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This month's article was written by H. Patrick Furman, Boulder, Clinical Professor of Law at the University of Colorado School of Law—(303) 492-2638, furman @colorado.edu. *The author gratefully acknowledges the contributions of Randy Canney, a Denver attorney whose insights about the role of advisory counsel, based on his experience, were invaluable; Nancy L. Cohen, Chief Deputy Regulation Counsel, for her insights regarding ethical issues; Deputy District Attorney Bruce Langer for his help in addressing the issues facing prosecutors; and District Court Judge Morris Hoffman for his thoughts on this topic.*

This article provides an overview of advisory counsel used to assist *pro se* criminal defendants, including the appointment and duties of advisory counsel, ethical obligations, and considerations for trial judges and prosecutors.

Two things are clear with regard to the constitutional right to counsel: everyone charged with a serious crime has the right to be represented by counsel, and everyone also has the right to proceed without counsel. What is much less clear are the duties and roles of advisory counsel appointed by the court to assist a criminal defendant who is proceeding without counsel but who, in the court's view, needs assistance from counsel. This article discusses the appointment of advisory counsel, the scope of duties assumed by advisory counsel, the ethical obligations that apply to advisory counsel, and considerations for trial judges and prosecutors dealing with cases in which advisory counsel has been appointed.

A Brief History of the Right to Counsel

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Article II, § 16, of the Colorado Constitution provides that "the accused shall have the right to appear and defend in person and by counsel. . . ."

Initially, only defendants with enough money to hire an attorney were able to exercise the right to counsel, but the U.S. Supreme Court subsequently held that "counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."[1] *Gideon v. Wainwright*[2] extended this federal constitutional guarantee to state courts through the due process guarantee of the Fourteenth Amendment. The expansion of the right to counsel to include those who could not afford to hire their own attorneys is one of the most important trends of the criminal justice system in the past fifty years. The right to counsel is acknowledged by state statute, as well,[3] with certain limits placed on the right to court-appointed counsel.[4]

The flip side is the right to proceed *pro se*. As noted, the Colorado Constitution explicitly acknowledges the right of the accused to "defend in person."[5] The Sixth Amendment to the U.S. Constitution has been interpreted to establish the right to proceed *pro se*.[6] A trial court may not "thrust counsel upon the accused, against his considered wish."[7] A defendant's desire to "conduct his own defense ultimately to his own detriment . . . must be honored out of 'that respect for the individual which is the life blood of the law.'"[8]

The "Right" to Advisory Counsel

There is, however, a middle ground between proceeding with counsel and proceeding alone. A trial court dealing with a defendant who wishes to proceed *pro se* may appoint advisory counsel.

There is no federal or state constitutional right to advisory counsel.[9] The only mention of the term in Colorado

statutes is the preclusion of the Office of Public Defender from being appointed as advisory counsel.[10] The authority to appoint advisory counsel therefore stems from case law. Although the case law is less than clear about the source of this authority, the discretion of the trial court to make such an appointment is now well-established.[11]

Types of Advisory Counsel

A brief discussion of terms is appropriate at this point. The decisions addressing the issues relating to advisory counsel suggest that there are three roles that counsel might play: that of advisory counsel, stand-by counsel, and hybrid counsel. Not all courts use these terms in identical fashion, and some courts do not distinguish among these types of counsel at all; however, it is important to distinguish these three roles.

Advisory counsel is appointed to assist the defendant with legal research before trial and with issues that crop up during trial, but may well never appear on the record in front of the jury. Advisory counsel has no decision-making authority with regard to the presentation of the case.

Stand-by counsel has a role that potentially is much larger than that of advisory counsel. Stand-by counsel is expected to be able to jump in and try the case as the lawyer of record, should the defendant decide he or she no longer wishes to proceed *pro se* or become unable to continue with self-representation. Stand-by counsel clearly has the ability to act as advisory counsel, as well, and might shift from an advisory role to a traditional role during the pendency of a case.

Finally, hybrid counsel may conduct certain portions of the proceedings, even in front of the jury, and act essentially as co-counsel to the defendant. The defendant conducts the balance of the proceedings and retains ultimate authority as to the presentation of the case.

