. Reason*[49] rejected the argument that a greater competency was needed, but Justice Jason wrote a strong dissent citing, among other cases, *Westbrook v. Arizona.*[50] In *Westbrook* the United States Supreme Court in a per curium opinion clearly distinguished the two:

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense.[51]

The Court went on to quote *Johnson v. Zerbst* and remanded for proceedings in light of *Pate v. Robinson.*[52] The Court has not otherwise addressed the issue. In so far as the mental capacities necessary for a defendant to understand the nature of the charges against him, to follow the proceedings at trial, and to confer with his attorney are different from the mental ability necessary to act as one's own attorney, there is good reason to require a high standard of competency to defend *pro se.*[53]

46. For an example of the type of questions used *see* People v. Lopez, 71 Cal. App. 3d 568, 138 Cal. Rptr. 36 (Ct. App. 1977). A full exchange of questions and answers can be found in United States v. Pavich, 568 F.2d 33 (7th Cir. 1978).
47. Johnson v. Zerbst, *supra* note 5, at 464.
48. Faretta at 836.
49. People v. Reason, 37 N.Y.2d 351, 334 N.E.2d 572, 574, 372 N.Y.S.2d 614 (1975).
50. Westbrook v. Arizona, 384 U.S. 150 (1966).
51. *Id.* at 150.
52. Pate v. Robinson, 383 U.S. 375 (1966). *Cf.* Massey v. Moore, 348 U.S. 105 (1954) and State v. Bauer, 245 N.W.2d 848 (Minn. 1976).
53. *See,* United States v. Dougherty, *supra* note 11, at 1123, n. 13.

Whether or not competence to elect to defend oneself is the same as competence to waive counsel is a more complicated question. In *Westbrook* the court mentions waiver of counsel along with *pro se* representation. Such, of course, is the inevitable consequence of a valid waiver of counsel. However, it is possible for a defendant to request and be granted permission to defend himself without any mention of counsel being made. The issue then raised is whether a "knowing and intelligent" assertion of the right to defend *pro se* is, at the same time, a "knowing and intelligent" waiver of the right to counsel. "Knowing and intelligent" which is the requirement for a valid waiver of counsel[54] was used by the Court in *Faretta* to describe the defendant's decision to represent himself.[55] In most cases the decision to represent oneself is likely to be a genuine choice between two alternatives. But the choice itself is a consequence of the "no right to hybrid representation" rule and not the rights involved. Therefore, unless the matter of counsel is raised otherwise, there is no guarantee that a *pro se* defendant has considered using an attorney and chosen not to be represented by one. Similarly, there is no guarantee that a defendant who understands what it is to represent himself, also understands the benefits of having an attorney do it for him. Such a defendant could legitimately claim on appeal that there had been no "knowing and intelligent" waiver of counsel and that, consequently, he did not receive the effective representation to which he was entitled.[56]

IV. *Pro Se* REPRESENTATION AND THE WAIVER OF COUNSEL

As the previous discussion indicates, it is wise to require that a defendant make a valid waiver of counsel as a condition of defending *pro se*. In most cases there is probably little *factual* difference between the defendant's competence to assert one right and his competence to waive the other. Nor is there likely to be a question as to his awareness of the choice he was making.[57] Most frequently, the defendant

54. Johnson v. Zerbst, *supra* note 5. *See also,* Adams v. United States *ex. rel.* McCann, *supra* note 44.
55. *See also,* Von Moltke v. Gillies, 332 U.S. 708 (1948).
56. Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976); Cason v. State, 31 Md. App. 121, 354 A.2d 840 (1976).
57. Difficulties concerning the forced choice the defendant must make are discussed in Section V.

knows he is choosing to represent himself rather than have an attorney because he does not want the attorney he has to continue to represent him. Furthermore, the defendant should have been advised of his right to counsel when he was arraigned; the *Faretta* warnings may have told him that it would be advantageous to have counsel represent him; and inquiry by the court may have revealed that he was aware of his right to have an attorney but was making a conscious, informed choice to defend himself.

Despite this, a defendant may make a timely, unambiguous request to defend himself, the court may find he has the mental capacity to do so and give the *Faretta* warnings necessary to point out the "dangers and disadvantages" he will face, and the defendant so allowed to proceed, all without having waived counsel. The defendant's request may stem from ignorance or uncertainty. He may not understand his right to have counsel appointed or understanding his right, may not consider himself indigent. He may not be indigent and yet not have the cash retainer required by private counsel. More important, not having consulted with an attorney, he may not understand the charges and evidence against him and the seriousness of the consequences. He may believe that he is innocent and that his "defense" will easily clear matters up once he gets to court. He may admit to all the facts alleged but not believe there will be a trial because he does not understand that his actions constituted a crime. He may not understand the role of the prosecutor, believing that the state's investigation will reveal that there was no crime or that he did not commit it.[58] As a result, a defendant who may be mentally competent to represent himself proceeds to trial without having made an "intelligent and knowing" waiver of counsel.

