



## The Washington Association Of Prosecuting Attorneys

September 30, 2020

Hon. Susan L. Carlson  
Clerk of the Supreme Court  
PO Box 40929  
Olympia, WA 98504-0929

[Sent via email to [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)]

Re: Suggested Amendment to CrR 3.1, CrRLJ 3.1, and JuCR 9.3

Dear Clerk Carlson:

As part of an indigent defendant's right to effective assistance of counsel, the State must pay for expert services, but only when such services are necessary to an adequate defense. *State v. Mines*, 35 Wn. App. 932, 935, 671 P.2d 273 (1983), *review denied*, 101 Wn.2d 1010 (1984). The right to State-paid services under CrR 3.1(f), CrRLJ 3.1, and JuCR 9.3 (collectively "CrR 3.1(f)") is co-extensive with the defendant's constitutional rights. *State v. Melos*, 42 Wn. App. 638, 640, 713 P.2d 138, *review denied*, 105 Wn.2d 1021 (1986).

Although *ex parte* communications undermine the integrity of the judicial system and the public's confidence in the fairness of the adversarial system, this Court authorized trial courts to consider some applications for public funds for expert services to be heard *ex parte* and for some applications to be sealed when necessary to protect a defendant's right to a fair trial or to preserve the attorney client privilege. The Washington Defender Association (WDA) is requesting that this Court now mandate that all motions for public funds for experts be heard *ex parte*. This Court rejected a similar proposal in 2018/2019. *See* Suggested Changes to CrR 3.1, CrRLJ 3.1, JuCR 9.3 and GR 15 (2018).<sup>1</sup>

The Washington Association of Prosecuting Attorneys ("WAPA") objects to mandatory *ex parte* hearings on all requests for expert services absent an official rule or additional language that carefully limits such hearings to whether funds will be made available. WAPA's objection is based upon the scope of issues being addressed in the current discretionary *ex parte* hearings that prejudice the public's right to a fair trial and violates the rights of victims, other criminal defendants, and various non-parties.

- Defendants in *ex parte* CrR 3.1 motion hearings have obtained the appointment of an expert witness who is not available for the current trial date and, in many cases,

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<sup>1</sup>The rejected proposed amendment and comments regarding the rejected proposed amendment are available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=2702](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=2702) (last visited Sep. 30, 2020)).

is not available for months. In essence, the *ex parte* application for funds also becomes an *ex parte* motion for a continuance. In granting the *ex parte* continuance, the court seldom considers the rights of victims or the potential unavailability of State's witnesses.

- Defendants in *ex parte* CrR 3.1 motion hearings have obtained orders directing the law enforcement agency that currently has custody of physical evidence to release such evidence to the newly appointed defense counsel. These orders make no provision for preservation of the chain of custody. These orders often interfere with the State's own testing and the testing by other participants in the offense. When co-participants are tried separately, these orders can render evidence unavailable for trial. Most concerning is that many of these orders commanding the release of evidence contain provisions that bar the law enforcement agency from consulting with its legal advisor regarding its obligations under the order.
- Defendants in *ex parte* CrR 3.1 motion hearings have obtained orders that require the Washington Crime Laboratory or a detention or correctional facility to allow the defense appointed expert to enter their facilities. Some of these *ex parte* orders command the laboratory or facility to grant access to an expert whose presence is barred due to prior misconduct or rules violation, to delay testing until the defense expert can be present, or to conduct testing on specific dates and times. Such *ex parte* orders can interfere with the prosecution's own investigations, interfere with the orderly processing of other cases, and can create unnecessary safety risks.
- Defendants in *ex parte* hearings have obtained orders that require a correctional or detention facility to transport them to a distant hospital or clinic for testing. The *ex parte* orders often specify dates and times while failing to take into account security needs, the availability of correctional staff, and other issues.

The concerns identified above will be exacerbated rather than ameliorated if all CrR 3.1 motions must be heard *ex parte*. WAPA urges this Court to deny WDA's proposed amendment. WAPA further suggests to this Court that either an official comment be added to CrR 3.1 that clarifies that the only issues that may be considered in an *ex parte* CrR 3.1 motion hearing are whether a certain class of expert is constitutionally necessary and the amount of funds that will be allocated for such an expert.

Sincerely,



Pamela B. Loginsky  
Staff Attorney

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
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**Subject:** FW: Suggested Amendment to CrR 3.1, CrRLJ 3.1, and JuCR 9.3  
**Date:** Wednesday, September 30, 2020 2:40:07 PM  
**Attachments:** [Final Comment re Mandatory Ex Parte Hearings Proposed Amendment.pdf](#)

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**From:** Pam Loginsky [mailto:[pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org)]  
**Sent:** Wednesday, September 30, 2020 2:38 PM  
**To:** OFFICE RECEPTIONIST, CLERK <[SUPREME@COURTS.WA.GOV](mailto:SUPREME@COURTS.WA.GOV)>  
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**Subject:** Suggested Amendment to CrR 3.1, CrRLJ 3.1, and JuCR 9.3

Dear Clerk Carlson:

Please find attached WAPA's comment letter regarding suggested amendment to CrR 3.1, CrRLJ 3.1 and JuCR 9.3.

Please do not hesitate to contact me if you should encounter any difficulty in accessing the attachment.

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