The Authority to Appoint Advisory Counsel

The first Colorado decision addressing the power to appoint advisory counsel appears to be *Reliford v. People*.[12] Reliford, who was charged with second-degree murder, asked to proceed *pro se* and the trial court allowed him to do so. After finding that the trial court adequately advised the defendant about the perils of proceeding *pro se*, the Colorado Supreme Court held that the trial court was not under an obligation to appoint advisory counsel over the defendant's objection. The Court also discussed the power of the trial court to appoint advisory counsel.

The *Reliford* court did not identify the source of the authority to appoint advisory counsel, although it did note, with approval, the American Bar Association (ABA) *Standards Relating to the Function of the Trial Judge*.[13] The *Standards* recommend that a trial court should consider appointing advisory counsel whenever a defendant elects to proceed *pro se*, and should appoint advisory counsel whenever a case is complicated.[14] The Colorado Supreme Court agreed that "that the appointment of advisory counsel is generally a fair and commendable practice," but refused to mandate such an appointment, holding instead that the decision whether to appoint advisory counsel rests in the sound discretion of the trial court.[15]

This basic principle remains unchanged. The judge's discretion to appoint advisory counsel is so broad that the U.S. Supreme Court has recognized that a trial court has the authority to appoint advisory counsel even over the defendant's objection "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."[16] Similarly, the Colorado Court of Appeals has held that a "trial court is not precluded from appointing counsel at any stage of the proceedings if a *pro se* defendant is so grossly inept as to deny himself meaningful representation."[17] The accused in this situation is not under any obligation to seek or accept help from appointed advisory counsel.[18]

The authority of a trial court to appoint advisory counsel also stems from the inherent authority of the trial court to run trials in a manner that ensures the proceedings are fair. This concern may justify the appointment of advisory counsel. The old adage, "One who represents himself has a fool for a client,"[19] recognizes the likelihood that a *pro se* defendant will conduct an inadequate defense. As the Supreme Court has acknowledged, a layperson:

> is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense . . . [and] faces the danger of conviction because he does not know how to establish his innocence.[20]

Although this reasoning was used to justify the appointment of counsel for indigent defendants, it also supports the appointment of advisory or hybrid counsel, who can take over if necessary.

A judge's authority to appoint also may be based on the judge's duty to ensure that cases progress in an orderly fashion.[21] A *pro se* defendant, unfamiliar with

Advisory Appellate Counsel

A criminal defendant has no more of a right to advisory appellate counsel than to advisory counsel at trial. *Downey v. People*,[1] which addresses a claim that advisory appellate counsel was ineffective, adopts the language of the decisions addressing advisory trial counsel. The trial court had appointed an attorney to act as advisory appellate counsel and "after a partially successful appeal, Downey filed a Crim.P. 35(c) motion claiming ineffective assistance of his advisory appellate counsel."[2]

This 35(c) motion was filed in the trial court and the trial court took testimony concerning the precise nature of the role advisory counsel played. The conclusion of the trial court was that counsel began in a purely advisory role but, after seeing the first draft of the brief Downey was planning to file, negotiated with Downey about the nature of his role, and wrote most of the brief that eventually was filed. However, the trial court found that Downey retained control over what issues were addressed in the brief and had veto power over the final product. The trial court therefore rejected Downey's argument that advisory counsel had inserted himself into the appeal to such a degree that he should be treated as if he was counsel of record.

The Colorado Supreme Court accepted the trial court's factual finding that counsel remained in the status of advisory counsel, and this factual conclusion compelled the legal conclusion: "Under these circumstances, Downey could not maintain a claim for ineffective assistance of counsel against his advisory appellate counsel."[3]

1. *Downey v. People*, 25 P.3d 1200 (Colo. 2001).
2. *Id.* at 1202.
3. *Id.* at 1206.

rules and procedures, is more likely to cause delays and disruptions at trial. In *United States v. Mack*,[22] the trial court declined to appoint advisory counsel for an extremely disruptive *pro se* defendant. When the defendant eventually was banned from the courtroom due to his disruptive behavior, there was no one to give a closing argument for the defendant. The Ninth Circuit Court of Appeals held that his removal constituted grounds for a new trial because the defendant "wound up deprived of counsel—himself or anyone else."[23]

The appointment of advisory counsel may help ensure that a *pro se* defendant does not strain overburdened resources by presenting untenable theories and submitting frivolous motions. Hybrid counsel may be better able to perform this function. The appointment of stand-by counsel can solve the problem of the defendant who initially chooses to proceed *pro se*, but later changes his mind and seeks—and needs—the help of counsel.

