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Subject: FW: Proposed amendments to CrR 3.4and CrRLJ 3.4
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From: Law office of Chris Van Vechten [mailto:chris@soundlawyering.com]
Sent: Friday, October 1, 2021 5:10 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed amendments to CrR 3.4and CrRLJ 3.4

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Greetings,

I am a former prosecutor who turned criminal defense attorney 7 years ago and just became aware that - although amendments were recently made to 3.4 in just the past year - additional alterations are now being suggested to allow for remote hearings and virtual trials. Given the chaos of the last year, it has been difficult to keep on top of all the crazy ideas, but I wanted to chime in on this one.

There isn't a single hearing that should be conducted remotely. There are some hearings for which the defendant's presence should be optional like omnibus hearings, vacation of conviction hearings, restitution hearings and gun rights restoration hearings but arraignments, bail quashes, - possibly readiness hearings - and all contested motion hearings must still be in person.

While I understand remote court is viewed as a potential cost saving solution which many in our field were already in support of prior to the pandemic, as a practicing attorney in civil and criminal practice who has been dealing with this now for quite some time, I want to assure those involved that it has caused - and will continue to cause - significant damage to both the solemnity of the judiciary as well as undermine the ability of parties to have the merits of their cases be fairly evaluated. What does it say about what we as attorneys do when Costco, casinos, liquor and marijuana dispensaries and stadiums filled with sports fans have been open for months while our municipal, district and in some places superior courts are closed in the name of slowing Covid?

One thing that was made very clear to me in law school was that what lawyers do matters. If we fail to take our jobs seriously, business can collapse, children can be taken from their parents, innocent people can go to prison and even be executed. Surely that requires we be willing to take a risk on par with attending the upcoming Harry Styles concert at the Tacoma Dome on November 7, 2021.

Constitutional and human rights concerns aside, there is no shortage of research to suggest that the behavior and interpretations of what people perceive from behind a keyboard is significantly diminished or altered because of this experience. So too is the attorney client relationship. So too is the Court's ability to ensure due process and the integrity of testimony from witnesses - many of

whom are clearly reading prepared statements rather than giving oral testimony.

Frankly, there's a reason why it's easier to breakup with a girlfriend over Zoom than in person – because the distance technology creates allows us to avoid certain uncomfortable realities. In a pre-Covid world, forcing people to confront certain truths was a big part of what I did. Sometimes that meant questioning a State's witness during a pretrial interview to make certain things clear to the State and to the witness that would advance my client's case. Sometimes it was about forcing my own clients to confront certain truths about their situation and the evidence against them by actually forcing them to look at it and to actually talk to me face to face. Now, whenever a client doesn't want to confront something, he or she simply says they're too busy at work to look at the case or they think they have covid and endless continuances follow. While this procrastination is not new to Covid, it is extremely inflamed by the remote experience.

I also think my clients are cheated out of the learning experience that comes with being in a courtroom. They gather meaningful and realistic experiences by watching what happens with other defendants before they go before their court, and their awareness makes them more useful to me in building their case and serving their interests. Remote court deprives defendants of that experience. My clients just sit on their computers playing video games and watching movies until their case is called, and of course they get distracted by the voyeuristic nature of remote court.

Being primarily a criminal defense attorney, I also cannot write such a letter without expressing my ongoing concern about the long-term dehumanization of my clients' by failing to bring them into a courtroom during sentencing and substantive hearings in those courts that have gone remote. I am sure there will soon be data suggesting that – on the contrary – since courts embraced remote technology, bails have been lowered as have sentences for criminal convictions. But that data is a reflection of (1) fear of Covid 19 spreading if defendants are taken into custody & (2) the current political climate surrounding policing and the recognition of the inequities of this system – inequities which are sure to ultimately be inflamed by this model once the political climate shifts again.

Pre-pandemic data from courts that had experimented with video hearings demonstrated that defendants who were subjected to this system received harsher outcomes than those in traditional settings.^[1] I have experienced this firsthand in courts which long ago embraced video sentencing as a cost saving measure for in custody defendants. Additionally, although the defendant's right to be present for these sentencing hearings had been preserved pre-pandemic, there has always been a fear that asserting it could also lead to an even harsher sentence because it is contrary to the standard established by said jurisdiction's video court system. I am concerned about something similar happening here in a post-pandemic world.

You could argue that these disparities are rather a function of being sentenced while in custody vs while out on bail, but my older colleagues inform me they saw a similar imbalance take place when Department of Licensing Hearings transitioned to an exclusively remote format.

