

michaels, kathryn

From: dailey, john
Sent: Thursday, January 3, 2019 8:05 AM
To: michaels, kathryn
Subject: FW: Criminal Rules Committee

Please add these two items to the new business part of the agenda. And, when we forward materials to the groups, forward this email too. Thank you.

From: Espinosa, Adam - DCC Judge <adam.espinosa@denvercountycourt.org>
Sent: Wednesday, January 02, 2019 5:46 PM
To: dailey, john <john.dailey@judicial.state.co.us>
Subject: Criminal Rules Committee

Hi Judge Dailey,

I am writing to follow up on our brief call today. As I mentioned, I am currently serving in the Denver County Court, State Criminal Division. In this position I noticed two issues that the Criminal Rules Committee might want to review for possible rule changes. I've briefly outlined them below and I am happy to meet with you or the group about any questions you might have or to further flesh out the issues.

Termination of Representation

There was some confusion in my court as to when an appointed public defender's representation terminates. Under Crim. P. 44(e), "unless otherwise directed by the trial court or extended upon agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed shall terminate at the conclusion of the trial court proceedings and after a final determination of restitution." The rule continues to define when a proceeding has concluded. Title 21 of the Colorado Revised Statutes set forth the duties and responsibilities of the State Public Defender. C.R.S. 21-1-103 requires the public defender to represent indigent persons in criminal cases who are found to be indigent after the completion of an application. C.J.D. 04-04, which was amended July 2018, sets forth the specifics for the determination of indigency.

The issue came up in my courtroom recently when an appointed public defender objected to representing a client at a sentencing hearing. In this particular case, the public defender was appointed to represent a client that was in custody. The client reached a plea agreement with the District Attorney that called for probation, jail, and a personal recognizance bond pending a pre-sentence investigation report and the sentencing hearing. The client plead guilty while in custody and was released on the stipulated personal recognizance bond. About five weeks later, at the sentencing hearing, the client appeared out of custody and the appointed public defender objected to continuing to represent the client because he was now out of custody and needed to re-apply for their services pursuant to Title 21 and C.J.D. 04-04 to determine if the client was indigent. This objection appeared to be inconsistent with the language in Crim. P. 44(e) that addresses when appointed representation terminates. This issue also came up with regard to an appointed public defenders representation of a client at a subsequently scheduled restitution hearing after a client pleads guilty but where restitution was properly reserved. It has come up in other instances where sentencing is set out or when a stay of execution of a sentence was ordered. We have resolved these issues in my courtroom but there may be an inconsistency with the rule and the judicial directive that needs to be clarified. Crim.P. 44(e) and C.J.D. 04-04 may be ripe for review by your committee, especially considering the recent Colorado Court of Appeals opinion in *People v. Lancaster*, 18COA168, that addressed the issue of termination of representation in a somewhat similar context.

Limited Representation/Unbundled Legal Services

The issue of limited representation in state criminal courts has come up in many presentations I have made regarding unbundled legal services across the state. It has also come up in my criminal court when an attorney attempted to use the current civil rules to enter a limited appearance under C.R.C.P 121, Section 1-1(5). I resolved this issue with the attorney and the case has concluded. However, as you know, the Colorado Supreme Court and even the U.S. District Court for the District of Colorado have amended their procedural and ethics rules to allow for certain types of limited representation (even in certain proceedings before the Colorado appellate courts). Colo. RPC 1.2(c) allows a lawyer to limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and if the client gives informed consent. Rule 1.2(c) does not prohibit limited representation or unbundling legal services in criminal cases. C.R.C.P. 11(b)/311(b) allows a lawyer to assist a pro se party in drafting pleadings and documents for the court without entering an appearance and subject to certain requirements. C.R.C.P. 121, section 1-1(5), allows an attorney to enter an appearance for a particular proceeding and to withdraw without leave of the court, if certain procedures are followed. And, the federal court allows for limited representation in civil cases and certain prisoner cases with the consent of the court. The ethical and procedural rules for allowing limited representation in the state and federal courts have slowly changed to permit limited representation starting in 1999 (Colo. RPC 1.2(c) and C.R.C.P. 11(b)/311(b)) and more recently in 2011 (C.R.C.P. 121, section 1-1(5)), 2012 (C.A.R. 5(e)), 2015 (D.C.Colo.LAttyR2 and D.C.Colo.LAttyR5; limited representation in prisoner cases with consent), and 2016 (D.C.Colo.LAttyR2 and D.C.Colo.LAttyR5; limited representation in civil cases with consent). However, the criminal rules do not have a corresponding rule to allow limited representation. A creative lawyer might argue that Crim. P. 57(b) allows the trial court to permit limited representation in criminal cases because the trial court is required to look at the Rules of Civil Procedure to address issues of procedure that are not specifically provided for in the Criminal Rules.

Limited representation in certain proceedings in a criminal case could provide great assistance to pro se parties that do not qualify for the public defenders assistance and who cannot afford a lawyer for the entire criminal proceeding. It could ensure they have equal access to our courts and understand their legal matter better. Limited representation could permit a lawyer to assist, counsel, and advise a client on many issues in a criminal case including on what the charges are in a case and the possible penalties, the risks and advantages of a proposed plea agreement, and possible legal issues in the case all without entering their appearance. Limited representation might also be helpful in assisting a client to draft or argue a motion such as motions to modify bond, motions to modify pre-trial supervision conditions, motions to modify protection orders, motions to dismiss, or motions to suppress evidence, or even representation at sentencing hearings or restitution hearings, and withdraw after the specific proceeding is completed. Recognizing the constitutional and liberty interests at stake in criminal cases, limited representation may not be reasonable in all circumstances. All that said, the issue of limited representation in certain criminal proceedings may be ripe for your committee to consider.

Thank you for considering my email on these two issues.

Best,

Adam J. Espinosa

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