The appointment of advisory counsel also may reduce the danger of the judge or the prosecutor being placed in the uncomfortable position of attempting to assist a *pro se* defendant who is struggling and likely to unintentionally create a miscarriage of justice. Advisory counsel can assist the defendant in such matters. "Participation by counsel to steer a defendant through the basic procedures of trial is permissible" even if it undermines the defendant's appearance of control over his or her defense.[24] Again, however, hybrid counsel might be better able to perform this function.

In determining whether to appoint advisory counsel, judges should consider the seriousness of the charge, the complexity of the case, and the defendant's criminal experience and ability to represent himself or herself.[25] One observer has argued that advisory counsel should be appointed in every criminal case to ensure that defendants have access to an adequate defense, prevent courts from being tempted to act in place of defense attorneys for *pro se* litigants, and assure a smoother trial.[26]

The Role of Advisory Counsel

The precise role of advisory counsel varies from case to case. It is clear that advisory counsel is not expected to be the functional equivalent of retained or court-appointed counsel. In *People v. Haynie*, the court of appeals rejected a claim that "the scope of representation by advisory counsel should be equal to that guaranteed indigent defendants represented by public defenders."[27] A *pro se* defendant has the right to control the theory of the defense, pretrial motions, and the actual presentation at trial. On the other hand, advisory counsel is supposed to assist the *pro se* defendant navigate these difficult waters. The result is that there are no clear lines as to precisely what advisory counsel should or should not—and must or must not—do. As noted, trial judges can exercise control over the scope of advisory counsel's role, because they need not appoint advisory counsel at all.[28]

The Colorado Court of Appeals has described the role of advisory counsel as being merely the functional equivalent of a law library or alternative sources of legal knowledge.[29] In *People v. Rice*, the court observed:

On examining the record, we note that throughout the proceedings, the defen-

> dant either was represented by counsel, or after he chose to represent himself had a "standby" counsel available to provide secretarial assistance and provide . . . legal material if requested.

Hence, the defendant was at no time deprived of "access to a law library or alternative source of legal knowledge."[30] The court also has approved a description of advisory counsel as "only as a resource for defendant" who "would not actively participate in the trial."[31]

However, this interpretation of the role of advisory counsel does not seem to comport with other cases suggesting that advisory counsel serves as more than just a law library. The U.S. Supreme Court has been unwilling to categorically bar advisory counsel from participating in the presence of the jury. In *McKaskle v. Wiggins*,[32] the Court reasoned that a defendant's constitutional right to proceed *pro se* is not violated when counsel provides assistance in complying with procedural and evidentiary matters, as long as the defendant retains control over the defense. Moreover, a defendant may waive the right to represent himself or herself by allowing counsel to participate in front of the jury with tacit or express approval.[33] If the defendant chooses to let counsel participate in this manner, he or she may not later assert that counsel interfered with the right to proceed *pro se*.[34] The Court cautioned that a trial judge need not permit this type of "hybrid representation" and that it should not "serve as a model for future trials."[35]

Although advisory counsel may be more than a law library, the defendant who proceeds *pro se* should retain command of the case. *McKaskle* makes it clear that the defendant's right of self-representation is violated by the appointment of advisory counsel over the defendant's objection if the defendant did not have "a fair chance to present his case in his own way."[36] The *pro se* defendant must be allowed to:

> control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.[37]

The trial court should not, over the accused's objections, impose counsel on the accused by permitting advisory counsel to examine and cross-examine witnesses or make arguments.[38] If the defendant chooses to let stand-by counsel take over some portion of the trial proceeding, the trial court should clarify with the accused and counsel whether counsel is taking over all, or just some limited portion, of the defense.

The Supreme Court was unwilling in *McKaskle* to conclude that advisory counsel should be categorically barred from participating in any portion of the proceeding that occurs in the presence of the jury.[39] The Court reasoned that a defendant's right to proceed *pro se* is not violated when counsel assists in complying with procedural and evidentiary matters, because the defendant retains control over the defense. Clearly, when advisory counsel and the defendant disagree, disputes should be resolved in favor of the defendant.[40]

One approved limit on the in-court role of advisory counsel has been to preclude counsel from interrupting "the proceedings to 'coach' [the] defendant" but to allow "recesses or in-court consultations upon defendant's request."[41] Clearly, such an approach is disruptive and can become time consuming.