The *Faretta* Court seems to have adopted the "knowing and intelligent" waiver of counsel standard as a requirement of *pro se* representation:

> When an accused manages his own defense he relinquishes as a purely factual matter many of the

58. Misunderstandings of the operation of the judicial system cannot be underestimated. A recent poll found that 30% of the population believe that the job of a district attorney is to defend an accused who does not have a lawyer. *Vox Populi*, NEWSWEEK, XCI, No. 13, 87 (March 27, 1978).

> traditional benefits associated with the right to counsel. For this reason in order to represent himself the accused must "knowingly and intelligently" forego those relinquished benefits.[59]

In fact *Faretta* has been interpreted to require this finding.[60] However, the rule has not been uniformly adhered to. Many courts, while not rejecting the rule, have ignored it. While inquiry by the trial judge may serve the same purpose, unless the inquiry is sufficient, there may be no waiver.

Without sufficient inquiry a waiver cannot be found to be implied in the request to defend *pro se.* A waiver "is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[61] Since the right to counsel and the right to defend pro se are independent, the assertion of one right cannot imply the waiver of the other.[62] Nor can a waiver be inferred from a silent record.[63] Furthermore, even if a decision to act pro se is itself "knowing and intelligent", neither the decision nor the *Faretta* warnings expressly concern the right to counsel. Since the right is not expressly dealt with, there can be no implication that there has been an "intentional relinquishment or abandonment" of the right.

In *State v. Renshaw*[64] the defendant on the first day of trial requested that new counsel be appointed for him because he was dissatisfied with his attorney. The trial judge removed the attorney but refused to appoint new counsel. Instead, the attorney was appointed on an advisory basis with the defendant acting *pro se.* However, Renshaw did not want to represent himself and remained silent throughout the trial. Furthermore, counsel, acting on instructions from the judge, also remained silent. On appeal the court found that no waiver of the right to counsel had been made. The trial court therefore, was not justified in treating the expres-

59. Faretta at 835 (citing Johnson v. Zerbst, *supra* note 5, and Von Moltke v. Gillies, *supra* note 55).
60. United States v. Corrigan, *supra* note 8, at 799. For an earlier case supporting the requirement *see* United States v. Spencer, *supra* note 29. Contra, People v. Anthony, *supra* note 45.
61. Johnson v. Zerbst, *supra* note 5, at 1023.
62. *See,* Note 21 and Singer v. United States, 380 U.S. 24 (1965).
63. Johnson v. Zerbst, *supra* note 5. *See also,* Cumley v. Cockran, 369 U.S. 506, 516 (1962) and AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, 7.3 (1967).
64. State v. Renshaw, 276 Md. 259, 347 A.2d 219 (1975).

sion of dissatisfaction with assigned counsel, combined with a request for new counsel, as a waiver of the right to counsel and an election to defend *pro se*. Rather, the appellate court specified to have a waiver of counsel the record must show both that the defendant is competent to waive and that he "knowingly and intelligently has done so; after being made aware of the advantages and disadvantages of self representation."[65] Although denying the request for substitute counsel was not error, the court added, the judge should not have dismissed the attorney since the defendant did not wish to appear *pro se*.

As in *Renshaw* the reason for not allowing an implied waiver is most vivid when the defendant makes it clear that he does not wish to represent himself. In *Thomas v. State*[66] the defendant was adamant in that he wished to have his counsel removed and have another lawyer appointed. He was equally insistent that he was not capable of defending himself "because I don't know the law that good."[67] At trial Thomas represented himself. After citing *Powell v. Alabama* the appellate court found that there had been no waiver of counsel and reversed. The trial court "should have ordered counsel to render the fullest possible legal representation under the circumstances with or without cooperation of defendant."[68]

Establishing that a defendant has made a valid waiver of counsel and is acting *pro se* "with eyes open" would have the additional benefit of precluding claims that advisory counsel should have objected to evidence, made motions, cross-examined witnesses, or performed some other act at trial. Without a valid waiver, an advisory attorney may feel himself obligated to take an active part in the trial in order to assure that his client has the effective representation to which he is entitled. Yet, in doing so the attorney may violate not only his client's wish to defend himself but his constitutional right to do so. Once there is a valid waiver, advisory counsel is freed from his obligation to meet the defendant's right to counsel and is free to advise the defendant how to best make the defense he chooses to make.

65. *Id.* at 266.
66. Thomas v. State, 550 S.W.2d 64 (Texas Crim. App. 1977), *reh. den.* (1977).
67. *Id.* at 66.
68. *Id.* at 68.

