



**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**
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April 26, 2023

Clerk of the Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Sent via e-mail to supreme@courts.wa.gov

RE: Proposed Rules CrR 4.11 and CrRLJ 4.11

Dear Honorable Justices:

The Washington State Office of Public Defense writes this comment SUPPORTING the proposed new rules CrR 4.11 and CrRLJ 4.11.

The COVID-19 pandemic affected the daily lives of all Americans and Washingtonians. These impacts were felt throughout the Washington courts, and today we live with a legacy of an invisible agent that challenged our health and our responses. However, the more substantial effects of the pandemic's legacy are that we questioned our personal and institutional habits, decision-making, values, and priorities – things we would have seen as “everyday occurrences” had one particular virus not up-ended our lives and institutions.

On May 8, 2020, then-Chief Justice Debra L. Stephens coalesced the Board for Judicial Administration's Court Recovery Task Force (Task Force) to respond to the COVID-19 crisis in our courts and to maintain a vision on the future of Washington's judicial system. Among the guiding principles, the Task Force looked to “prioritize the fair, *efficient*, and safe provision of court services that fulfill constitutional and statutory mandates to protect individual liberties...” (emphasis added). Furthermore, the Task Force looked to “[e]ncourage courts to continue to use and ... expand technology ... to facilitate alternatives to face-to-face hearings in open court that contribute to a high density of people in courthouses...”

In June 2022, and after working with over 100 partners, the Task Force released its report “Re-Imagining Our Court: Pandemic Response and Recovery Lead Courts Into the Future.”¹ Among the recommendations the Task Force published were that courts should “embrace positive change,” “communicate and collaborate,” “use technology to promote efficiency and access to justice,” “plan for emergencies,” and “actively work with local and state governments to guarantee stable funding.”² Paraphrasing, the recommendations suggest

¹ BOARD FOR JUDICIAL ADMINISTRATION, COURT RECOVERY TASK FORCE, RE-IMAGING OUR COURTS: PANDEMIC RESPONSE AND RECOVERY LEAD COURTS INTO THE FUTURE. (2022). Available at <https://www.courts.wa.gov/content/publicUpload/Court%20Recovery%20Task%20Force/Court%20Recovery%20Task%20Force%20Report%202022.pdf>.

² *Id.* at p.7.

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that courts should accept and invite change and continue maintaining that mindset into the future.

The Task Force mentioned what all court stakeholders are aware of – the dependence on physical court space reduces court efficiency.³ Rules CrR 3.4 and CrRLJ 3.4 were amended to reflect this reality and allow defendants to appear remotely or through counsel to increase efficiency. The pandemic was, therefore, the catalyst reducing the occurrence of what many stakeholders commonly referred to as “the cattle call.”

The Task Force was not focused solely on court efficiency, however, and did focus attention on meaningful racial equity reform. It is no secret that racial inequity exists within the Washington court system – an issue that was brought front-and-center by the Washington Supreme Court itself.⁴ Specifically, the Court stated that there still remains “the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems.” While the Task Force was prevented from accumulating data concerning racial inequity, it did mention that the drop in pandemic era jail bookings still reflected the racial inequities in the system.⁵

Proposed rules CrR 4.11 and CrRLJ 4.11 work at accomplishing these meaningful goals. First, it strengthens and reinforces CrR 3.4 and CrRLJ 3.4 by providing a procedure that limits the racially disproportionate use of bench warrants for non-appearance at ministerial hearings.

Second, it reinforces the utility of defendants engaging with their attorneys to move cases forwards without requiring the defendant to forego pay by missing work, procuring childcare, or taking proper precautions for family or health without the imminent threat of jail. Despite what some commenters posit, without citing data, studies or professional defense experience, the adoption of CrR 4.11 and CrRLJ 4.11 will strengthen communications between defense attorneys and their clients.

Third, it further prevents defense counsel from becoming a witness against their own client. WSBA Ethics Advisory Opinion 1311 is succinct and clear: attorneys divulging client meetings and communications violates RPCs 1.6 and 3.3. Some commenters have argued, erroneously, that this is not a true ethical dilemma. OPD strongly disagrees with that assessment and believes commenters should not be advocating for attorneys to abrogate their ethical duties.

Some commenters have relied on comments arguing for a return to the old way of business. These arguments fail to recognize that the world before 2019 is gone. We must look to new ways to conduct efficient court business. However, they ignore the work of the Court

³ See Task Force Report at p.23.

⁴ Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

⁵ Task Force Report at p.23.

Recovery Task Force and other bodies concerned with realities of this post-pandemic world.

Commenters have stated that the issuance of summons would be “needless,” yet advocate for abandoning these new rules. Simply stated, they want to believe that something can be needless and necessary at the same time – which is logically incongruent. They also attempt to appeal to the emotional response of increased costs of the purported increase in summons. However, they cite no studies or cost analysis. Relying on electronic means, solely, as a manner of service also implies a certain level of privilege for those who traditionally do not hold that privilege or wealth.

It is clear that proposed rules CrR 4.11 and CrRLJ 4.11 would continue to develop Washington’s courts into a more efficient and racially equitable system. For the foregoing reasons, OPD supports the adoption of proposed rules CrR 4.11 and CrRLJ 4.11.

Thank You,

A handwritten signature in black ink, appearing to read "Larry Jefferson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Larry Jefferson
Director, Office of Public Defense

A handwritten signature in black ink, appearing to read "Geoffrey D. Hulse". The signature is cursive and somewhat stylized, with a large initial "G".

Geoffrey D. Hulse
Managing Attorney, Public Defense Improvement Program

From: [OFFICE RECEPTIONIST, CLERK](#)
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Good Afternoon,

Please see OPD's Comment in support of proposed rules CrR 4.11 and CrRLJ 4.11.

Please feel free to contact me if you have any questions or concerns.

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