From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Public Comments re CR 71 and Attorney Discipline
Date: Friday, April 16, 2021 1:20:18 PM

From: Noah Davis [mailto:nd@inpacta.com]
Sent: Friday, April 16, 2021 12:40 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Public Comments re CR 71 and Attorney Discipline

Dear Justices,

I write to oppose the proposed amendments to CR 71 and the Rules for Enforcement of Lawyer Conduct (the ELCs)

Re CR 71

I actually believe the proposed change will increase the cost of access to justice, barring many clients from either obtaining representation at the outset or else requiring significant retainers. Alternatively, we may see a wave of withdrawals occurring at around 120 days prior to trial (leaving far more individuals without representation than under the current Rule and creating even more congestion of unrepresented parties in the court than currently exists).

As it stands, Rule 71 provides a mechanism for a party to object to the notice of intent to withdraw (and I've had that happen), so there is a procedure in place to address what may be considered an untimely or inequitable withdrawal. And, as it stands, many small firms like mine, represent a diverse clientele clients in a wide variety of matters on very flexible terms (which help provide them access to justice).

As those cases get closer to a trial date, there is an increase in activity and expenditure. Trials are obviously expensive as the demands of the case, the rules of evidence, the formality of the proceeding require it.

If, 90 days prior to trial, an attorney cannot withdraw from a case due to a conflict or non-payment then there will be very little choice but to require sizeable retainers in all cases, even the smallest, with those retainers being requested and required at least 120 days prior to the trial date. That, I imagine, would create an artificial barrier. Maybe one side has financial means and the other doesn't, and then 120 days prior to trial (the party with lesser economic means is told they need to

come up with $50,000 (I'm sure this would be explained at the outset too, but likely won't hit home until there is no settlement and we are 120 days from trial).

At that point, the client feels compelled to settle the case right then because they have an inability to pay to continue (or maybe the economic situation changed). At present, the pressure of trial (the uncertainty and the costs) often drives settlement. But with the 90 day withdrawal limitation, there will be an additional pressure (and in many cases on only one side) to settle 90+ days plus before trial. And, unfortunately, in many cases, the Parties haven't yet identified the strengths and weaknesses of their cases, discovery hasn't been completed, we don't know the availability of witnesses, summary judgments motions have not been filed and mediation hasn't even taken place.

And, in the event that the attorney cannot withdraw, the client can exert great pressure (without costs to them) on the case and the work of the lawyer, including demanding more witnesses, more exhibits, more discovery, more motions, all without the prospect of having to pay for it (if the case is unsuccessful, or there are no funds to be had, or the client later files bankruptcy).

In a perfect world, where lawyers were provided at no cost to the client, or the clients had every financial mean available to them to pay for a trial, then this rule would help reduce the number of unrepresented Parties in Court.

But as it is not a perfect world and the reality is that the smaller and solo law firms provide access to justice for Washingtonians

Now all this said, I could and would accept a 30 day cutoff (that the lawyer must have withdrawn no later than 30 days prior to trial, and thereafter, only with the consent of the court after a motion).

RE the changes to the ELCs

As for these proposed changes, I would request that stakeholders who are more representative of the bar be brought to the table to discuss not just proposed changes from the WSBA, but proposed changes from the lawyer's rights perspective. I would see the Solo Small Firm Divisions wanting a seat, the minority bars, the larger County bars, WSAJ, WDTL, lawyers defending lawyers, the criminal defense bar, and family law lawyers (DRAW).

With the utmost respect to the WSBA disciplinary team, in my review, the proposed changes seek to expedite the process for attorney discipline without affording accused lawyers the minimal due process I believe they are entitled. One major area of concern already for accused lawyers is default proceedings. Any rule change that increases the number of defaults (by reducing the timelines for answering, after in some cases, allowing service of complaints by mail or email and without personal service) would, in my estimation, serve to increase the number of defaults. And, any process that decreases the prospect or availability of lay down discovery to the accused also limits their ability to defend (including by increasing costs).

As a former hearing officer, and as a former adjunct investigator I know the volunteer hearing officers work hard and that it's a major commitment to serve. But I also know that is an honor to

serve our profession in that capacity – one of the greatest honors. So, while I see pluses and minuses in paid professional hearing officer positions (one plus being a more consistent approach while one negative being a less potentially independent group of hearing officers –a particularly from the sense of perceived independence), I feel that we just cannot institute broad and material changes without input from a more diverse and effected group of stakeholders.

There, I would ask that the Court defer decision until there is a fuller, broader and more robust discussion.

Kindest Regards,

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