

Comments to proposed change to CrR 3.4 on Presence of the Defendant:

These comments are focused on the items in **yellow highlight**.

Stated purpose of the rule change:

"The COVID-19 pandemic forced our courts to implement better infrastructure for remote proceedings. CrR 3.4 should be updated to utilize this technology while also establishing standards for conducting remote hearings. The SCJA recognizes that fewer required physical appearances for defendants would likely lead to fewer missed court dates and warrants. This reduction should decrease daily court congestion and allow for a more expeditious case resolution while improving access to justice."

Comment: If the goal is to "likely lead to fewer missed court dates and warrants" the rule change will not accomplish that because defendants frequently miss court dates when allowed to appear remotely. If the goal is to "decrease daily court congestion" it will have the opposite effect because experience tells us that remote hearings are more time consuming because of technical problems, confusion about documents and misunderstandings. If the goal is to "allow for a more expeditious case resolution" the proposed rule will be irrelevant. Allowing a defendant to appear remotely will not make his or her case more likely to resolve in a guilty plea or bring the case to trial sooner. "Improving access to justice" will not increase for defendants who cannot afford to appear remotely and will not help witnesses or victims with their "access to justice."

Specific Comments on proposed rule:

CrR 3.4

PRESENCE OF THE DEFENDANT

(a) – (d) [Unchanged.]

(e) ~~Videoconference Proceedings Remote Appearances.~~

*(1) In General. A defendant may appear remotely through video or **telephonic** conferencing as available in each court and indicated in this rule. A defendant who is out of custody and wishes to appear remotely is responsible for his or her own device and internet access to connect to court.*

Comment: Telephonic appearance will be a huge problem. It is estimated that 70%-80% of communication is nonverbal. If telephonic conferencing is allowed, the Court and the Jury would lose this method of communication. The Court cannot insure ensure that the person appearing telephonically is the defendant. The defendant may claim that he was forced to plead guilty, or not guilty, by someone who was present during the telephone conference.

(2) Authorization. Remote appearances are authorized for all criminal proceedings except for arraignment, all phases of a trial, entry of a guilty plea, and sentencing for which the defendant must have prior court approval permitting a remote appearance. Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by videoconference in which all participants can

~~simultaneously see, hear, and speak with each other.~~ Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All remote videoconference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

Comment:

- The proposed rule allows criminal defendants to testify remotely but does not allow victims and witnesses to testify remotely. If one goal of the proposed rule is truly to “improve access to justice” it only delivers that to one participant—the defendant.
- There are numerous times when it is important for a jury to see a defendant during a trial. At voir dire the defense attorney has the defendant stand and introduces his or her client. This allows a jury to look at the defendant’s physique, which may be important in an assault case. It may be important to see how the defendant responds during testimony. If a defendant is allowed to testify remotely, he or she might have others presence who coach the testimony.
- Entering a plea of guilty remotely has proven to be more time consuming than in-person hearings. Frequently, defendants have questions during the course of the plea colloquy that are easily addressed by counsel when all parties are in the courtroom. If a plea and/or sentencing is being conducted remotely, the hearing must be continued. Further, if this proposed rule is adopted, prosecutors anticipate many more challenges to the validity of a guilty plea based on the defendant misunderstanding the court, misreading the statement on guilty plea or claiming that the plea was coerced.
- At sentencing it can be beneficial for victims to read impact statements in the presence of the defendant.
- The proposed rule does not establish any standards for a Court to determine whether to grant the defendant’s request for remote appearances.
- The proposed rule assumes there will be no technical problems. Whether in a county courtroom or on network television technical problems are frequent. Technical problems will make it more difficult for the defendant, who may not be aware of the problems, to understand what is happening in court.
- The proposed rule does not anticipate issues which may arise during the hearing when the defendant needs to consult with the defense attorney.

(3) Remote Appearances Required by Video. Remote appearances at arraignments, testimonial hearings, trials, sentencing, and whenever the defendant is in-custody shall include video. **Local court rules may require all remote appearances take place over video.**

Comment: Video should be a requirement in all remote appearances. The Court would not know whether the defendant is at work, driving, in a restaurant or subject to any coaching.

~~(3)-(4)~~ Standards for Remote Appearances Videoconference Proceedings.

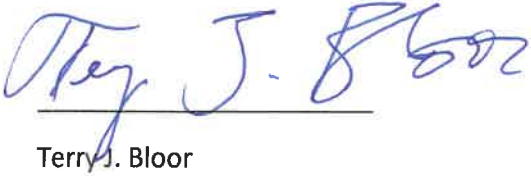
(a) Video Appearances. The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. The video and audio should be of sufficient quality to ensure that the video and audio connections are clear and intelligible participants are easily seen and understood. ~~Videoconference facilities~~ Platforms, court procedures, or in-custody facilities must ~~provide for~~ allow confidential communications between attorney and client, including a means during the hearing for the attorney and the client to read and review all documents executed therein, and security sufficient to protect the safety of all participants and observers when conducted in a custodial environment. ~~For purposes of videoconference proceedings,~~ The electronic, scanned, or facsimile signatures of the defendant, counsel, interested parties, and the court shall be treated as if they were original signatures. This includes all orders on judgment and sentence, no contact orders, statements of defendant on pleas of guilty, and other documents or pleadings as the court shall determine are appropriate or necessary. Defense counsel or the court may affix a "/s/" on any documents except a judgment and sentence to indicate the defendant's signature when the defendant indicates their approval during the hearing. In interpreted proceedings, the interpreter must be in a location or over a platform where the defendant and defense attorney can have confidential conversations through the interpreter. the interpreter must be located next to the defendant and ~~†~~ The proceeding must be conducted to assure that the interpreter can hear all participants. When the public appears remotely, members of the public need not enable their video to be visible to other participants absent a finding of good cause and order of the court.

Comment: The proposed rule would allow a defense attorney to indicate the defendant's signature on a form, including guilty pleas and No-Contact Orders if the defendant indicates approval during the hearing. There is far too much room for a defendant to later claim he did not understand the terms of a guilty plea, did not understand he was pleading guilty or understand that he could not contact a victim.

There are additional notice requirements at the time of conviction and sentencing, including sex offender registration, firearm prohibition, rights on appeal and an acknowledgement of criminal history. It will be difficult to ensure that the defendant has allowed his attorney or the Court to affix his signature to each of these documents. It will be more difficult to ensure that the defendant did so understanding the nature of these documents.

General comments: **Allowing a defendant to appear remotely will diminish the seriousness of the court proceedings. For most defendants, especially those facing a felony conviction, the most important ongoing event in their lives might be the pending criminal charge. Many victims feel the same way. It is not too much to ask that defendants appear in person. Courts have dealt with defendants who have emergencies or who reside out- of- state since Washington became a State. The proposed rule will not promote efficiency in the operation of the courts and will not provide greater understanding by defendants of what occurs in courts.**

Dated: September 23, 2021

A handwritten signature in blue ink that reads "Terry J. Bloor". The signature is written in a cursive style and is positioned above a horizontal line.

Terry J. Bloor

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From: Terry Bloor [mailto:Terry.Bloor@co.benton.wa.us]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Attached are my comments on amending CrR 3.4.