The waiver is particularly beneficial when the defendant wishes to pursue a trial strategy which, although legitimate, the attorney considers unwise. In such a case the defendant, because he appears *pro se,* is in charge of the defense and the attorney, because counsel has been waived, the assigned attorney can advise him how to best pursue his chosen strategy. Advisory counsel should not, of course, provide advice which would conflict with either his duties as an officer of the court or the American Bar Association's *Code of Professional Responsibility.*[69]

In addition to clarifying the role of advisory counsel, requiring a valid waiver of counsel establishes whether a defendant is requesting permission to act as co-counsel or whether he wishes to appear *pro se* with advisory counsel assisting him. Although the "no right to hybrid representation" rule has been applied to both requests, its application and effect is very different in each case. If a defendant requests co-counsel status, he is indeed asking for hybrid representation and the denial of his request leaves him represented by counsel. In contrast, if a defendant wishes to proceed *pro se,* particularly if he has waived counsel, his request is *not* for hybrid representation but for assistance in understanding the law he will need to know in order to present his own defense. Granting a request for advisory counsel is unlikely to complicate the trial proceedings, but rather would tend to expedite matters by providing a ready source of information and advice without which the defendant may flounder and create confusion. Advisory counsel can best give this assistance if there has been a waiver of the right to counsel.

V. CHOOSING TO DEFEND *Pro Se:* HOBSON'S CHOICE

Although there are many reasons why a defendant might elect to represent himself rather than have an attorney, the most frequent, at least as reflected in appellate cases, is that the defendant disagrees with his attorney over how his defense is to be handled.[70] Having reached the point of strong disagreement, defendants do not always conclude that they would rather do it themselves. Understanding the

69. ABA CODE OF PROFESSIONAL RESPONSIBILITY.
70. The attorney, of course, decides on trial strategy. People v. Thompson, 69 Mich. App. 465, 245 N.W.2d 93 (Ct. App.1976).

importance of having an attorney, they frequently try to obtain other counsel. If they have retained counsel, they can fire their attorney and hire another. However, if the trial date is at hand, the court may not allow the first attorney to withdraw from the case. Choices of indigent defendants who have appointed counsel are even more limited. Their right to an attorney does not include the right to select the attorney who is to represent them.[71] And although a defendant has a right to the attorney of his choice and must be given reasonable time to obtain counsel,[72] a defendant with appointed counsel does not have a right to obtain a different attorney simply because he disagrees with his present one.[73] There is a distinct difference, however, between not allowing a defendant to name the attorney to be appointed and refusing to appoint substitute counsel when there is serious disagreement between a defendant and his attorney.[74] Not granting a request for substitute counsel may raise an issue as to whether or not the defendant received a fair trial in which *his defense* was presented.

Recently the Wyoming Supreme Court was faced with this question in *Irvin v. State*.[75] Defendant was on retrial on charges of aggravated robbery. Prior to the date of trial the attorney, a public defender, filed a motion asking that his office be relieved of all obligations to defend Irvin. The motion was supported by an affidavit stating:

> We are unable to achieve the rapport, trust and confidence of said Irvin necessary to the vigorous defense to which he is constitutionally entitled.[76]

Though the motion was never formally denied, the attorney was informed by the court that it would not be granted. On the morning of trial Irvin submitted a handwritten petition requesting both permission to defend *pro se* and a continuance. He was permitted to defend himself with the public defender present as advisory counsel but was not given the continuance.[77] On appeal the Supreme Court ruled that the

71. *See generally*, 66 A.L.R.3d 996 (1975); United States v. Dolan, 570 F.2d 1177 (3rd Cir. 1978).
72. Chandler v. Fretag, 348 U.S. 3 (1954).
73. Lofton v. Procunier, 487 F.2d 434 (9th Cir. 1973).
74. State v. McNeil, 263 N.C. 260, 139 S.E.2d 667 (1965).
75. Irvin v. State, *supra* note 4.
76. *Id.* at 3.
77. The denial of a continuance as well as substitute counsel was at issue on appeal. The matter of continuances for pro se defendants is discussed in Section VII.

motion to appoint substitute counsel was subject to the discretion of the trial court and its action would be altered only if there was an abuse of discretion. To show abuse required a factual showing that there was good cause for the appointment of substitute counsel. "Good cause," the court said:

> Is to be found in incompetence, commitment to a position or an interest which would conflict with the furnishing of an effective defense to the accused, or other good reason to conclude that appointed counsel is unable to furnish effective assistance.[78]

Of the three reasons given by the court only the third is likely to result in controversy on appeal. Attorneys appointed for indigent defendants are usually experienced trial lawyers. Although it is possible for an attorney to have a conflict of interest, most attorneys would recognize it and request to be relieved of the assignment. Although Irvin's claim might seem to come under the category of "other good reason," the court ruled that there had not been an abuse of discretion without specifically discussing this category. Apparently it concluded that the defendant's lack of "rapport, trust, and confidence" in his attorney did not prevent the attorney from furnishing effective assistance. In a dissenting opinion Justice Rose argued that mutual confidence between an attorney and his client is essential in order for the attorney to furnish effective assistance. "I find the law to be that where a defendant shows good cause why mutual confidence and trust between him and his attorney no longer exist, the court should substitute counsel."[79] The dissenting opinion also rejected the majority's view that Irvin's election to defend himself involved a valid waiver of counsel. Rather, it pointed out:

> the defendant could either accept the representation of a lawyer in whom he had no confidence and who admittedly did not feel he could furnish the defense to which the defendant was constitutionally entitled —or—the defendant could go it alone unprepared. This was no choice at all!![80]

78. Irvin v. State, *supra* note 4, at 1069, 1070.
79. *Id.* at 1072 (dissenting opinion).
80. *Id.* at 1072 (dissenting opinion).

