

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Comments to Proposed CrR 3.4
Date: Thursday, September 30, 2021 9:01:59 AM

From: Lee, Celia [mailto:Celia.Lee@kingcounty.gov]
Sent: Thursday, September 30, 2021 8:57 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to Proposed CrR 3.4

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, **DO NOT DO SO!** Instead, report the incident.

As a result of the pandemic, courts have demonstrated that they are nimble and able to quickly adapt to these unique conditions. Some recent innovations and procedural changes have been positive and increase access to justice. For example, allowing victims, advocates, and members of a defendant's family to appear for hearings via Zoom, allows increased openness and access to court proceedings. Many prosecutors have further found that conducting some or all of voir dire via Zoom has led to increased diversity and participation in the voir dire process.

However, not all of these changes have been positive. Many adaptations have slowed the court process and decreased efficiency. These adaptations should be temporary, and not made permanent by way of an amended court rule. Technical problems are common and slow an already heavily overburdened criminal justice system.

Throughout the pandemic I have appeared regularly in court and have seen firsthand the challenges presented by telephonic or zoom appearance of parties. Interpreters often do not appear in court. When connections are poor or a defendant needs an opportunity to speak with his attorney and an interpreter in private, that opportunity is often simply not available. The hearing must be delayed or continued to afford the defendant an opportunity to simply consult with his attorney via an interpreter.

Beginning at arraignment for defendants who appear remotely, which is currently permitted, a defendant who is not physically is unable to sign important court documents, such as a sexual assault protection orders, DV no contact orders, or conditions of release. In the event of a violation of these orders, it is the State that bears the burden of proving a knowing violation of the condition. Moreover, in a Zoom appearance, there may be no record that the defendant actually read or saw the document itself. This places victims and the community in danger and puts the State in an untenable position.

Allowing the defendant to appear remotely for plea, trial, and sentencing is fraught with danger, both for the defendant, but also for the State. Pursuant to RPC 3.8, Comment 1: A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice ... To ensure that a defendant receives procedural justice, it is the obligation of the court and the State to demonstrate that the defendant enters into critical, potentially life-altering decisions knowingly, intelligently, and voluntarily. Moreover, it is the obligation of the court and the prosecutor ensure that defendants understand critical decisions they are making, including that the defendant is in the right mind to proceed. It is not uncommon in criminal practice for a defendant to raise post-trial motions claiming that they may have been intoxicated during trial, asleep during trial, or not advised by counsel of important rights, such as the right to testify. I also foresee that defendants could easily claim that they tried to talk with their attorney during trial, but due to their internet connection (or other technical issue) their attorney could not hear them, and they were prejudiced as a result. How can the State rebut such post-trial motions and claims if the defendant is appearing via the internet?

Having litigated such post-trial motions prior to the pandemic, if this rule is passed, I fully anticipate that it will become common practice for defendants to claim, either in post-trial motions or in appeals, that they missed part of the proceedings because their device failed or their internet cut out or that they did not have an opportunity to consult with counsel. The State will be hard pressed to prove otherwise because the motion will be based upon the defendant's representations from a remote location.

Additionally, reliance upon technology in this way will slow down court processes, in a way that the already overburdened court process cannot sustain.

It is also unequitable and simply unfair that victims of crimes, including young children and sexual assault victims, and all other victims, must come into court, while a defendant (an out of custody defendant) can sit through his or her trial from the comfort of home. The State would be unable to know or prove later that the defendant was not under the influence of drugs or alcohol, or being influenced by a person near the defendant. Cross-examining a defendant via video link and the process of impeachment via video link (including presentation of exhibits to a defendant appearing remotely) would absolutely prejudice the State. And the court, the prosecutor, and the jury would be deprived of the benefit of observing the defendant's body language, and his response to traditional and in person cross-examination.

The defendant's presence at a plea, trial, or sentencing is a critical phase where the defendant's presence in court is imperative, both to ensure that the defendant understands the proceedings, but also to protect the finality of any decision reached in those proceedings.

Celia A. Lee

Senior Deputy Prosecuting Attorney
Criminal Division
Special Assault Unit

King County Prosecuting Attorney's Office

Tel: (206) 477-2452

Fax: (206) 296-0955

Email: Celia.Lee@kingcounty.gov

**This e-mail and related attachments and any response may be subject to public disclosure under state law.