From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment on proposed new CrR 4.11 and CrRLJ 4.11 (corrected)
Date: Monday, May 1, 2023 8:32:41 AM

From: Hinds, Patrick <Patrick.Hinds@kingcounty.gov>
Sent: Sunday, April 30, 2023 2:12 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed new CrR 4.11 and CrRLJ 4.11 (corrected)

Attention: Clerk of the Washington State Supreme Court

I am writing to urge the Court to reject proposed rules CrR 4.11 and CrRLJ 4.11. The many problems with these proposed rules have been described at length in the comments submitted by numerous judges, judicial associations, and prosecutors from around the state and I will not simply repeat their points. Instead, I will focus on two issues in particular.

First, the end result of proposed CrR/CrRLJ 4.11 will be that courts will not be able to rely on defense attorneys conveying new court dates to their clients. But this is at odds with the fact that courts routinely rely on defense attorneys to do exactly that. For example:

- With regard to continuances of the trial date, CrR 3.3(f)(1) and CrRLJ 3.3(f)(1) both explicitly state that the court's "notice to defense counsel of new hearing dates constitutes notice to the defendant."
- The entire concept of a defendant appearing "through counsel" – as allowed by the 2021 amendments to CrR/CrRLJ 3.4 – fundamentally rests on the core premise that the court can rely on the defense attorney to convey the defendant's position to the court and the court's rulings (including setting new hearings dates) back to the defendant.
- Proposed CrR/CrRLJ 4.12 fundamentally rests on the same core principle. If the court can rely on the defense attorney to communicate the defendant's agreement to the continuance of a hearing or trial, then it should also be able to rely on the defense attorney to convey the new dates set as a result of the continuance back to the defendant.
- Throughout the COVID-19 pandemic, the Washington State Supreme Court's emergency orders all included and relied on the fundamental premise that courts could rely on defense counsel to convey new court dates to their clients. See, e.g., AMENDED ORDER No. 25700-B-607 (March 20, 2020) ("Defense counsel shall provide notice to defendants of new court dates." Sec. 10.c.); FIFTH REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS No. 25700-B-658 (February 19, 2021) ("Defense counsel shall provide notice to defendants

and respondents of new court dates." Sec. 13.c.)

In this context, there is no reasonable basis to treat notice of new dates through the defense attorney – which is adequate notice for essentially all other purposes – as being suddenly insufficient notice when the defendant fails to appear for a hearing that required their physical presence.

Second, the proponents of the new rule (and may of the comments in support of it) assert that allowing courts to issue a bench warrant for failure to appear based on notice of the hearing provided through the defense attorney puts the defense attorney in the position of being a witness regarding whether or not a given communication with their client actually took place. But this argument ignores the fact that defense attorneys routinely convey such information to the court without it creating an issue. For example:

- With regard to continuances of the trial date, CrR 3.3(f)(1) and CrRLJ 3.3(f)(1) both explicitly state that "[i]n the absence of the defendant's signature or presence at the hearing, *defense counsel's signature constitutes a representation that the defendant has been consulted and agrees to the continuance.*"(emphasis added)
- The entire concept of a defendant appearing "through counsel" for a hearing under CrR/CrRLJ 3.4 rests on the fundamental premise that the defense attorney has been in contact with the defendant regarding the hearing. In addition, the rule itself requires the defense attorney to provide some information to the court regarding the status of their contact with their client – appearance through counsel is only allowed if the defense attorney establishes that they have communicated with the defendant and the defendant wishes to appear through counsel. CrR/CrRLJ 3.4(a).
- Proposed CrR/CrRLJ 4.12 fundamentally relies on the same core principle. The proposed rules specifically state that a defense attorney's "signature on an order to continue constitutes a representation that the defendant or respondent has been consulted and agrees to the continuance."
- During the COVID-19 pandemic, the initial Washington State Supreme Court's emergency orders included and relied on the fundamental premise that defense attorneys can and should provide the court with some basic information regarding whether or not a given communication with their client had actually taken place. See, e.g., REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS No. 25700-B-658 (February 19, 2021) ("An attorney's signature on an order to continue constitutes a representation that the client has been consulted and agrees to the continuance…" Sec. 13.a.)

In this context, there is no reasonable basis to conclude that a court presuming that a defense attorney actually provided notice of a hearing date to their client – as required by rule – for purposes of issuing a bench warrant is any more problematic than treating the attorney's signature on an order as an indication that the client was consulted with and agreed to a continuance.

For the above reasons – and for the many other reasons eloquently articulated in the comments of others – I respectfully request that the proposed rules be rejected.

Sincerely,

Patrick Hinds

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