There are admittedly some in my field who feel this new model is preferable because it has allowed them to enjoy a lifestyle as attorneys that was previously unattainable. But I have yet to find anyone who believes it has improved the attorney client relationship; or made us more effective in our arguments; or increased respect for the judicial process or solemnity for what transpires in a courtroom. While there may be many fields where a remote work model makes sense – nothing that is commonly referred to as “essential” seems to work well on Zoom. Schools have imploded under this model; doctors and psychologists find that remote consultations or services often fail their patients; and courts seem to function only so long as judicial safeguards that were developed through centuries of experience are discarded or ignored.

For criminal practice, the best arguments for remote hearings dissolved with the new CrR 3.4 rule,

and with the Legislature's amendment of the bail jumping statute. These changes, in themselves, will accomplish many of the supposed long-term aims of virtual courtrooms without degrading the actual courtroom experience for those who require/desire it, nor unfairly prejudice either party when a dispute comes before the bench.

While remote court may be more "convenient" for some of my clients, please don't confuse convenience with what is in our clients best interest. There are a lot of facets to the judicial system which exist not to be efficient or convenient but rather serve the higher genius of ensuring a fair process with outcomes the majority can accept. That is eroded by remote court.

If there is a place for remote court, it should be reserved to those with extreme physical disabilities. I currently have a paraplegic client in a long term care home in Tacoma with a warrant for his arrest in Clallam County. His warrant may impact his ability to be transferred to alternative care facilities but I can't transport him to Clallam to address the warrant. I have another client who sustained serious burns to his body in a tent fire while homeless in Tacoma. He spent many months in recovery at Harborview before being released to his parents who took him home to California and we were able to let him plead to a suspended sentence remotely in Tacoma Municipal Court. These are the rare examples where remote court seemed like the best alternative we could provide without skipping too far down the path to indifference.

But it is always a mistake to use the exemption to set the example.

The mainstream experience of remote court has been a disaster for our profession, and I fully expect future generations of attorneys to damn us for it. "How did we ever determine our client's needs were less important than going to Applebees or flying to Hawaii", they will ask.

Examples of ridiculous things I have personally witnessed in remote court since this began include

1) A defendant who claimed to be having a heart attack in video court while asking to have his conditions of release be amended before Puyallup Municipal Video Court. **The poor man collapsed on the floor in front of his laptop and proceeded to roll around on the ground** while we all just watched him, unsure if this was a ploy to get whatever he wanted or if we should call 911. (He eventually recovered claiming problems with a stint in his heart).

2) **A pet rooster hopped onto the computer and crowd into the microphone** in Mason County District Court. Judge Steele ordered the rooster to be held in contempt

3) **My client was held in contempt for wearing a t-shirt to a zoom hearing in Mason District Court and sentenced to 30 days in jail.** He responded by turning the camera off, which Judge Steele ordered him to turn back on. When he refused, Judge Steele added another 30 days. At that point my client began swearing at the judge who kept raising his sanction. **By the time my client signed off the judge had sanctioned him to 120 days in jail for his disrespectful behavior in Zoom Court.**

I filed a motion informing the court of my client's underlying mental health issues and explaining how the detachment from my client during zoom court hearings had allowed this incident to transpire. I further expressed skepticism in the lawfulness of sending my client to jail for wearing a tshirt to court or that the court can force my client to be video recorded in his own house without their consent.

4) A high school age girl in a Pierce County Superior Court Sexual Assault Protection Order case accused my client – her father – of having raped her in her sleep. During the hearing I was allowed

to cross examine her. This individual had previously alleged a friend of the family had raped her in her sleep and that individual had subsequently been convicted and sent to prison several years prior. The theory of my defense was that the drugs and alcohol the alleged victim admitted to having consumed on the night of this incident may have forced her to relive the experience of her previous abuse, as the facts she alleged against her father largely mirrored the previous incident involving the family friend.

As I was questioning her, it became clear she was reading something from the other side of the table. **Suddenly a voice could be heard coming from behind the laptop. It said “you don’t need to answer anymore questions”** and it came from the AV’s mom, who was present for the hearing and clearly telling her what to say. It was unclear to me if the Commissioner fully appreciated what had happened in that incident and I don’t recall if she reprimanded her for the interruption. Frankly the courts lose a lot of control when they go remote and that’s a real problem when both sides are depending on the bench to ensure a fair presentation of their case.

5) Just yesterday in Pierce County District Court during a pretrial hearing, a defendant's phone camera malfunctioned so that - no matter which way he turned it, the image was inverted so that he appeared to be hanging upside down like a bat. It was incredibly distracting, degrading, and yet somehow symbolic of a time when we are holding concerts at the Tacoma Dome but courts are remote because apparently it's unsafe and we're following science.

I urge the court to return to the idea that those involved in the criminal justice system are people, not pixels, and to reject what has already proven to be a failed experiment.

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