Finally, the trial court must make it clear to the jury that the defendant is representing himself or herself.[42] The *McKaskle* court was particularly concerned with the actions of counsel that took place in front of the jury because the "defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."[43] The Court noted with approval that the trial judge made it clear to the jury, whenever counsel got involved, that the defendant retained control of the case.[44] Colorado trial judges have broad discretion over the scope of advisory counsel's role, because a state court defendant is not constitutionally entitled to the appointment of advisory counsel or hybrid representation.[45]

The Ethical and Professional Obligations Of Advisory Counsel

The state legislature has explicitly excluded the Public Defender (P.D.) from accepting an appointment as advisory counsel.[46] This exclusion appears to preclude the appointment of the Alternate Defense Counsel (A.D.C.), as well, because an A.D.C. appointment is premised on the existence of eligibility for a P.D. appointment. Therefore, private counsel are appointed as advisory counsel by the trial court and paid by the judicial department.[47]

The ethical obligation of defense counsel to accept an appointment to represent a criminal defendant stems, in part, from the fact that such representation is guaranteed by the Constitution and all lawyers have an obligation to help protect constitutional rights.[48] Because there is no constitutional right to advisory counsel, the question of whether counsel is under an ethical obligation to accept an appointment as advisory counsel is somewhat different. Although no Colorado case has specifically addressed this question, it would seem that counsel has an ethical and professional duty to accept appointment as advisory counsel and, if counsel wishes to challenge such an appointment, should do so through the appellate process rather than by refusing the appointment.

General Ethical Guidelines

Counsel who have accepted appointment as advisory counsel face a number of ethical and professional concerns. There are no ethical guidelines specific to advisory counsel, and there are no Colorado decisions addressing the ethical issues faced by advisory counsel. If there is a conclusion that comes out of the following discussion, it is this: advisory counsel should follow the same ethical rules they would follow if they had been retained or appointed in the traditional manner.

It is unethical for a lawyer to "offer evidence that the lawyer knows to be false."[49] A retained or appointed defense lawyer simply should refuse to call a witness the lawyer knows is going to present perjured testimony. Advisory counsel in this situation should attempt to persuade the "client" not to offer such evidence, but cannot preclude the action. This situation may put advisory counsel in the uncomfortable position of standing silent while perjured testimony is offered. If the persuasion fails, the best course of action is for advisory counsel to seek permission to withdraw, without revealing to the court the specific reason withdrawal is being requested.[50] The same analysis would seem to apply to the requirement that a lawyer must "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client"[51] and to the rule that a lawyer may not allude in trial to "any matter that the lawyer does not believe is relevant or that will be supported by admissible evidence."[52]

The duty to act in a professional manner is closely connected to the duty to act in an ethical manner. The first rule of the Colorado Rules of Professional Conduct states: "A lawyer shall provide competent representation to a client."[53] Advisory counsel, like counsel in any other situation, must do his or her best to represent the client competently and effectively.

Ineffective Assistance of Counsel and Malpractice

A *pro se* defendant may not assert an ineffective assistance of counsel claim against advisory counsel who does not exceed the advisory role, because the defendant does not have a constitutional right to advisory counsel.[54] However, if counsel exercises a broader role—one that more closely resembles the traditional defense counsel role—during some or all of the proceedings, the defendant may have a claim of ineffective assistance of counsel.[55] Here again, it is in the best interests of all parties if the precise nature of the role of advisory counsel is delineated as clearly as possible at the outset of the appointment. If counsel exercises a broader role, he or she must comply with the relevant ethical standards, just as if counsel was acting in the traditional capacity.

The question of whether a defendant has an ineffective assistance claim against advisory counsel does not answer the question of whether the defendant has a malpractice claim against advisory counsel. There are no Colorado cases addressing malpractice claims against advisory counsel. Regardless of whether the defendant has an ineffective assistance claim, the defendant is entitled to competent representation by advisory counsel, and advisory counsel is under an ethical obligation to competently perform all work.[56]

The Role of Prosecutors

The fact that a defendant is proceeding *pro se*, with or without advisory counsel, does not relieve prosecutors of their ethical or professional obligations. It may, in fact, increase those obligations. A *pro se* defendant almost certainly raises difficult challenges for prosecutors who may be tempted to "help" a *pro se* defendant more than they would help a represented defendant, to ensure that procedural justice is achieved while, at the same time, vigorously pursuing the conviction that they believe to be the just result in the case.