Some courts have termed this limited choice "Hobson's choice"[81] and though not a pleasant one to make, it is faced by many defendants. This forced choice is most objectionable when, as in *State v. Renshaw* and *Thomas v. State,* the defendant clearly does not want either alternative. Requiring a valid waiver of counsel can prevent the forced choice in such cases. Irvin, however, though wanting an attorney, was willing to choose to represent himself rather than have the one he had been appointed. At that point there can be a knowing and intelligent waiver of counsel even though it has come about only through a forced choice. The issue, however, is the fairness of the forced choice.

Motions for substitute counsel are in most jurisdictions considered to be subject to the discretion of the court. In granting such motions a court is faced with two problems. First, if it grants the request without requiring a showing of good cause, it may grant the motion only to be later confronted with another request, *ad infinitum.* Second, even if the dispute between the attorney and the defendant is genuine and there is little likelihood that the request will be repeated, considerable administrative problems may be raised, particularly if the trial date is near. A new attorney will need time to prepare and a continuance may be needed, rescheduling the trial may delay it for months, and possibly with a new attorney on the case another series of pre-trial motions will begin. Yet, one must ask can there be effective representation when there is a serious conflict between the attorney and his client? An additional question is whether the election to defend *pro se* under such circumstances is itself a denial of the effective representation of counsel.

Some courts find the choice the defendant must make to be unproblematic because the election of *pro se* representation, though not the original desire of the defendant, is a clear choice between alternatives.[82] Other courts have been

81. "Hobson's choice: the option of taking one thing offered or nothing. Named from Tobias Hobson, the Cambridge carrier (commemorated by Milton in two Epitaphs), who let out horses, and is said to have compelled customers to take the horse which happened to be next to the stable door, or go without." THE OXFORD ENGLISH DICTIONARY, C, 369. The application of the term seems to be that the indigent defendant has the choice of taking the horse assigned by the court or walking through the trial himself.

82. Maynard v. Meachum, *supra* note 57, at 278. *Cf.* People v. Longuemire, 77 Mich. App. 17, 257 N.W.2d 273 (1977); German v. State, 373 N.E.2d 880 (Ind. 1978).

more sympathetic to the dilemma the defendant faces. In *Commonwealth v. Cavanaugh*[83] defendant's attorney requested a continuance because he had not had adequate time to prepare for trial. The trial judge, believing the attorney had had considerable time because he had represented the defendant at arraignment, denied the motion. In fact, the attorney had not been appointed until eight days before trial. He had acted at the arraignment because he was representing the defendant in other matters at the time. On the morning of trial the defendant, through his attorney, announced that he did not wish to have counsel represent him. On appeal the Supreme Court of Massachusetts reversed the conviction. It reasoned that to construe the election to proceed *pro se* under such circumstances as a waiver of counsel would mean that the defendant could protect himself only by either refusing to go to trial or by remaining silent throughout.[84]

Short of granting substitute counsel there does not seem to be any good answer to the problems posed by defendants who must make Hobson's choice. Several steps, however, are available which could compensate for forcing the choice. As previously mentioned requiring a valid waiver of counsel can eliminate the most distasteful cases. Inquiry by the trial judge into the reasons for the request can also be useful and has been required in some jurisdictions.[85] Although the decision would remain within the court's discretion, inquiry would serve to disclose whether the dispute was merely a disagreement over trial tactics or a serious breach of relations between the attorney and the defendant. "To compel one charged with grevious crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever."[86] Requiring trial judges to make an inquiry would have the effect of requiring them to find there is no good cause, be it incompetence, conflict of interest, "or other good reason to conclude that appointed counsel is unable to fur-

83. Commonwealth v. Cavanaugh, 353 N.E.2d 732 (Mass. 1972).
84. *Id.* at 737. *See also*, United States *ex rel* Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975) and Wright v. State, 32 Md. App. 60, 359 A.2d 1 (1976).
85. United States v. Morrisey, 461 F.2d 666 (2d Cir. 1972).
86. Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970) (defendant's four requests for substitute counsel had been summarily dismissed).

nish effective assistance" to grant the request. Inquiry would be minimal,[87] but failure to inquire could be reversible error.[88]

A third remedy would be to allow the defendant to defend *pro se* and assign him advisory counsel with the understanding that counsel would be permitted to perform duties either as needed by the defendant or as agreed upon at the beginning of the trial.[89] In order for advisory counsel not to have the burden of representing the defendant there would need to be a valid waiver of the right to counsel. The defendant would then not have a claim on appeal that conflict with his attorney prevented effective representation, yet at the same time the burden of defending *pro se* would be lessened.

