MEMORANDUM

TO: ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
FROM: S. UHLMANN, D. REED. M. HOFFMAN
RE: RULE 44(e)(1)
DATE: MARCH 21, 2019

At the Committee's meeting on January 18, 2019, our subcommittee was charged with looking at Rule 44(e)(1), the rule governing when representation automatically terminates because the criminal proceedings have concluded. In particular, we were asked to examine whether any changes to that Rule might be appropriate to address the concerns raised by Denver County Judge Adam Espinosa in his e-mail dated January 3, 2019. A copy of that e-mail is attached.

Rule 44(e)(1) provides in its entirety:

> **(e) Termination of Representation.**
> (1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate at the conclusion of trial court proceedings and after a final determination of restitution. Trial court proceedings shall conclude at the point in time:
> (I) When dismissal is granted by the court and no timely appeal has been filed;
> (II) When an order enters granting a deferred prosecution, deferred sentence, or probation;
> (III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim. P. 35(b) or such motion so filed is ruled on; or
> (IV) When a notice of appeal is filed by the defendant.

Judge Espinosa reports his concerns arose out of two situations he encountered in his courtroom. In one, a public defender appearing for a sentencing objected to proceeding because his client had, after the guilty plea, been released on bond and needed to re-apply. The second case involved a defendant who had pleaded guilty and been sentenced, but for whom a restitution hearing had been set post-sentencing. Judge Espinosa also mentioned more generally that there

are other situations where sentencing is set out and the issue of the public defender's continuing representation can come up. He expressed the view that Rule 44(e)(1) might conflict with § 21-1-103 and Chief Justice Directive 04-04 (amended 2018). He also suggested we look at *People v. Lancaster*, ___ P.3d ___, 2018 WL 6214199 (Colo. App. 2018).

The subcommittee unanimously agreed that Judge Espinosa's concerns did not justify any changes to Rule 44(e)(1). In the first place, we all agreed that these examples he mentioned—where a public defender said a defendant had to requalify before sentencing or holding a restitution hearing—is not a practice any of us has seen on any regular basis in our jurisdictions. Yes, there is the ongoing challenge of criminal defendants going in and out of custody, or for other economic reasons going in and out of indigency, and yes, CJD 04-04 seems to authorize the PDs to require such defendants to requalify. But none of us has ever seen this happen post-plea or post-verdict in a sentencing or restitution context. Sheryl Uhlmann even asked the public defenders in her office and in Denver whether they've ever done this or heard of it being done, and they said no. This appears to be a one- or two-off situation—a solution in search of a problem.

Moreover, Rule 44(e)(1) governs when the lawyer-client relationship automatically terminates because the case proceedings "conclude." The Rule of course does not address continued indigency or other circumstances that might affect a lawyer's representation of a client *before* the proceedings otherwise conclude. So we see no conflict at all between 44(e)(1) and either § 21-1-103 or CJD 04-04. Moreover, even if there were a conflict, it is our view that Rule 44(e)(1) is not the place to resolve any such conflict because it has nothing to do with the problem of continuing indigency.

Neither does *People v. Lancaster* create any problem. In that case, the court of appeals rather straightforwardly held that a criminal lawyer's representation of his client continues through the filing of the notice of appeal, despite a contract purporting to terminate it earlier (remember, 44(e)(1) allows the lawyer and client to *extend* the relationship by agreement, not to terminate it earlier without leave of court).

But in reviewing the Rule, we did notice three things we thought might be worth fixing. First, subsection (1) states the rule that the representation terminates at the "conclusion" of trial court proceedings, but then goes on to define "conclusion" by rather awkwardly saying that trial proceedings "shall conclude" once the listed events in (I) through (IV) are finished. We thought both versions of the root "conclude" should be the same since that is a defined term, and we could in one fell swoop also fix the odd "shall conclude" phrase. We propose using the phrase "trial proceedings have concluded."

Second, one of our members reported she and other lawyers in her office have had judges read only the first part of section (1)—the representation terminates when the trial proceedings are concluded—and ignore the second part dealing with open matters of restitution. To address this concern, we recommend moving the restitution phrase into a more prominent place in the definition of when "trial court proceedings have concluded."

Third, we all noticed that subsection (II) does not contemplate that a jail sentence might be imposed in connection with a sentence to probation, thus setting up a conflict with subsection (III), which deals with when proceedings conclude after a jail sentence. We therefore propose adding the phrase "if no sentence to incarceration has been imposed as a condition of probation" to the end of subsection (II).

To accomplish these three changes we propose the following:

(e) Termination of Representation.

(1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate when ~~at the conclusion of~~ trial court proceedings have concluded.~~and after a final determination of restitution.~~ Trial court proceedings "have concluded" when restitution is finally determined and ~~shall conclude~~ at the point in time:

(I) When dismissal is granted by the court and no timely appeal has been filed;

(II) When an order enters granting a deferred prosecution, deferred sentence, or probation, if no sentence to incarceration is imposed as a condition of probation;

(III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim. P. 35(b) or such motion so filed is ruled on; or

(IV) When a notice of appeal is filed by the defendant.

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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 came 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 protections 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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