The Colorado Rules of Professional Conduct address the issue of *pro se* defendants in only one sentence, in Rule 3.8, which bars prosecutors from seeking to obtain waivers of important pretrial rights from unrepresented defendants, "except that this does not apply to a defendant appearing *pro se* with the approval of the tribunal." Presumably, the exception is intended to make clear that prosecutors may speak with unrepresented defendants on this particular topic and not to open the door to any communications that otherwise would be banned. In light of these ethical and professional obligations, it may well be that prosecutors must modify their standard practices to prevent a miscarriage of justice in a case involving advisory counsel.

Communications With the Defendant

At the outset, the prosecutor, like the court and advisory counsel, has an inter-

est in clarifying the role of advisory counsel. For example, the parties should clarify the role of advisory counsel in connection with communications between the prosecutor and the defendant. It may be difficult, as a purely practical matter, for a prosecutor to communicate directly with the defendant, particularly one who is in custody. Advisory counsel may be able to facilitate this process.

Prosecutors may have difficulty with the substance of communications, as well. Plea negotiations are an example. A plea offer may be premised on the likelihood of success of a pretrial motion. Such a prediction can be fairly evaluated by defense counsel, but not by a *pro se* defendant. Advisory counsel can provide an experienced opinion on such matters, and prosecutors should consider how to use advisory counsel in this regard. If required to deal directly with the defendant, prosecutors should urge the defendant to consult with advisory counsel about any offers that are made.

Trial Issues

Problems that implicate the ethical and professional obligations of prosecutors likely will arise at trial, as well. A *pro se* defendant may be unable to introduce a document or exhibit that the prosecutor knows is admissible if the correct foundation is laid. If advisory counsel is allowed to take a hybrid role and help the defendant in court, the problem may be overcome. If advisory counsel cannot do so, the prosecutor's independent obligation to seek the truth may require him or her to help the defendant. A prosecutor has no such obligation when there is counsel of record, because the defendant has a cause of action for ineffective assistance. Because the defendant waives any claim of ineffective assistance by choosing to proceed *pro se*, one response to this situation is simply to say that the defendant has voluntarily assumed the risk of his or her own incompetence. However, the prosecutor's obligation to seek justice should be viewed as independent of any such waiver by the defendant.

There are other trial scenarios in which a *pro se* defendant's actions might implicate the ethical and professional duty of a prosecutor. What if a prosecution witness, in response to a completely proper question, starts giving a clearly objectionable answer? What if a prosecutor, in the heat of battle, asks a clearly objectionable question? "The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting . . . the accused from having a conviction result from misleading evidence."[57]

One framework for addressing these questions may be to distinguish between "passively" and "actively" taking advantage of the blunders of a *pro se* defendant whose advisory counsel cannot intervene. It could be argued that a prosecutor would be acting unprofessionally and unethically by taking affirmative steps to take advantage of the defendant's lack of legal skills. It is one thing to remain silent while the defendant blunders; it is quite another to file motions or ask questions or take other steps that the prosecutor knows would be objected to by counsel simply because the prosecutor believes the defendant would fail to object. In other words, there is nothing unprofessional or unethical with passively taking advantage of the defendant's decision to proceed *pro se*, but it is improper to actively take advantage of that decision.

The Role of the Court

The problems facing trial judges presiding over cases in which the defendant is proceeding *pro se* with advisory counsel are sometimes similar to the problems facing prosecutors and sometimes unique to the court. Trial courts "clearly have the responsibility to ensure that a criminal defendant receives a fair trial . . . as well as the latitude to ensure the integrity, and appearance of integrity, of the process."[58] The ABA *Standards* cited with approval in *Reliford*[59] mandate that the trial court "take whatever measures may be reasonable and necessary to ensure a fair trial for a *pro se* litigant."[60] The question is whether a trial court's obligation to protect against miscarriages of justice overrides the right of a criminal defendant to proceed *pro se*. As previously noted, *McKaskle* permitted participation by advisory counsel to steer the *pro se* defendant through basic trial procedures, even when doing so undermined the defendant's appearance of control over his defense.[61]

The first step a trial judge should take is to fully advise the potential *pro se* defendant of all of the pitfalls of proceeding *pro se*. A trial judge who thinks that proceeding *pro se* is a bad idea may well be tempted to bend over backward to dissuade the defendant from proceeding *pro se*. A judge, like prosecutors, may feel torn between equally important ethical and professional duties, in a manner different from when the defendant is represented.