A final alternative is to deny the motion for substitute counsel, retain the appointed attorney, but grant a form of "hybrid" representation. The limits would be determined by the defendant's reasons for dissatisfaction with his attorney and the extent to which he waives the right to be represented in those matters.[90] Although such an arrangement would complicate the trial proceedings, as long as there is no threat of disruption and no better alternative available, the convenience of the court should not be sufficient reason to deny a remedy that would help to assure that the defendant receives a fair trial.

VI. COMPETENCY OF THE *Pro Se* DEFENSE

Although finding a valid waiver of counsel precludes later claims that the right to counsel has been denied, a different issue is raised by the defendant who claims that his own ineptitude denied him effective representation. In *Faretta* the Supreme Court dealt with this type of claim in the same footnote in which it discussed "standby" counsel:

> The right to self representation is not a license to abuse the dignity of the courtroom. Neither is it a

87. United States v. Hart, 557 F.2d 162 (8th Cir. 1977), *cert. den.* 434 U.S. 906 (1977).
88. United States v. Young, 482 F.2d 993 (5th Cir. 1973).
89. *E.g.*, United States v. Trapnell, 512 F.2d 10 (9th Cir. 1975).
90. For examples in which mixed representation has been successful *see:* Houston v. State, 246 N.W.2d 908 (Iowa 1976); Wake v. Barker, *supra* note 20; and Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).
91. Faretta at 835, n. 46.

> license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of "effective assistance of counsel."[91]

The point has been widely accepted.[92] *Pro se* defendants are held to the same standards as attorneys. When a defendant acts as an attorney, he must abide by the rules of evidence and procedure and other regulations governing the conduct of attorneys at trial. Likewise, if he does not raise objections at trial, he cannot raise them on appeal unless there is plain error.[93] Additionally, most courts have been unwilling to apply even the "farce, sham, or mockery" standard of competence to *pro se* defendants for fear that they will deliberately take that course of action.[94]

Nonetheless there is a problem when a defendant who represents himself does not present even a semblance of a defense. Such a trial would seem to violate all considerations of fairness and be precisely the sort of case *Gideon, Powell,* and others were intended to prevent.[95] In *Martinez v. People*[96] the Supreme Court of Colorado was faced with such a case. The court acknowledged that the Colorado Constitution granted the right to defend *pro se* and that the trial judge had made sufficient inquiry so that the defendant had an "intelligent understanding of the consequences."[97] Despite this, the court found that the judge had erred in failing to protect the defendant's rights by not instructing the jury on a defense going to a vital element of the crime charged even though the defendant had not requested the charge. The absence of a defense attorney and the ineptitude of the defendant, the court said, resulted in a lack of due process requiring reversal.[98]

92. United States v. Pavich, *supra* note 46; United States v. Rowe, 565 F.2d 635 (10th Cir. 1977) and Miller v. State, 560 P.2d 739, 741 (Wyo. 1977).
93. United States v. Pinky, 548 F.2d 305, 310 (10th Cir. 1977).
94. United States v. Pavich, *supra* note 46. Contra, People v. McIntyre, *supra* note 42.
95. *See,* Chief Justice Burger's dissenting opinions in Faretta.
96. Martinez v. People, 172 Colo. 82, 470 P.2d 26 (1970).
97. *Id.* at 28.
98. *Id.* at 29.

One answer is to remedy the situation during trial. Although the judge is a likely candidate for the task and has a general duty to assure a fair and just trial, it is not feasible to require him to take over all areas in which a *pro se* defendant may be incompetent.[99] It is reasonable to expect that his obligation extends to providing jury instructions or preventing the prosecution from taking advantage of the ignorance of the defendant by halting a line of questioning that is clearly improper, but he can hardly be expected to take over the task of examining witnesses for the defendant.[100] Advisory counsel could be useful, either in assisting the defendant to intelligently conduct his defense or with the consent of the defendant taking over some portions of the defense.[101] However, in *Martinez* the defendant refused advisory counsel. In such a case the only alternative would be to find the defendant incompetent and provide him with a defense attorney. If a court were unwilling to take this extreme measure, the remedies discussed in regard to Hobson's choice could also be helpful here. At present, in most jurisdictions the "no right to hybrid representation" rule prevails and even if a defendant is mute throughout his trial, he is allowed to live and be incarcerated by his decision. Only if he "engages in serious and obstructionist misconduct"[102] do most courts take action by terminating the defendant's *pro se* status and bring in standby counsel.

VII. PRACTICAL CONSEQUENCES OF *Pro Se* REPRESENTATION

In addition to questions concerning competency and conduct at trial the constitutional status of self representation raises questions concerning *pro se* defendants' rights prior to trial. Chief among them are questions concerning rights to access to legal materials in order to prepare for trial and right to a continuance in order to have time to prepare.

