

Judge Angelle Gerl
Airway Heights Municipal Court

Judge Jim Rogers
King County Superior Court

February 23, 2023

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 90504

Re: Comment CrRLJ 4.11 and CrR 4.11 proposed rules

We are the co-chairs of the BJA Remote Proceedings Work Group. We have a few comments for this purposes, and a few comments that go beyond our responsibilities for the BJA.

First, the proposed rules are problematic for the following reasons:

1. The rule does not address failure to appear for a remote hearing where an appearance is required. The rule is specific only to “physical presence”.
2. The rule does not provide for email notice, which is a preference for many defendants who do not have a valid mailing address.
3. The rule does not address actual notice by signature of the defendant. For example, a continuance, signed by the client, is signed off-docket by a judicial officer and a copy provided to counsel. This could be considered notice “only through the defendant’s attorney” even though the client has signed. The rule seems to require mailing of notice to the defendant even if the defendant has signed a scheduling order. Many scheduling orders are signed off docket, and a copy provided to counsel. The rule may result in every scheduling order being signed on the record in open court, in order to affirm notice. Such a practice would be time consuming in our already busy courts.
4. When considering a warrant, it will be difficult for a judicial officer to quickly determine whether the defendant was present at the last hearing and informed on the record of their court date as contemplated in the rule.
5. The Remote Proceedings Work Group is developing recommended court rules and best practices for remote proceedings and would likely need to provide amendments to this rule if adopted as proposed.

Second, this rule shifts costs from prosecutor's offices to courts and clerk's offices. PAOs are staffed for this; clerk's offices would have to add staff. There's simply no cost impact figured into this rule.

Third, the stated purpose of the proposed Criminal Rule 4.11 for courts of limited jurisdiction and superior courts is primarily to avoid a violation of RPCs 1.3 and 3.3 in the event that an attorney may be asked to inform the court whether the attorney told their client about the required court appearance.

However, we believe that this is a fundamental misunderstanding of how the process already works. Defense attorneys make representations all the time about their clients and have for many, many decades. These representations have never been held to violate the Rules of Professional Conduct. No judge or court has so found, to our knowledge. Nothing about 3.4 changes this.

Also consider the following:

Both CrRLJ 3.3(f)(1) or CrR 3.3(f)(1) state that when an attorney consents to a continuance in 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. The court's notice to defense counsel of new hearing dates constitutes notice to the defendant.

Additionally, CrRLJ 3.4 defines "Appearance through counsel" and states that

[a]pppearance through counsel requires that counsel affirm, in writing or in open court, that they have consulted with the defendant since the last appearance and that the defendant waives the right to be present at the instant hearing."

CrR 3.4 (a) similarly provides

Appearance through counsel requires that counsel either (i) present a waiver the defendant has signed indicating the defendant wishes to appear through counsel or (ii) affirm, in writing or in open court, that this is the defendant's preference.

Scenario A: A defendant is not present, has appeared through counsel, and counsel is requesting a continuance. The rules require that counsel have communicated with their client and affirm the approval of the continuance, before signing a continuance. The fact that counsel signs a scheduling order/continuance on behalf of their client, is sufficient for a court to presume notice to the defendant. Counsel is not required to violate the RPC's under this type of circumstance, the signature of counsel speaks for itself.

Clerk of the Supreme Court
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Scenario B: If a defendant appears for court, signs a scheduling order or notice of a court date, then the defendant has been properly notified, whether on the record or not. Many scheduling orders are done “off-docket”.

Neither of the above circumstances would require counsel to violate the RPC’s nor would they necessitate the court sending an additional notice in the mail to the defendant in order to assure notice prior to issuing a warrant.

We recommend that the Supreme Court not adopt the rule. Any such proposed rule should be studied with the input of state and local courts’ clerk’s offices and prosecutor’s offices for the cost issue, and should await proposed amendments on the remote aspects of the rule.

A handwritten signature in cursive script that reads "Angelle Gerl".

Angelle Gerl,
Airway Heights Municipal Court Judge

s/Jim Rogers

Jim Rogers,
King County Superior Court Judge

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Sent: Friday, February 24, 2023 2:44 PM
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Good Afternoon,

Please see attached to this email a comment for the proposed rules CrRLJ 4.11 and CrR 4.11 from both myself and Judge Rogers from King County Superior Court.

Thank you,

Angelle M. Gerl
Airway Heights Municipal Court Judge



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