A trial court does not exceed its discretion in denying a request to proceed *pro se* that is not timely or unequivocal.[62] A waiver of the right to counsel must be made knowingly and intelligently and the trial court must ensure that a defendant is aware of the dangers and disadvantages of self-representation.[63] There is a series of questions that trial courts should ask before allowing a defendant to proceed *pro se*,[64] and this inquiry could be expanded to include a discussion about the possibility of appointing advisory counsel. On the other hand, because there is no right to advisory counsel, there is no requirement that the trial court advise a defendant about the possibility of such an appointment, and such an advisement actually might increase the likelihood that the defendant will choose to proceed *pro se*.

Because a defendant wishing to proceed *pro se* is not entitled to the assistance of advisory counsel, it would seem logical that a trial judge has the authority to condition the appointment of advisory counsel on the defendant's agreement as to the rules relating to the function of advisory counsel. The power to deny an appointment entirely includes the power to put conditions on such an appointment.[65] If this is the case, the trial court may be able to negotiate with the defendant about the authority of advisory counsel in an effort to reduce the danger of a miscarriage of justice.

Assuming that the defendant has been allowed to proceed *pro se* and that the role of advisory counsel precludes counsel from intervening in court, does the trial court nonetheless have an obligation to protect the right of the defendant and/or to prevent a miscarriage of justice that will occur due to the defendant's choice to proceed *pro se*? Just as with prosecutors, one simple answer is that the court has no additional duty beyond advising the defendant of the difficulties and dangers of proceeding *pro se*. The many pitfalls of proceeding *pro se* are, after all, the reason trial judges are required to give such a thorough advisement to a defendant wishing to proceed *pro se*, and the defendant "is bound by his choices, however ill-advised they may be."[66] Perhaps, however, the answer is more difficult. Like prosecutors, trial judges have an independent ethical obligation to stop miscarriages of justice from occurring,[67] and this may require them to alter their normal procedures to help the *pro se* defendant avoid plain er-

rors without improper favoritism. Some of the suggestions made herein for prosecutors may apply to trial judges, as well.

Although a *pro se* defendant must comply with the rules of evidence and procedure, the court need not inform him of her of the substantive law and applicable rules. As a result, *pro se* defendants lose the right to appeal issues if they fail to request a record of opening and closing arguments[68] and a record of the complete proceeding.[69] Presumably, the rule that a reviewing court can take notice of plain error and reverse on that ground regardless of whether the issue was properly preserved at trial, applies with full force to a *pro se* defendant.[70]

An exception to the general rule that judges need not inform *pro se* defendants of the applicable rules is the right against self-incrimination. The *Curtis* rule applies to *pro se* defendants.[71]

Conclusion

A defendant who proceeds *pro se* may face an increased risk of conviction. For these reasons, trial courts must carefully and thoroughly advise *pro se* defendants of the right to counsel, as well as the pitfalls of proceeding *pro se*. In appropriate cases, trial courts should consider the appointment of advisory counsel. When advisory counsel is appointed, all parties—the defendant, the court, the advisory counsel, and the prosecutor—have an interest in making sure that the boundaries of advisory counsel's role are defined as clearly as possible. The trial court, the advisory counsel, and the prosecutor all must consider whether there exists an independent professional or ethical duty to step in to avoid miscarriages of justice.