The problem of access to legal materials effects only those pro se defendants who cannot post bond pending trial

99. United States v. Trapnell, *supra* note 89.
100. United States v. Pavich, *supra* note 46, at 39-40; United States v. Pinky, *supra* note 93; and the cases cited therein.
101. For a successful case of a defendant being ably assisted by his advisory counsel, *see* State v. Wilson, 563 P.2d 792 (Utah 1977).
102. Faretta at 834, n. 46. *See also,* United States v. Theriault, 474 F.2d 359 (5th Cir. 1973), *cert. den.* 411 U.S. 984 (1973); and for a discussion of denial of the right on this basis *see* People v. McIntyre, *supra* note 42, at 327-28.

or who are already incarcerated on other charges. Although there has been little litigation in the area, an analagous concern, access to legal materials by prisoners, has received considerable attention. In particular the United States Supreme Court has held in *Bounds v. Smith* that:

> The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.[103]

Initially it would seem that *Bounds*[104] would guarantee that *pro se* defendants have rights to access to legal materials. If law books are necessary for prisoners to have access to courts, they are crucial for the incarcerated defendant who must prepare for trial. Nor would the alternative allowed by the court, "adequate assistance from persons trained in the law," seem sufficient to meet the needs of a defendant who must present his own defense. But this is not how the rule of *Bounds* has been applied. In *United States v. West*[105] a *pro se* defendant was a federal prisoner incarcerated in a facility which did not have a law library. The attorney appointed to assist him was instructed not to actively participate in the defense but to provide assistance if and when requested. The defendant wanted access to a law library, a telephone, and a typewriter, but the request was denied because he was considered a potential escapee and a suicide risk. Appointed counsel visited him seven times offering to do any research. The offer was refused each time; the defendant insisting that he should do research himself if he was going to be the one to try the case.[106] He was allowed to spend one afternoon calling potential witnesses. On appeal the court held that the arrangement qualified as "adequate assistance from persons trained in the law" satisfying *Bounds v. Smith.*[107]

103. Bounds v. Smith, 430 U.S. 817, 828 (1977). The principle had been previously established in Gilmore v. Lynch, 319 F. Supp. 105, *affd. sub. nom.* Younger v. Gilmore, 404 U.S. 15 (1971).
104. *Id.*
105. United States v. West, 557 F.2d 151 (8th Cir. 1977).
106. *Id.* at 152.
107. *Id.* at 153.

When *pro se* defendants are confined in a facility which has a law library, their right of access to those materials is clear.[108] The difficult case is that of the *pro se* defendant who is confined in a facility which does not have a law library. Although advisory counsel may serve to satisfy the defendant's needs, practically it is difficult to say that he is adequate substitute for direct access to legal materials. Although *United States v. West* holds to the contrary, the key features of that case may be that the defendant was considered dangerous and that the advisory counsel visited him seven times. Placing the burden of preparation on advisory counsel as a means of satisfying the right also creates difficulties. It creates an affirmative obligation on counsel to consult with the defendant and do research for him. Failure to meet his needs may be grounds for appeal. It is also unlikely to be a popular alternative. Not many attorneys will be pleased to find themselves research assistants for *pro se* defendants.

A further matter in regard to access to legal materials should be noted. In *People v. Carter*[109] the defendant, when asked by the judge whether he felt he was capable of representing himself, answered "Yes, I do, if I am granted the use of the law library."[110] Shortly after this exchange the jury was sworn in and, despite the protests of the defendant because he wanted time to use a law library, the trial began. On appeal the court ruled that there had been *no* effective waiver of counsel because whatever waiver had been offered was conditioned upon access to a law library and was valid only if the condition was accepted by the court. While this is not instructive to advisory counsel, an attorney, whose incarcerated defendant is going to request permission to appear *pro se,* would do well to advise him to condition his request. Although *Bounds* should guarantee his right to access to legal materials, it is most frequently applied to prison libraries and the case law governing its application is still in the formative stage.

Another issue is whether a *pro se* defendant is entitled to a continuance in order to have time to prepare for trial. In

108. Hernandez v. Dist. Court in and for Fremont County, 568 P.2d 1168 (Colo. 1977).
109. People v. Carter, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967).
110. *Id.* at 617.

Irvin v. State the Wyoming Supreme Court followed its long standing rule that "a motion for continuance based upon the necessity for additional trial preparation is addressed to the sound discretion of the trial court."[111] There seems to be no jurisdiction which deviates substantially from this rule. It was adopted by the United States Supreme Court in *Ungar v. Sarafite.*[112] Although its use is widespread, the rule suffers from vagueness.

