From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comments re proposed new CrR 4.11 (and CrRLJ 4.11)
Date: Thursday, March 23, 2023 4:58:12 PM

From: Guthrie, Stephanie <Stephanie.Guthrie@kingcounty.gov>
Sent: Thursday, March 23, 2023 4:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments re proposed new CrR 4.11 (and CrRLJ 4.11)

I am writing to express my strong opposition to the proposed new rule CrR 4.11 and CrRLJ 4.11 (which are essentially amendments to CrR 3.4). There are a multitude of problems with the proposed rules. First and foremost, the problem the rule claims to solve was foreseeable when CrR 3.4 was amended in 2020 to allow defendants to appear through counsel. If that system has proved unworkable, then we should go back to CrR 3.4 as it existed before the pandemic, not build in further mechanisms that will allow defendants to delay proceedings and fail to appear for trial without accountability. Over the past several years the rules have been amended in ways that allow defendants to be absent for more and more court proceedings—despite concerns from I and many others about the difficulty of proving that defendants who are not present have received notice of important issues and dates—and in ways that place greater and greater barriers to the issuance of bench warrants when defendants do not appear. However, the court has held the line on requiring defendants to appear in person for trial. It is frustrating that the recent changes—the proponents of which offered assurances that the changes would not imperil ensuring that defendants have the required notice—are now being used to argue that the procedures they advocated for are in fact not sufficient to allow the court to impose consequences when defendants fail to appear for their trials.

The proposed rule removes all incentive for defendants to appear at hearings for which their physical presence is required if they were permitted to appear through counsel when the hearing date was set. Those hearings are the most important proceedings, and are also the proceedings for which witnesses and victims may be required to appear (e.g., substantive motions, trial, bail hearings, sentencing). Witnesses are often required to appear in court at great inconvenience and sometimes great expense to themselves. When a defendant fails to appear for trial, that inconvenience and expense is for naught. Civilian victims and witnesses often need to request time off work well in advance of trial and are often not able to "undo" the request for time off on short notice, imposing a real hardship on them when trial gets continued because a defendant fails to appear. Under the new rule, a victim might have to request time off work THREE TIMES, with the first two times being wasted because a defendant has failed to appear. It is not fair to require that

every defendant be given one "free" failure to appear for trial or sentencing, followed by a two week delay and another opportunity to appear, before a failure to appear for trial can be met with a bench warrant. Inevitably, some defendants will exploit this system to exhaust/frustrate the victims or witnesses in their case until the victims/witnesses simply stop participating in the process. **If current procedures do not adequately ensure that defendants have the necessary notice to enforce the requirement that they appear in person when necessary, then the appropriate solution is to require that defendants appear in person at any continuance such a hearing or personally sign the continuance order.**

Other thoughts/concerns:

This proposed rule is contrary to the motivating premise of CrR 3.4, that the court can rely on defense counsel to provide notice to the defendant.

It's contrary to CrR 3.3(f)(1) (and the same CrRLJ), which states that a continuance may be granted upon written agreement of the parties, and provides:

> 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.

The premise of proposed CrR 4.11 is that the court cannot rely on defense attorneys to convey court dates to their clients, but the premise of the proposed companion rule, CrR 4.12, (and CrR 3.3(f)(1)) is that defense attorneys are a reliable method of communication between the defendant and the court. Defense counsel can convey the defendant's agreement to a continuance to the court, and notice to defense counsel of a hearing date constitutes notice to the defendant. This proposed rule is inconsistent with that premise.

A number of judges have commented that some defendants prefer notice to be delivered by email, which is not permitted by the rule.

Sending summons by mail is costly. The mandate in the rule does not carry additional funding for the court to do so. (or for the prosecutor to do so, if the court shifts responsibility there)

In King County Superior Court, many cases are on the trial calendar each day. On the trial date, a case will be placed on standby, awaiting the availability of a judge (or counsel, if they are in another trial). If trial cannot begin that day, the case is held over to the next day's trial calendar. The same thing may occur for several days. However, these hold-over cases do not appear for a hearing each day, the holds are handled off-docket. So, although the defendant will have been given notice of the initial trial date in court, they will not have been given notice in court of the hold to the next day. If the rule is implemented, the court will have to require defendants to appear in court each day they are on the trial calendar, to hold a hearing setting each case to the next day, instead of relying on defense counsel to communicate with their client. That procedure would be a waste of time and expense for the court, the lawyers, and defendants who must appear in court every day. Under the proposed rule, if those daily hearings are not set, the defendant may choose not to appear after the

case is held over for two days, and will not be held to account by issuance of a bench warrant, but will instead accomplish a two-week continuance of the trial date. Unless additional unnecessary hearings are scheduled to establish that the defendant has notice of the next trial date, our trial calendar will descend into chaos.

Under King County Local Rules, defendants are required to appear for bond hearings and hearings set to address conditions of release. If this rule is adopted, the court cannot rely on defense counsel to provide notice of that hearing. Hearings, which may be set because of safety or flight concerns, will have to be continued for two weeks if the defendant fails to appear, to provide an opportunity for a mailed summons to reach the defendant.

There should be clear expectations about when defendants are required to appear. This rule muddies that question. It essentially provides that a defendant is not required to appear at a hearing at which their physical presence is required, at least until the second time that hearing is scheduled.

In each case in Superior Court, a trial date is selected at arraignment. However, in almost all cases, the trial date is continued, at least once, to allow for further investigation of the case and possible mitigation, for negotiation, to obtain expert services, or for other reasons. For 90% of those agreed continuances, the defense attorney has signed the order on behalf of the defendant and the order of continuance is signed off-docket, as authorized by CrR 3.3(f)(1). Whether or not the defendant is in the courthouse that day with counsel, there is no hearing in court, so, under this rule, the defendant will not be deemed to have notice of the new trial date. The unintended consequence of the rule is to undermine the opportunity of counsel to appear on behalf of the defendant pursuant to CrR 3.4 and to force courts to require defendants to appear in person if the court wants to avoid a lengthy delay if they fail to appear on the trial date.

Additionally, I share many of the concerns articulated by Judges Angelle Gerl and Jim Rogers in their comment on the proposed rule.

Thank you,

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