NOTES

1. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (describing the holding in *Johnson v. Zerbst*, 304 U.S. 458 (1938)).
2. *Gideon, supra* note 1.
3. CRS §§ 21-1-101 *et seq.* (establishing the Office of Public Defender).
4. CRS §§ 21-1-103 and -104.
5. Colo. Const. Art II, § 16; *People v. Romero*, 694 P.2d 1256 (Colo. 1985).
6. *Faretta v. California*, 422 U.S. 806 (1975).
7. *Id.* at 820.
8. *Id.* at 834.
9. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *Romero, supra* note 5 at 1265.
10. CRS § 21-1-103(1)(b).
11. *People v. Garcia*, 64 P.3d 857 (Colo.App. 2002).
12. *Reliford v. People*, 579 P.2d 1145 (Colo. 1978).
13. Now found at American Bar Association (ABA) *Standards for Criminal Justice* (*Standards*) 6-3.7 (2d ed. 1980 & Supp. 1986).
14. *Reliford, supra* note 12.
15. *Id.* at 1148.
16. *McKaskle, supra* note 9.
17. *People v. Woods*, 932 P.3d 500, 535 (Colo. App. 1996). *See also People v. Lucero*, 615 P.2d 335 (Colo. 1980), approving the appointment of advisory counsel over the objection of the defendant.
18. *Lucero, supra* note 17 at 662.
19. Fred R. Shapiro (Editor), *Oxford Dictionary of American Legal Quotations* (New York, NY: Oxford University Press, 1993) *citing Port Folio* (Philadelphia, August 1809) at 132 as the first mention of this quote.
20. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).
21. *United States v. Mack*, 362 F.3d 587 (9th Cir. 2004).
22. *Id.*
23. *Id.* at 602.
24. *McKaskle, supra* note 9 at 184.
25. *Am.Jur. Crim.L.* § 1248.
26. Pearson, "Mandatory Advisory Counsel for *Pro se* Defendants: Maintaining Fairness in the Criminal Trial," 72 *Calif. L.Rev.* 697, 719 (1984).
27. *People v. Haynie*, 826 P.2d 371, 375 (Colo. App. 1991).
28. *Id.* at 376, *citing Romero, supra* note 5.
29. *People v. Vialpando*, 954 P.2d 617, 620 (Colo.App. 1997).
30. *People v. Rice*, 579 P.2d 647, 650 (Colo. App. 1978).
31. *Haynie, supra* note 27 at 375.
32. *McKaskle, supra* note 9 at 182.
33. *Id.*
34. *Id.*
35. *Id.* at 183, 186.
36. *Id.* at 177.
37. *Id.* at 174.
38. *Faretta v. California*, 422 U.S. 806, 820 (1975).
39. *McKaskle, supra* note 9 at 182.
40. *See id.* at 181.
41. *Haynie, supra* note 27 at 376.
42. *See McKaskle, supra* note 9 at 185.
43. *Id.* at 177.
44. *Id.* at 181.
45. *See Haynie, supra* note 27 at 376.
46. CRS § 21-1-103(1)(b).
47. Author conversations with Hon. Morris Hoffman and Gaylene Wagoner, formerly of the S.C.A.O.
48. *Stern v. County Court*, 773 P.2d 1074, 1076, 1077 (Colo. 1989).
49. Colo.R.P.C. 3.3(a)(4).
50. See *People v. Schultheis*, 638 P.2d 8 (Colo. 1981).
51. Colo.R.P.C. 3.3(a)(2).
52. Colo.R.P.C. 3.4(e).
53. Colo.R.P.C. 1.1.
54. *Downey v. People*, 24 P.3d 1200, 1202 (Colo. 2001).
55. *Id.*
56. Colo.R.P.C. 1.1.
57. *DeLuzio v. People*, 494 P.2d 589, 593 (Colo. 1972).
58. *People v. Frisco*, 119 P.3d 1093 (Colo. 2005).
59. *Reliford, supra* note 12.
60. ABA *Standards*, 6-3.7.
61. *McKaskle, supra* note 9 at 184.
62. *People v. Edwards*, 101 P.3d 1118 (Colo. 2004); *People v. King*, 121 P.3d 234, 237 (Colo. App. 2005).
63. *People v. Rawson*, 97 P.3rd 315, 317 (Colo. App. 2004).
64. *People v. Arguello*, 772 P.2d 87 (Colo. 1989).
65. *Haynie, supra* note 27 at 376.
66. *Lucero, supra* note 17 at 664.
67. ABA *Standards*, 6-3.7.
68. *Berry v. State*, 552 P.2d 87 (Okla.Crim. 1976).
69. *State v. Palmer*, 580 P.2d 592 (Or.App. 1978).
70. *Wilson v. People*, 743 P.2d 415 (Colo. 1987) (setting out the plain error standard; there appears to be no case law applying this doctrine in the context of a *pro se* defendant.
71. *People v. Curtis*, 681 P.2d 504 (Colo. 1984). ■