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.[113]

Applied to *pro se* defendants, there is a further problem that the rule may act as a penalty on the exercise of the constitutional right to defend *pro se.* Exercise of the right is generally permitted any time prior to the actual start of trial, but the effect of a denial of a continuance is to make the right less of a right immediately prior to trial. In addition, the denial of a continuance which forces a defendant to proceed without preparation raises the question of whether or not he receives a fair trial.[114] Lack of preparation may assure that the defendant, even though otherwise intelligent and capable, cannot adequately present his defense. The defendant in *Irvin* was familiar with the issues because it was his second trial. However, the court supported its sustaining the trial court's denial of a continuance by pointing out that Irvin was not justified in discharging his attorney and that the attorney was otherwise available so that Irvin did not need to defend *pro se.* However attractive this analysis may be, because Irvin was exercising a constitutional right, the circumstances under which he chose to exercise that right should not limit it.[115]

111. Irvin v. State, *supra* note 4.
112. Ungar v. Sarafite, 376 U.S. 575 (1964).
113. *Id.* at 589.
114. This point was raised by Justice Rose in his dissenting opinion to Irvin v. State, *supra* note 4.
115. People v. Williams, 386 Mich. 565, 194 N.W.2d 337 (1972).

VIII. THE ROLE OF ADVISORY COUNSEL

With the exception of cases in which the appellant claims that he was denied effective representation because of the inactions of his advisory counsel, the role of advisory counsel has not been litigated. Most cases are settled on the basis of whether or not counsel had been waived, rather than specific duties owed by advisory counsel. In general, so long as there is a waiver, no duty is owed except that of being available for consultation; without a waiver the defendant is entitled to full representation by the attorney. It is possible, however, to provide some analysis and advice on the basis of reported cases.

Cases can be classified on the basis of whether the attorney was passive or active in his role. As has already been indicated the passive role pertains to an attorney who assists a defendant before trial and may sit with him at trial in order to provide advice and counsel, but who does not take part in any of the proceedings. In contrast, an active advisory counsel may undertake many of the same activities he would if he were the trial attorney but does it to assist a pro se defendant. Two general principles control within each class. First, because of the constitutional status of the *pro se* right, the wishes of the defendant should be determinative. Second, any activity undertaken by the attorney is probably acceptable so long as it is not opposed by the defendant or clearly contrary to his *pro se* role.

Usually the role of advisory counsel is passive. In addition to his standby function, he is assigned to advise and counsel the defendant, not to take part in the trial. This passive role may take one of two general forms. In the most passive form, and when directed by the court, the attorney is available to answer questions and confer only when asked.[116] The alternative, yet still passive, role is for advisory counsel not to wait to be asked but volunteer information and advice to the defendant. Obvious examples are telling the defendant when to make objections and suggesting questions to be asked in cross examination. Prior to trial the difference can

116. United States v. Price, *supra* note 39, at 1227; Moore v. State, 142 Ga App. 145, 235 S.E.2d 557 (Ct. App. 1977).

be seen in whether advisory counsel consults on his own initiative with the defendant, assisting him in choosing his strategy and preparing his defense, or whether the attorney waits to be consulted by the defendant. Unless directed by the trial judge, advisory counsel is usually not under any obligation to volunteer assistance. He may, of course, do so out of his own sense of professional and personal obligation, but if his offer is rejected, the attorney must respect the defendant's wishes. So long as there has been a valid waiver of counsel, and unless otherwise instructed by the Court, advisory counsel's only obligation is to remain available.

Although the most common role for advisory counsel is passive, there are many instances in which advisory counsel has been active in assisting the defendant. Frequently he must be active because the defendant is incarcerated and cannot undertake matters himself. "Active" does not mean that the attorney performs as though he were representing the defendant; the defendant is still representing himself. Rather "active" means that he undertakes one or more particular tasks on behalf of the defendant. Cases can be divided into activities prior to or associated with trial and activities at trial.

In *United States v. Spencer*[117] the defendant claimed on appeal that he had been denied his right to counsel. After finding that he had indeed waived his right, the court went on to set forth "desirable practices for district judges faced with such a situation in the future."[118] Among the suggestions was that indigent defendants be offered advisory counsel as a resource to whatever extent the defendant wishes to make use of their services. In particular, the court suggested, advisory counsel could meet with the prosecuting attorney, see that discovery procedures were carried out and necessary motions made, and confer with the defendant. The court described advisory counsel's role as "doing those things which the defendant is unable to do for himself."[119] It is not unusual for advisory counsel to play this role. Other attorneys have had subpoenaes issued, obtained statements

117. United States v. Spencer, *supra* note 29.
118. *Id.* at 1051.
119. *Id.* at 1051.

from witnesses and prepared jury instructions for the defendant to submit to the judge.[120]

While activities of the sort mentioned are similar to those contemplated by the ABA standards and Chief Justice Burger's comments, they are distinguished by being activities prior to trial or peripheral to the trial rather than activities in the courtroom itself. Participation by advisory counsel in the trial has, on occasion, been permitted. It is, of course, subject to the court's discretion.[121] Making objections, conducting direct examination of the defendant and making motions are activities during trial which have been approved for advisory counsel.[122]

