RIDLEY MCGREEVY & WINOCUR P.C.

MEMORANDUM

TO: Colorado Supreme Court Committee on the Rules of Criminal Procedure

FROM: Judge Grohs, Bob Russel and Kevin McGreevy

DATE: April 12, 2019

RE: Report from Subcommittee on Unbundled Legal Services/Limited Appearances

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Overview: Unbundled legal services or a limited appearance would allow an attorney to limit the scope of representation in a criminal case. This was one of the issues raised by Judge Adam Espinosa (County Court, Denver) in his email to Judge Dailey, dated January 2, 2019. In general, the Subcommittee was disinclined to recommend any rule change that allowed limited appearances. Members of the Subcommittee were intrigued by the ideas of a potential pilot project, or of allowing limited appearances for the purpose of addressing bond only, but that level of interest was not greater than the prospect of doing nothing. By this memo, we are looking to present a summary of our discussion as a Subcommittee to see if this Committee would like us to further pursue any aspect of this issue.

Process: The Subcommittee spoke with Judge Espinosa, Court of Appeals Judge Taubman, the Colorado State Public Defender's office, and several private practice criminal defense lawyers. The Subcommittee met twice to discuss these issues.

Evaluation: The strongest reason to suggest a rule change, in our collective view, is this: for the group of people that do not qualify for court-appointed counsel, and cannot afford to retain counsel, allowing lawyers to engage in a limited appearance (presumably for less money than is required for a lawyer to file a general entry of appearance) would provide access to attorneys to more defendants. According to Judge Espinosa, in Denver about 6% of felony defendants are *pro se*. The bigger need is in County Court (excluding traffic), where about 38% of the defendants are *pro se*. If one assumes that, for felony defendants, some proceed *pro se* by choice, the impact on felony cases is fairly small. On misdemeanor cases, the impact could be far greater, and many more people would have some advice of counsel to navigate at least a portion of their case.

We discussed several drawbacks to allowing limited appearances. The first affects the general concept of what a criminal defense lawyer's role is – and that is providing overall advice and judgment to the accused. If a lawyer is hired only to address a motion to suppress, or advice at arraignment, the lawyer may not have important factors such as investigation, reading the

whole of discovery, negotiations with prosecution, or discussions with co-defendant's counsel to effectively advise the client of his or her options. A second issue discussed was the impact limited appearances may have on post-conviction matters. We raised concerns that pleas, with the advice of a limited-role counsel, may be problematic. For example, the attorney may not include such activities in the scope of services as: review discovery, conduct investigation, or have a sense of what evidence would be admitted at trial. A corollary to this concern was whether defendants would feel compelled to plead if their lawyer was exiting the case if they did not plead. A third drawback was the potential for the limited appearance lawyer to undermine the defense of a case by only focusing on one aspect, so that the defendant is in a worse position if subsequent counsel (including court-appointed counsel) takes up the case. The fourth concern discussed was that the quality of attorneys who would be willing to engage in a limited practice might detract from the overall quality of criminal defense representation in Colorado.

We discussed a few other issues related to limited appearances. First, unless a trial is fast approaching in a case, most judges allow privately retained attorneys to withdraw if financial agreements are not being met. The effect is that many private lawyers do not demand payment of cases through jury trial as an upfront requirement, so there is an aspect of limited duration, general appearances currently in place. Second, if the Denver demographics are indicative, on the most serious cases, only 6% are *pro se*. Some portion of that 6% is *pro se* by choice. The experience in the private bar is that when absolutely necessary, most defendants can rely on some family help to retain a private attorney for serious matters. Similarly, on complicated cases, the Colorado State Public Defender and the courts are often generous on analyzing the guidelines for court-appointed counsel to find a way for court appointment when the defendant strongly desires a court-appointed attorney. The troubling area was in misdemeanors, where a larger portion of defendants are *pro se*. Generally, the fees demanded by the private bar for misdemeanors are much less than fees for a felony, so whether unbundled legal services would be effective in the narrower gap between court-appointed qualifications and an ability to afford misdemeanor representation is more unknown.

All of these concerns weighed the Subcommittee's recommendation to this Committee to decline to propose a rule of criminal procedure that would allow limited appearances or unbundled legal services. On balance, the detriments to allowing unbundled legal services outweigh the benefit.

Exception: *Limited appearances for purpose of arguing bond*. The Subcommittee discussed adopting a rule allowing limited appearances for the purposes of arguing bond (or representing a defendant at a bond hearing). On this issue, one member of the Subcommittee was intrigued enough to go forward with it, while the others were less intrigued. No-one thought it was a necessity to further the administration of justice. The theory behind the proposal is that private lawyers, contacted by the defendant in custody or his family who are out of custody, have an opportunity to put together a bond argument that the court-appointed lawyer is not afforded, such that judges may have more information that supports a lower bond. The quick timing of bond hearings hampers a defendant's ability to pull together financial resources; lawyers will be more likely in invest in a bond hearing without fear of being unable to withdraw, if the lawyer can

enter for the limited scope of the bond hearing.

The second benefit to allowing limited appearances for the sole purpose of bond is that it would seem to undercut the argument that limited appearances are implicitly authorized in criminal cases. Described in greater detail in the January 2, 2019 email from Judge Espinosa, the Rules of Professional Conduct allow for attorneys to limit the scope of representation. The civil rules allow for limited appearances. The criminal rules are ostensibly silent on whether limited appearances are authorized, and Crim. P. 57(b) invites referral to the civil rules when the criminal rules are silent. By explicitly allowing limited appearances only in circumstances of bond hearings/advocacy, this argument that limited appearances are currently implicitly authorized may be eliminated. And so, a collateral benefit to explicitly allowing limited appearances for the purpose of addressing bond (only) is impeding the road to authority of other limited appearances via the Rules of Professional Conduct, through the civil rules, by virtue of the silence from the Criminal Rules.

Next Steps: The Subcommittee thought if the general consensus of the Committee was that unbundled legal services, in any form, are ill-advised, we are well-prepared and equipped to fold up our tents. If there is not a consensus on this threshold question, we have other options for the Committee to consider. Judge Espinosa is willing to address the Committee at some future meeting on his views on this topic. The Subcommittee did not do a survey of other states' practices (though the ABA has; we just need to wade through the materials). In 2016, the Colorado Bar Association issued a formal ethics opinion on the topic, following the changes to the Rules of Professional Conduct, on advice on how to engage and deal with unbundled legal services (generally). The Subcommittee could draft options of what a rule may look like, either broadly or narrowly (such as on the question of addressing bond, or what would it take for a pilot project to allow this in Denver, or perhaps just Judge Espinoza's courtroom) for the Committee's consideration. But we have done none of this at this time, on the potential that Committee reaches the consensus that unbundled legal services are, at every level, not yet ready to be injected into the criminal process in Colorado.