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**Subject:** FW: Comments on CrR 3.4 Proposal  
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**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments on CrR 3.4 Proposal

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Summary-From being a Drug Court prosecutor we have operated mostly remotely except for in custody, plea, termination, sentencings and some remands/warrant quash hearings. Having defendants on the phone, connectivity/technology issues, distractions/interruptions/freezing, sharing documents, getting notices/documents to defendants, having interpreters, ability for defendants to talk to their attorneys, identity of the person appearing via phone, people being able to observe the entire courtroom- have all been issues we have encountered. We cannot feasibly do no contact orders, judgement and sentences, and plea paperwork sufficiently without the defendant present and especially without them being on clear video. There is no way to get fingerprints remotely. The proposed changes would conflict with equity, equitable unincumbered access, the confrontation clause, and even the accuracy of crucial paperwork/convictions/procedures. The proposed changes to this court rule would expand those problems to other courts, trials, effect critical hearings and create an undue burden that would make the criminal justice system less efficient. The courts are also not set up or been given adequate resources to accommodate this change and with a severe backlog more litigation on each case will cause an overall problem for the system and courts.

Specific concerns.

- Equity-Not all defendants have access to technology to appear remotely and know how to use technology. Defendants appearing by phone give the court very little ability to monitor their behaviors, whereabouts or insure the person appearing is actually the defendant. There are also privacy/distraction issues if the person is in a public place.
- Having defendants routinely appear remotely for pleas, trials, and sentencings will slow down court proceedings as courts and defense attorneys are not prepared always prepared/equipped, getting paperwork signed, finger printed, and establishing identity will be difficult, cumbersome and a burden.

- Defendants often don't report for court ordered remands and having the person being remote for a sentencing will make that remand into custody even harder.
- Courtrooms are not currently equipped to have defendants be able to sufficiently observe everything or even see the courtroom for a trial via Zoom.
- It will be virtually impossible to assure that the defendant has the same access to exhibits, pre- and post-admission, as if present in court.
- The amendments diminish the right to counsel – the defendant will not have the opportunity to simultaneously consult with counsel during the proceedings. If the court has to halt proceedings for a private conversation, it may be to the defendant's or the State's detriment. Interruptions to consult with counsel also will irritate the jury and delay the proceedings.
- As to testimony, the defendant's remote presence would not satisfy the confrontation clause. It will be difficult to assure that courts obtain sufficient waivers before allowing remote presence.
- Identity-The amendments invite problems verifying the defendant's identity at critical stages of the proceedings.
  - If the defendant isn't physically present and fingerprinted, any conviction cannot be added to felony criminal history databases.
  - If the defendant is not present, the parties will be unable to conduct in-court identification – positive or negative.
- This will deprive the fact-finder of the chance to observe the defendant's demeanor. It also would allow coaching to occur off-screen without detection by the fact-finder or the court. The defendant could refer to notes that are not apparent remotely
- It will be impossible to assure the voluntariness of a guilty plea or waiver of other constitutional rights, especially via phone, where there is no ability to determine who else is present (off screen) when the plea is taken, who may be exerting undue influence.
- The defendant appearing remotely for trials, guilty pleas, and sentencing diminishes the seriousness, importance, and dignity of these proceedings – that is important to all parties and to the public perception of fair administration of justice.
- The defendant is being given a privilege to appear remotely for all hearings, while no other participants (including witnesses and victims) are given the same opportunity. Others who are seeking justice from the criminal justice system will question why the defendant is given this privilege.
- The amendment's limiting requirement of court approval for remote appearance at trial, pleas, and sentencing will require litigation of the issues noted here in each case where the possibility is raised. This will cause further waste of time or will be perfunctory consideration that does not explore the overwhelming negative consequences of remote appearances at these proceedings.

- For video appearances, the rule should require that the defendant appear with a live background. Otherwise, the court will have no idea of the environment, any distractions, whether the defendant is driving, or outside influences. The court needs to ensure that defendants' responses are their own, freely made.
- The rule should require that the defendant be alone and focused on the proceedings (not using any other electronic devices, not eating, not on the phone).
- It should not be common practice for defendants to plead guilty remotely. It is too difficult to assure that the plea is made freely and voluntarily. Moreover, there are serious risks that the record of a remote plea will be inadequate to refute later challenges to voluntariness. The lack of a signature on the plea form will cause the problems to multiply.
- If it is not signed by the defendant, proving knowledge of an order prohibiting contact that is entered at sentencing will require testimony of a person present at the sentencing hearing who was able to identify the defendant via the remote access used and is available when the order is violated years later. This is an unreasonable and unnecessary burden.
- There are other notice requirements at the time of conviction and sentencing – e.g., sex offender registration, firearm prohibition, rights on appeal/collateral attack. It will be difficult to assure the defendant has received these notices unless the entire notice is read on the record, causing substantial delay. If it is necessary to prove receipt of the notice for purposes of later prosecution, the same identity issue arises as noted for orders prohibiting contact.
- There will be logistical problems for a defendant requiring an interpreter can be handled during a remote appearance, particularly for any testimonial hearing. Confidential conversations with counsel could not happen simultaneously during brief pauses in the proceedings but would require a complete break in the proceedings. As a result, these provisions would apply inequitably, allowing English speakers to appear remotely while that is impossible for defendants requiring an interpreter.
- The amended rule is not a codification of general practice during the pandemic. It will cause significant delays in court proceedings rather than expedite them. Given the backlog of cases awaiting trial, it does not make sense to create additional barriers to expeditious proceedings in the courtroom.
- Remote proceedings should not be expanded beyond the current rule.
- The practical problems with these amendments are huge. If they can be overcome in a specific case and there is a necessity, the current rule allows for remote appearance.
- The rule prejudices the defendant by diminishing their participation in critical proceedings. They will not know what they are missing or will only know it too late.
- The rule applies inequitably, providing this option to privileged defendants.
- While the party at greatest risk is the defendant, inevitable problems noted above will result in unnecessary reversals, retrials, and withdrawal of pleas.

Victims and the community have an interest in finality of convictions that is not well served by this rule.



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