

Cotton Law Offices



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Clerk of the Supreme Court
P.O. Box 40929,
Olympia, WA 98504-0929

Re: Comment on proposed Amendment to Civil Rule 71

Dear Clerk;

I write to express my some of my concerns with regard to the proposed amendment to CR 71 affecting an attorney's ability to withdraw from representing a client. I write in my capacity as an individual attorney and not in any other capacity.

I was somewhat stunned to accidentally learn of the proposed amendments to CR 71 earlier this month. I can find no information to indicate that it was circulated to stakeholders such as the WSBA Court Rules and Procedures committee, WSBA Sections, Minority and Specialty Bars, the Domestic Relations Attorneys of Washington (DRAW) or local bar associations prior to being submitted to the Supreme Court for consideration. To then realize that there were only a couple of weeks left before the comment deadline was startling.

With that in mind this letter may not necessarily address all of my concerns and questions raised by the proposed amendment. I therefore provide for your consideration at least the following:

1. The proposed amendment could result in unnecessary fees being incurred by adding a new layer of bureaucracy to the withdrawal process. For example, proposed CR 71(c)(4) adds potential "further proceedings" at which a court could conceivably order *sua sponte* a hearing at which that same court could presumptively decide to deny the request for withdrawal regardless of whether or not the parties are in favor of the withdrawal. Thus, the court may improperly insert itself into the proceedings and stand in the shoes of a party.
2. The proposed amendment does not seem to contemplate occasions when a client or a client's actions ends the attorney-client relationship. In such cases, the amendment could result in court interference in confidential matters that the attorney, by virtue of the Rules of Professional Conduct (see comment #4 below), is prohibited from disclosing. The court does not know what conversations have occurred or if attorney and client are estranged. Yet, the client would have contemplated the consequences of *his/her* decision which caused the relationship to end.
3. Under the current rule, a remedy to improper withdrawal already exists. The client receives notice of an intended withdrawal before anyone else. Any party may object to the withdrawal thus protecting rights of all involved parties. The Rule in its current form provides a remedy that is appropriate, works well, and should not be amended.

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4. An attorney withdrawing incident to RPC 1.7 is almost certainly restrained from saying why he/she is withdrawing. Even mentioning "RPC 1.7" during a withdrawal may be an impermissible disclosure of a "confidence". This is particularly true when an attorney "must withdraw." The presumed benevolent intentions of the proposed amendment is thwarted if the court is prejudiced by the airing of inadmissible inappropriate conduct and the attorney is opened up to a grievance for violation of RPC 1.7. In sum, CR 71 should not be allowed to conflict with RPC 1.7.

5. There are both Constitutional and Due Process concerns. For example, a rule that requires compulsory work without consent or compensation would seem to run afoul of prohibitions against involuntary servitude.

6. There are also potential significant economic problems for small or solo practitioners if this amendment to CR 71 is adopted. Many solo practitioner's incomes fluctuate month-to-month. If an attorney is "compelled" to take a case to trial without pay, the attorney's income for that month may be zero or even negative given the consuming nature of trial litigation that includes preparation time, briefing, pre-trial hearing, pre-trial motions, trial time, purchase of trial supplies, and drafting orders. A \$0.00 or negative income in a month can result in the inability to pay staff, inability to pay bills, impaired credit, and so on. The court should not have the ability to impose such an unreasonable burden on a practitioner.

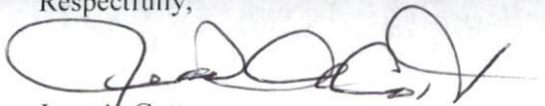
7. In many rural counties there is often not a period of 90 days between the time a trial date is requested and the date set for trial to occur. The proposed CR 71(c)(1) does not contemplate such an occurrence and, in fact, requires inclusion of the date set for trial in the notice of intent to withdraw. Moreover, the inclusion of language to add three additional days if served by mail is redundant as such a calculation of time is already mandated by CR 6(e). If CR 6(e) were to be amended in the future, would the language being proposed in CR 71(c)(1) also require amendment?

8. The proposed CR 71(c)(2) imposes further requirements without consideration of the differences between various counties. While providing bench copies to the Court is not disfavored, the additional information that an attorney would be required to provide in the notice is objectionable. Without consideration of the fact that many counties do not issue case schedules for every case, under this proposed amendment the withdrawing attorney would be required to confirm notice that the client has been provided a document that does not exist. Likewise, mandating that the attorney inform the client how to obtain a copy of the attorney's file would seem to be beyond the purview of the court. The attorney-client fee agreement should already include information on how a client obtains a copy his/her file if, in fact, he/she has not already been provided all of its contents previously. Perhaps most offensive in this portion of the proposed amendment is the distinction that only when the matter is a family law case is the attorney required to inform the client how to locate local court rules. Why wouldn't such information be needed for any civil proceeding and why is it the duty of counsel to provide such information? Who gives the information to a self-represented party who has never been represented by a lawyer?

In closing, there are numerous existing Ethics Opinions that address attorney withdrawals that require considerable review by experts in that field to determine the impact of the proposed amendment on those opinions and the Rules of Professional Conduct. While the proposed changes to CR 71 appear to be minimal on the surface, their effect could be far reaching and thus a detailed analysis of those impacts should occur.

Finally, if reducing the costs of litigation or Judicial caseloads are the reason behind the proposed amendments, there are other options better tailored to do so. Sanctions for bad faith, frivolous motions, intransigence, and discovery abuses could reduce the cost of litigation more than the proposed amendment. Courts can also use reasonable fee awards where allowed by statutes such as RCW 26.09.140 to discourage litigiousness. Such remedies might not only reduce the costs of litigation but in turn, also will reduce Judicial caseloads.

Respectfully,

A handwritten signature in dark ink, appearing to read 'Jean A. Cotton', with a large, stylized initial 'J' and a long horizontal flourish extending to the right.

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