Since there is little on which advisory counsel can rely to define his role in advance and because the services he may provide can vary widely, two items of advice are offered for the attorney who is appointed standby or advisory counsel. First, if he is not familiar with local practices, he should check with other members of the bar. Although *Faretta* applies in all jurisdictions, the attitudes of courts toward *pro se* defendants and advisory counsel vary considerably. He should also consult with the appointing or trial judge to see what expectations may accompany the appointment. Most important, he should consult with the defendant. Some defendants will not wish advisory counsel to even appear at the defense table, while others will welcome assistance. Second, for the purpose of settling claims on appeal, it would be well for advisory counsel to see that the wishes of the defendant are placed in the record.[123] This is especially important if there is to be "hybrid" representation or if the defendant wishes his advisory counsel to perform some specific task during the trial such as making objections in order to preserve the record. Establishing advisory counsel's role in the record at the outset has the additional benefit of assuring that the trial judge understands and approves of what the attorney will be doing during the trial.

120. *E.g.*, People v. Kensik, 22 Ill. 2d 567, 177 N.E.2d 162 (1961).
121. State v. Randell, 530 S.W.2d 407, 409 (Mo. Ct. App. 1975).
122. State v. Helms, 563 P.2d 794 (Utah 1977).
123. For an instance in which the record was helpful, though not in the defendant's interests, *see*, City of Chicago v. Kiger, 130 Ill. App. 2d 162, 264 N.E.2d 488, 491 (Ill. Ct. App. 1970).

Finally, advisory counsel should be aware that if he plays too active of a role, the defendant by consenting or failure to object may loose his right to appear *pro se.* In *United States v. Conder*[124] the trial court granted the defendant permission to appear *pro se.* When the defendant later complained that he lacked the books and materials necessary to prepare motions he wished to file, the court appointed counsel to assist him instructing the attorney "not to force himself" on the defendant. During the six months prior to trial both the defendant and the attorney prepared and argued various motions, all of which were submitted with the attorney's signature. On the first day of the trial the attorney participated in the selection of the jury, made an opening statement, and conducted cross-examination of the first nine prosecution witnesses.[125] On the second day of trial the defendant was denied permission to object to the admissibility of evidence. The appellate court held that by accepting the attorney's assistance both during the pretrial proceedings and on the first day of trial, the defendant had shown an intent to be represented by counsel rather than by himself.[126]

Although this case antedates *Faretta,* there is indication that in so far as activities at trial are concerned the result would not be different under *Faretta.* In a more recent case, defendant's motion for leave to represent himself and have advisory counsel was granted. However, the attorney conducted the entire defense up to the final summation to the jury at which point the trial court refused to allow the defendant to address the jury. The ruling was upheld on the basis that having been represented by counsel throughout the trial, the defendant was not entitled as a matter of right to address the jury during closing argument.[127]

Advisory counsel should keep the possibility of his supplanting the defendant's *pro se* status in mind if he finds himself becoming highly active at trial. There is little reason for a trial judge to deny a request to allow advisory counsel to perform a limited role. Nor, even if advisory counsel has

124. United States v. Conder, 423 F.2d 904 (6th Cir. 1970).
125. *Id.* at 907.
126. *Id.* at 908.
127. State v. Armstrong, 562 P.2d 1129, 1131-32 (Mont. 1977). *See also,* United States v. Montgomery, 529 F.2d 1404, 1406 (10th Cir. 1976), *cert. den.* 426 U.S. 908 (1976).

become highly active, should a request by a defendant to perform a limited task be denied. The defendant, after all, has asserted a right, has probably waived counsel, and the court should not lightly override the *pro se* right once properly asserted. Many trial judges, however, are not tolerant of unusual procedures, so the advisory attorney should exercise caution.

IX. CONCLUSION

The chief conclusion to be drawn from the foregoing discussion is that the law both as to *pro se* defendants and advisory counsel is complex, unclear, and unsettled. Many jurisdictions have now ruled that a request for *pro se* representation must be timely, unequivocal and that the defendant must be given some sort of *Faretta* warnings. Most of those jurisdictions have made some indication as to whether or not the right to counsel must be waived. However, the extent of the warnings to be given and whether and to what extent there must be additional questioning to find a waiver is frequently uncertain. In addition, the relationship between the *Faretta* warnings and the waiver of counsel is dealt with in a variety of ways. Courts have also confused requests for advisory counsel and requests for co-counsel status. And methods to deal with the problem of guaranteeing a fair trial raised by incompetent or unwilling pro se defendants have not been fully developed. Because of these uncertainties, the role of advisory counsel is unclear and an attorney in that role may find himself struggling with these matters without any means to find answers to his questions. There is little clear law he can follow. The use of the terms "standby" and "advisory" is not consistent from one court to another. The expectations of judges vary both as to their understanding of the terms and the case at hand. And the defendant may or may not want assistance and may or may not have waived his right to counsel. This comment has presented an analysis of the considerations involved and has indicated some means by which courts might solve some of the problems they face.

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