

WSR 21-13-063
RULES OF COURT
STATE SUPREME COURT
[June 4, 2021]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENT TO CrR) NO. 25700-A-1355
3.4—PRESENCE OF THE)
DEFENDANT)

The Superior Court Judges' Association, having recommended the suggested amendment to CrR 3.4—Presence of the Defendant, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as shown below is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites with a comment period ending September 30, 2021.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than September 30, 2021. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 4th day of June, 2021.

For the Court

Gonzalez, C. J.

CHIEF JUSTICE

GR 9 COVER SHEET
Suggested Amendment to
CRIMINAL RULES FOR SUPERIOR COURTS, CrR 3.4
PRESENCE OF THE DEFENDANT

A. Name of Proponent:

Superior Court Judge's Association (SCJA) Criminal Law and Rules Committee.

B. Spokesperson:

Laura M. Riquelme
SCJA Criminal Law and Rules Committee, Chair
Skagit County Superior Court Judge
205 W Kincaid Street, Ste. 202,
Mount Vernon, WA 98273
(360) 416-1200

C. Purpose:

On February 2, 2021, CrR 3.4 was amended pursuant to Order No. 25700-A-1319 upon the suggestion of the Washington Defender Association. Subsections pertaining to Video Conference Proceedings (subsection (e)) and Video Conference Proceedings under chapter 10.77 RCW

(subsection (f)) were unchanged in this most recent amendment to CrR 3.4. The SCJA suggests a robust update to CrR 3.4 (e) and (f).

The COVID-19 pandemic forced our courts to implement better infrastructure for remote proceedings. CrR 3.4 should be updated to utilize this technology while also establishing standards for conducting remote hearings. The SCJA recognizes that fewer required physical appearances for defendants would likely lead to fewer missed court dates and warrants. This reduction should decrease daily court congestion and allow for a more expeditious case resolution while improving access to justice.

The FOURTH REVISED AND EXTENDED ORDER REGARDING COURT OPERATIONS, Order No. 25700-B-646, was used as a foundation to develop the suggested amendments. These suggested amendments are necessary for fair administration of justice in a post-pandemic Washington State.

The suggested amendments address issues such as standards for audio and video quality, the use of electronic signatures, access to interpreters, and visibility of the public during a remote proceeding. The same safeguards suggested in subsection (e) are suggested for Remote Proceedings under chapter 10.77 RCW in subsection (f).

D. Hearing:

The proponents do not believe a public hearing is needed.

E. Expedited Consideration:

The proponents believe exceptional circumstances justify expedited consideration of the suggested amendment to CrR 3.4 (e) and (f) and request that the Rules Committee proceed to an abbreviated comment period.

[Suggested changes to CrR 3.4 (e) and (f)]

(e) Video Conference Proceedings. Remote Appearances.

(1) In General. A defendant may appear remotely through video or telephonic conferencing as available in each court and indicated in this rule. A defendant who is out of custody and wishes to appear remotely is responsible for his or her own device and internet access to connect to court.

(1)-(2) Authorization. Remote appearances are authorized for all criminal proceedings except for arraignment, all phases of a trial, entry of a guilty plea, and sentencing, for which the defendant must have prior court approval permitting a remote appearance. Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All remote video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in-person hearing, which may in the trial court judge's discretion be granted.

(3) Remote Appearances Required by Video Remote appearances at arraignments, testimonial hearings, trials, sentencing, and whenever the defendant is in-custody shall include video. Local court rules may require all remote appearances take place over video.

(2) Agreement. Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the par-

ties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

~~(3) (4) Standards for Remote Appearances Video Conference Proceedings.~~

(a) Video Appearances. The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. The audio and video should be of sufficient quality to ensure that the audio and video connections are clear and intelligible participants are easily seen and understood. ~~Video conference facilities Platforms, court procedures, or in-custody facilities must provide for allow~~ confidential communications between attorney and client, including a means during the hearing for the attorney and the client to read and review all documents executed therein, and security sufficient to protect the safety of all participants and observers when conducted in a custodial environment. ~~For purposes of videoconference proceedings, t~~The electronic, scanned, or facsimile signatures of the defendant, counsel, interested parties, and the court shall be treated as if they were original signatures. This includes all orders on judgment and sentence, no contact orders, statements of defendant on pleas of guilty, and other documents or pleadings as the court shall determine are appropriate or necessary. Defense counsel or the court may affix a "/s/" on any documents except a judgment and sentence to indicate the defendant's signature when the defendant indicates their approval during the hearing. In interpreted proceedings, the interpreter must be in a location or over a platform where the defendant and defense attorney can have confidential conversations through the interpreter. ~~the interpreter must be located next to the defendant and t~~ The proceeding must be conducted to assure that the interpreter can hear all participants. When the public appears remotely, members of the public need not enable their video to be visible to other participants absent a finding of good cause and order of the court.

(b) Telephonic Appearances. If participants appear remotely with only an audio connection, the connection should be of sufficient quality to ensure participants are clearly audible. Telephonic appearances shall otherwise have the same requirements as indicated for video appearances.

(f) Remote Video Conference Proceedings under chapter 10.77 RCW.

(1) Authorization. Proceedings held pursuant to chapter 10.77 RCW may be conducted by video conference using the same safeguards in CrR 3.4 (e) (4) (a). ~~in which all participants can simultaneously see, hear, and speak with each other except as otherwise directed by the trial court judge.~~ When these proceedings are conducted ~~via~~ by video conference, it is presumed that all participants will be physically present in the courtroom except for the forensic evaluator unless as otherwise provided by these rules, or as excused or excluded by the court for good cause shown. Good cause may include circumstances where at the time of the hearing, the court does not have the technological capability or equipment to conduct the conference by video as provided in this rule. Such video proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule, or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Five days prior to the hearing date, any party may request the forensic evaluator be physically present in the courtroom, which may in the trial court judge's discretion be granted.

~~(2) Standards for Video-Conference Remote Proceedings under chapter 10.77 RCW. These proceedings shall use the same standards enumerated in CrR 3.4 (e) (4) (a). The judge, counsel, all parties, and the public must be able to see and hear each other during the proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.~~