WACDL Washington Association of Criminal Defense Lawyers

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September 29, 2020

Washington State Supreme Court
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Re: Proposed Court Rules CrR 3.1, 3.4, 8.2
Proposed Court Rules CrRLJ 1.3, 3.1, 3.4, 8.2
Proposed Court Rule GR 31
Proposed Court Rules JuCR 9.2, 9.3
Proposed Court Rule MPR 2.1

Honorable Justices of the Supreme Court:

The Washington Association of Criminal Defense Lawyers (WACDL) urge you to adopt the proposed court rules. The rights of accused persons will be protected if these proposed rule changes are adopted.

CrR 3.1 and CrRLJ 3.1

This rule seeks to clarify that indigent standards for performance requiring certification by lawyers applies to civil commitment proceedings. WACDL supports this change. All types of cases should have clearly defined caseload standards and require certification by counsel.

In addition, the amendment clears up the right for defense counsel to seek expert funds, *ex parte,* without involvement of the prosecutor. To be clear, defense attorneys' duties to our clients to ensure confidentiality under RPC 1.6 protect decisions to seek experts for evaluation and/or consultation. We have no duty to notify the state of such potential witness unless and until we decide to present the evidence at trial, or once our client provides us with permission to share such information.

In addition, defense counsel has the duty to investigate all possible options for relief for their client. Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). This includes seeking exploratory expert evaluations to help advise a client whether to accept a plea offer or proceed to trial. Such evaluations must be kept confidential and should only be revealed if helpful to the client. This

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proposed amendment to the rule underscores the definition of *ex parte* and protects from prosecutors knowing when we seek appointment of experts.

CrR 3.4 and CrRLJ 3.4

WACDL strongly supports adoption of the proposed changes. We have learned much from the unprecedented suspension of many court hearings due to the novel Coronavirus. One such lesson is that many pretrial court hearings, which largely consist of motions to continue trial, are unnecessary.

Beginning on March 4, 2020 and continuing today, this Supreme Court has issued several general orders limiting in-court appearances due to COVID-19. This Court encouraged appearances via video or telephone for all criminal hearings. This Court also noted the significant burdens on defense attorneys to secure written waivers of speedy trial from clients, requiring attorneys to enter correctional facilities to obtain client signatures. Recognizing this burden, the Court permitted attorneys to obtain consent from clients and sign on their behalf with agreement to provide written notice of the next court date.

Between March and today, we have experienced over six months of reduced in-person hearings and seen that cases *can* move forward without the hours and hours spent in court for simple pretrial hearings that most often result in agreed continuance orders. Justice is best served by only requiring defendants to appear for substantive pretrial hearings. Defendants can always choose to appear at every hearing, if they want. We have seen over the last six months that such presence is not *necessary*, and that allowing defendants to waive speedy trial through counsel is a better practice for all parties and overburdened court systems.

WACDL enthusiastically supports the amendment of this rule. As we see in federal practice, cases are always continued with a written motion and signed speedy trial waiver by the defendant without the need for a hearing or court appearance. It is quite rare for a United States District Judge to require a hearing for a continuance that is grounded in fact and law and with a defendant's written waiver.

Though not reflected in the proposed court rule, WACDL would support the rule allowing for video appearance for arraignment hearings rather than an in-person requirement.

WACDL believes that allowing defendants the ability to appear through counsel for most hearings is important to protect clients' employment and financial interests. The current rule is incredibly burdensome on individuals who have other duties during daytime hours, such as employment or childcare. Our clients incur costs for childcare assistance and suffer economic hardship by taking off time from work. Many of them work hourly jobs. Missing time from work may result in termination, or reduced opportunities for promotions or growth. Many of our clients have only limited access to public transportation, whether due to their own indigence or the lack of adequate local public transportation.

Defendants are routinely placed on a bloated criminal calendar which can take hours to complete, meaning that a "required" court appearance lasting 2-3 minutes can often take hours before their case is even called. This was a common occurrence in King County Superior Court for the "case setting" calendar. Even more frustrating, the vast majority of defendants' cases are read into the record without allowing them to even "appear" before the judge in court. If they do appear, the hearing is several minutes long and does not concern substantive matters. Instead, most hearings

like this around the state are simply paper-pushing meetings where a defendant spends a few minutes with his lawyer just to sign a waiver of speedy trial. Meaningful discussions do not occur. The defendant does not experience “justice” at these hearings.

WACDL believes that an amended rule that does not require in-person appearance but does require video or telephone appearance for these pretrial hearings would also be problematic. This is not a sufficient substitute. It still requires our clients to be on call and wait for hours fort their case to be called. It has the same impacts on employment and disproportionately impacts low-income defendants.

The proposed amendments to the rule contain protections to ensure that judges may order a defendant’s appearance if the court finds good cause. This means that a court may decide that the case has been delayed for too long and require in-person appearance. This could be limited to one appearance or could apply to all future appearances. The discretion left to the trial court allows for modification of the rule.

