WACDL

Washington Association of Criminal Defense Lawyers

David Hammerstad
President

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April 28, 2023

Justices of the Washington Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929
VIA E-MAIL: supreme@courts.wa.gov

RE: WACDL Comments in Support of Proposed New Rules CrR 4.11 and CrRLJ 4.11

Dear Justices:

The Washington Association of Criminal Defense Lawyers ("WACDL") writes in support of the adoption of proposed CrR 4.11 and CrRLJ 4.11. The proposed rules ensure that defense attorneys comply with WSBA Advisory Op. 1311 when a defendant fails to appear for a hearing through which notice was provided through defense counsel pursuant to CrR 3.4 and CrRLJ 3.4.

The benefits of CrR 3.4 and CrRLJ 3.4, which permit defense counsel to appear on behalf of clients for certain hearings if authorized by the court, cannot be overstated for all defendants, including those who have been historically marginalized. People who have pending criminal cases no longer have to take time off from work to attend hearings that are routinely continued, or find daycare, or pay for transportation to come to court. This is especially important for communities of color, who suffer disproportionate representation in the criminal legal system and economic inequalities. Nor can we understate the impact this rule has on defense representation. A court that allows a defendant to appear through counsel assures that the defendant is communicating with counsel outside the courtroom; through this rule Washington has essentially abolished the practice of attorneys and clients only meeting in the courtroom during a mandatory hearing.

Proposed CrR 4.11 and CrRLJ 4.11 rules have been vetted through a deliberative process that included representatives from WACDL, the Washington Defender Association, the Washington Association of Prosecuting Attorneys, the Washington Association of Municipal Attorneys, and the District and Municipal Court Judges' Association. Those representatives formed the Adult Offender Committee of the BJA Court Recovery Task Force. There were multiple meetings convened to draft the proposed rules, which were then presented to the full CRTF. The Committee then further revised the proposed rules to incorporate feedback they received. The Court can thus have confidence in this work product. Using WSBA Advisory Opinion 1311 as guidance, the Committee drafted a process that assures notice to the defendant, avoids ethical conundrums for public defenders, and also avoids the downstream effects of that ethical conundrum, which would result in multiple attorneys having to conflict out of a case after testifying against their own client and disclosing privileged information at a bench warrant hearing.

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Much is made by commentators opposing the proposed rules of fears of increased costs associated with implementation of these proposed rules. But, they provide no evidence to suggest that the costs will outweigh the savings that are realized through the implementation of CrR 3.4 and CrRLJ 3.4. They submit no data about actual FTA rates for the specific subset of defendants who failed to appear for hearings where notice was provided through defense counsel only or the actual costs that the courts would incur. Further, this data would be meaningless without an analysis of the cost savings realized through reduced court calendars and hearings, court staff, jail staffing for court calendars, and costs associated with issuing and executing warrants.

The commentators also overstate the reach of the potential costs. The procedure provided for in this rule is triggered only when the defendant's sole notice of hearing is provided through counsel. If the court issued a summons for the future court date as well, the notice requirement has been met. If the court does not want to take the risk of having to schedule an additional hearing should the defendant fail to appear for a hearing through which notice was provided through counsel, it can issue a summons pre-emptively.

Another significant, and often overlooked, benefit is that reduced mandatory court appearances means reduced issuances of warrants for missed hearings. Defendants who lack resources may miss a hearing because they couldn't get transportation or have to choose between leaving a child unsupervised and attending a routine court hearing. There are additional costs associated with entering the warrant into the system and having law enforcement execute the warrant. Finally--and most important--there is always a risk that tragedy may result in the process of executing the warrant. People of color, who are already disproportionately represented in the criminal legal system, have been killed in these police encounters. So have law enforcement officers and members of the public. There is no price that can be placed upon avoiding these encounters altogether. Preserving the effectiveness of CrR 3.4 and CrRLJ 3.4 carries out this Court's demonstrated dedication to racial and economic equity for criminal defendants.

Several commentators propose amending the rule to permit electronic service of court dates. WACDL supports this proposal so long as it is opt-in; not every person who attends court has regular and available access to internet technology, and by making this opt-in, it ensures that those people can reliably receive electronic notice.

Last, WACDL agrees with the analysis of the fraught ethical implications associated with defense counsel being required to disclose whether their client was provided actual notice of the court hearing that was provided in the cover letters for the proposed rules. WSBA Advisory Op. 1311 is unambiguous. Defense counsel cannot be placed in a position to disclose whether their client received notice of a court hearing.

The proposed rules have been carefully thought out by critical stakeholders in the criminal legal system. Arguments that the costs associated with implementing the rule are prohibitive cannot be taken seriously absent any hard numbers that list costs and then offset them by factoring in court, law enforcement, and societal savings that result from reduced FTA warrants. CrR 3.4 and CrRLJ 3.4 were similarly well-thought out and carefully considered. Together, these rules reap the

benefits of reduced court appearances for defendants within their attorneys' ethical bounds. WACDL urges the Court to adopt proposed CrR 4.11 and CrRLJ 4.11 and supports an opt-in electronic service option to further realize the cost savings already attained through the implementation of CrR 3.4 and CrRLJ 3.4.

Sincerely,

/s/ Emily Gause

Emily Gause

WACDL Court Rules Committee Co-Chair

/s/ John Ziegler

John Ziegler

WACDL Court Rules Committee Co-Chair

From:	OFFICE RECEPTIONIST, CLERK
To:	Martinez, Jacquelynn
Subject:	FW: Attached: Comments on court rule proposals with 4/30 deadline
Date:	Friday, April 28, 2023 4:12:17 PM
Attachments:	(2023) Comments in support of CrR 4.11.pdf (2023) Comments in support of CrRLJ 7.4 and CrRLJ 7.5.pdf (2023) Comments RAP 16.8.pdf

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From: Amy Hirotaka <amy@wacdl.org>
Sent: Friday, April 28, 2023 3:57 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Attached: Comments on court rule proposals with 4/30 deadline

To Whom it May Concern:

I am submitting three letters, attached to this email, to the Supreme Court Rules Committee on behalf of the Washington Association of Criminal Defense Lawyers (and one co-signed by ACLU of Washington). The letters contain comments on rule proposals with a comment deadline of April 30, 2023.

I would appreciate confirmation of receipt.

Thank you!

Warm regards,

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