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September 30, 2020

Washington State Supreme Court
via e-mail only: supreme@courts.wa.gov

re: Proposed Court Rules CrR 3.4, CrRLJ 3.4
Presence of the Defendant

Honorable Justices of the Washington State Supreme Court,

I am writing to you to express my fervent support for the proposed changes to CrR/CrRLJ 3.4, Presence of the Defendant. I have been practicing criminal law in Washington since my admission to practice in 1974, primarily in criminal trial and appellate law. For years, I have been an active member of both the Washington Defender Association (WDA) and the Washington Association of Criminal Defense Lawyers (WACDL)

1. Present Rule: This Court's initial version of Rule 3.4(a), limiting the number of proceedings at which the defendant's presence is truly "necessary," is an enlightened recognition of the reality of current criminal practice:

> (a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

Clearly, the defendant must be present for these "critical stages" of the process, but there are a multitude of other proceedings where the defendant is a superfluous bystander while the attorneys are clearing the way for trial, such as omnibus hearings where discovery requests are listed and motions are declared and scheduled; the result is usually counsel signing an agreed order. By far the most common of these hearings are calendaring and continuance hearings, typically called "pretrial" or "readiness" hearings, where counsel report the status of their preparation and estimate probable future time requirements. Trial continuances are routine in criminal practice, as defense attorneys fulfill their myriad constitutional duties to investigate the State's case and marshal witnesses in support of the defense, as well as research and prepare pretrial and trial motions. At most, the defendant's only contribution is to sign a waiver of right to a speedy trial, a task usually, and easily, accomplished by defense counsel before the hearing

2. Local Courts Have Emasculated CrR/CrRLJ 3.4: Rule 3.4, limiting the number of the defendant's required appearances to only the critical phases, is a wonderful rule, but its spirit and purpose have never been honored. Local courts immediately began requiring appearances at most or all other types of hearings, either by a local rule, by a blanket order setting a condition of release that the defendant appear at all hearings, or by a practice requiring the defendant, at the close of each appearance, to sign a promise to appear at the next scheduled hearing. I am

unaware of any court in this State that limits the defendant's mandatory presence to the three proceedings recognized as "necessary" by this Court in Rule 3.4(a).

2. Pointlessly-Required Presence is an Onerous Burden: Local rules and practices requiring the defendants' pointless presence wreak havoc on our clients fortunate enough to have a job, even in non-Covid times. For a majority of our clients at home, child care costs are prohibitive unless they can prevail upon a friend or family; often the solution must be to drag all the children to the courthouse. Many of our clients cannot even afford public transportation, which is essentially nonexistent in nearly all rural, and many urban, areas of the State. While court personnel must be present for the entire court day, defendants are routinely placed on a crowded calendar lasting hours or the entire day; our clients languish until their hearing, which typically consumes less than two minutes as the attorneys briefly address the court. Even more substantive matters, such as motions *in limine*, involve only issues of law; if a defendant's presence is necessary for testimony or consultation, defense counsel will obviously have the client present.

3. Disproportionate Sanctions for Missing Hearing: These local rules and practices are a running trap when a client fails to appear (FTA) for a hearing, either from simple forgetfulness or a failure of transportation. The sanctions are draconian: an automatic new commencement for the right to a timely trial, CrR/CrRLJ 3.3(c)(2)(ii) and nearly always by issuance of an arrest warrant which jails the client, often until trial because the FTA violates the pointless condition of release. FTA notations are gleefully used by prosecutors to argue for a more punitive sentence, and against pretrial release for years to come.[1]

4. Summary: The Proposed Rule carries out the manifest intent of this Court's original Rule, by eliminating the near-universal disregard of the Court's original purpose. Contrary to most of the comments opposing this rule change, a defendant's constitutional rights are not "assured" or "defended" by constant useless appearances in court, and these appearances are **not** needed to somehow force defense attorneys to meet with their clients! Defense attorneys will produce the defendant whenever their appearance is truly necessary, and of course defendants will continue to appear with their attorneys even when not coerced to do so by local appearance rules which were always without rational purpose.

Respectfully Submitted,

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John G. Ziegler, WSBA # 5875

[1] Until the passage of HB 2231 this year, prosecutors could also add a felony bail jumping charge to each FTA. This additional charge was typically used either to change to a less-advantageous plea offer or to join with trial on the original charge and argue the defendant's "consciousness of guilt" of the first charge by "fleeing." These persistent abuses led to amendment of the bail jumping statute to apply only to a nonappearance at trial. *See* House Bill Report ESHB 2231 at p.4. The old rule for more frequent mandatory appearances remains for those with serious charges. Laws 2020 ch. 19, § (1)(b)(i).

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Comments on Proposal to Amend CrR 3.4 and CrRLJ 3.4
Date:	Wednesday, September 30, 2020 3:17:03 PM
Attachments:	CrR 3.4 Proposal Comment.docx

From: John Ziegler [mailto:zieggie@hotmail.com]
Sent: Wednesday, September 30, 2020 2:59 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on Proposal to Amend CrR 3.4 and CrRLJ 3.4

Attached are Comments to the Proposed Amendment of CrR/CrRLJ 3.4.

John G. Ziegler, WSBA #5875
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From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Comments on Proposal to Amend CrR 3.4 and CrRLJ 3.4
Date:	Thursday, October 1, 2020 8:14:01 AM
Attachments:	CrR 3.4 Proposal Corrected Comment.docx

From: John Ziegler [mailto:zieggie@hotmail.com]
Sent: Wednesday, September 30, 2020 6:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Re: Comments on Proposal to Amend CrR 3.4 and CrRLJ 3.4

To: Susan L. Carlson, Clerk of the Supreme Court:

In my endeavor to timely submit my Comments on Proposed Court Rules earlier today, I now see that I made a humiliating blunder. In the first paragraph, I intended to say that "I have been practicing criminal LAW" since 1974.

I have not been a "practicing criminal" since 1974.

I have attached a copy of my Comment letter, corrected to add that single word. Recognizing that the Court has closed for the final day for Comments, I would be so grateful if the corrected letter could be submitted to the Rules Committee. If this is not permissible, I would humbly request that this *apologia* be forwarded to the Committee.

Thank you for your consideration.

John G. Ziegler, WSBA #5875
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