The current rule is problematic for when a defendant misses a hearing, either from simple forgetfulness, failure of transportation or even pretrial detention elsewhere. The sanctions are draconian, resulting in new commencement for the right to a timely trial, almost always with issuance of an arrest warrant, and often, a charge of bail jumping. Research in Washington state has shown that many individuals charged with crimes miss court not because they are trying to abscond from justice but rather because they had difficulties with transportation, feared losing their job, had to care for a child or struggled with mental health issues. These individuals often feel pressure to plea to the underlying offense to avoid an additional charge of "bail jump" that will likely result in conviction and prison time. Interviews with defenders in multiple jurisdictions across the state show that prosecutors frequently file bail jump charges or threaten to file bail jump charges when cases are set for trial instead of a plea. Recently our State legislature addressed the issue of punitive bail jumping charges with ESHB 2231 due to the harsh ways that prosecutors used the statute to criminalize a missed court hearing due to unforeseen circumstances.

The comments lobbied by prosecutors are impugning and insulting to defense attorneys who take our ethical obligations to our clients seriously. They fail to acknowledge the work on cases and communication with clients that happens frequently outside of court. They suggest that defense lawyers do not meet with or talk with our clients until we are present together in court. The truth is that our ethical obligations require that we update our clients along the way. Our clients will know what will happen at a hearing before it happens because we discuss the status of their case ahead of time. These same conversations can occur prior to the scheduled pretrial hearing where the client can make a decision about whether to waive his or her presence via counsel or choose to appear at the pretrial hearing.

Most of the comments opposing this rule come from attorneys or judges who have never practiced as criminal defense attorneys. The amount of work and communication between lawyer and client that happens outside of court hearings is substantial. Very little communication or discussion happens in court. Attorneys will still be required to touch base with clients about the hearing and discuss options for what to do with the hearing (i.e. move to continue, set for trial, raise substantive issues).

This rule ensures defendants are not *required* to appear for unnecessary pretrial hearings that often result in agreed trial continuances while still requiring appearance at substantive stages in the criminal legal process. It provides judges with discretion to order a defendant’s appearance after finding good cause to do so. The current COVID-19 pandemic has taught us all a valuable

lesson about the efficiency and progress we can make in our justice system even without frequent in-court appearances.

We urge you to modify CrR 3.4 permanently to allow defendants to appear via counsel rather than be required to attend every court appearance in person.

CrR 8.2 and CrRLJ 8.2

WACDL supports these amendments that clarify the rules on motion for reconsideration. As of now, there is no criminal rule that addresses motions for reconsideration. This rule will only clarify that the criminal rule for these motions will mirror the civil rule.

WACDL believes that this rule change is long overdue. At different times, parties opposing reconsideration will attempt to defeat a criminal reconsideration motion by pointing out that there is no criminal equivalent to reconsideration in civil cases, CR/CRLJ 59, and are able to cite *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982) as authority. We have concluded that there are grounds for a criminal motion for reconsideration, but the analysis involves parsing the civil and criminal rules with the different purposes of each. But, the simplest answer is that trial courts have the inherent power to reconsider and revise previous rulings if advised of new or different matters of fact or law. No judge would advocate a system where decisions known to be erroneous become graven in stone, revisable only by pointless appeal. This rule change makes the court's inherent power clear.

GR 31

WACDL supports the amendment of this rule. This amendment would further the goal of therapeutic courts and protect client confidentiality. Limited public access to assessments and treatment reports would help encourage defendants to cooperate more honestly with risk/needs assessments, mental health and chemical dependency evaluations, and treatment.

JuCR 9.2 – Standards for Juvenile Indigent Defense

WACDL supports this amendment. All types of cases should have clearly defined caseload standards and require certification by counsel.

JuCR 9.3- Right to Appointment for Experts in Juvenile Court Proceedings

Similar to our comments above for proposed changes to CrR 3.1 and CrRLJ 3.1, we support this similar amendment to the juvenile court rule.

This proposed amendment to the rule underscores the definition of *ex parte* and protects from prosecutors knowing when we seek appointment of experts.

MPR 2.1 – Standards for Mental Health Proceedings Indigent Defense

WACDL supports this amendment. All types of cases should have clearly defined caseload standards and require certification by counsel.

Very truly yours,

Larry Jefferson
President

Emily M. Gause
WACDL Court Rules Committee Co-Chair

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Attached: Comments on various court rule proposals
Date:	Wednesday, September 30, 2020 3:32:45 PM
Attachments:	WACDL Comments on WDA Proposed Rules (2020).pdf WACDL Comments on Judges Proposed Rules (2020).pdf

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From: WACDL Info [mailto:info@wacdl.org]
Sent: Wednesday, September 30, 2020 3:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Attached: Comments on various court rule proposals

To Whom it May Concern:

I am submitting two letters, attached to this email, to the Supreme Court Rules Committee on behalf of the Washington Association of Criminal Defense Lawyers. The letters contain comments on rule proposals whose comment periods expires today. I'd appreciate it if you could confirm receipt of this message.

Kind regards,

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