

WSR 22-07-015
RULES OF COURT
STATE SUPREME COURT
[March 3, 2022]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1378
CrRLJ 3.4—PRESENCE OF THE)
DEFENDANT)

The District and Municipal Court Judges' Association, having recommended the suggested amendments to CrRLJ 3.4—Presence of the Defendant, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in November 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 April 30, 2022. 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 3rd day of March, 2021.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET
Suggested Amendment to
WASHINGTON STATE COURT RULES:
CRIMINAL RULES FOR COURTS OF LIMITED JURISDICTION

RULE 3.4
PRESENCE APPEARANCE OF THE DEFENDANT

A. Name of Proponent: District & Municipal Courts Judges' Association (DMCJA)

B. Spokesperson: Judge Charles Short, President, DMCJA

C. Purpose: Two recent events have prompted the DMCJA to propose revisions to the current CrRLJ 3.4. First, the global pandemic and associated Washington Supreme Court orders loosening restrictions on virtual or remote hearings have forced courts of limited jurisdiction to explore new ways to conduct court business to provide greater access to justice and to facilitate court operations. Most courts in the state made large investments to advance technology in the courtrooms to make these hearings not only possible, but even desirable for certain types of hearings. Allowing remote appearance for many hearings has decreased the financial impact of criminal charges on many defendants, by allowing defendants to appear in court without taking time

off from work or arranging childcare for their family. It has also increased efficiency of courts by allowing attorneys to appear in courts in different jurisdictions without the need to travel between the courts. These advancements justify a broadening of the rule allowing for remote appearance by defendants.

Second, the recent Court of Appeals decision in State v. Gelinas, 15 Wn. App. 2d 484 (2020) has caused considerable confusion surrounding when courts of limited jurisdiction may require a defendant's physical appearance for certain types of hearings, and when these courts have the authority to issue a bench warrant for non-appearance. The revisions in this rule are designed to codify the primary holding of Gelinas, that a defendant may appear through counsel for many types of hearings, and that a court of limited jurisdiction may not issue a bench warrant for the defendant's failure to personally appear when counsel is appearing on their behalf.

These changes proposed by the DMCJA continue current appearance opportunities for defendants and allow limited jurisdiction courts to manage calendars and trial terms. Some language changes are proposed for clarity or grammar purposes. The current rule uses the terms "required" and "necessary," resulting in lack of clarity. CrRLJ 3.3 (c) (2) (ii) uses the term "required" when discussing the restarting of a commencement date. For clarity and consistency, the proponent recommends using "required" in place of "necessary." The current version of CrRLJ 3.4 also uses the terms "presence" and "appearance." For consistency and clarity, the proponent recommends using "appearance" or "appear" throughout the rule.

- Paragraph (a) is revised to clarify that an appearance by the defendant (or their attorney) is required at all hearings. This change allows the court to manage trial and pre-trial calendars while still permitting the defendant to appear through counsel.
- New Paragraph (b) defines what "appearance" means for purposes of this rule. This definition section clarifies that there are three ways in which a defendant may "appear" in court - in person, by video or remote appearance, and through counsel.
- Paragraph (c) is retitled "When Physical Appearance Required." This clarifies that for certain types of necessary hearings, appearing only through counsel is not permitted. Thus, the defendant's physical or remote appearance is required at the hearings listed. The revisions here also incorporate a separate holding of Gelinas, by clarifying that a trial court may find good cause to require a defendant's personal appearance at certain types of hearings other than those explicitly listed. Finally, these revisions now allow a trial court to permit remote appearance of the defendant for required appearances.
- Paragraph (d) is identical to former paragraph (c), with the exception that it changes "by its lawyer" to "through counsel" to make the language consistent with the definitions in the new paragraph (b).
- Paragraph (e) clarifies that a trial court has the authority to issue a bench warrant if no appearance is made by the defendant. In other words, if a defendant fails to appear, and a defense attorney does not appear or appears but has no authority to act on behalf of the client and no information as to why the defendant is not present, the trial court has the discretion to issue a bench warrant. This is consistent with the Gelinas holding that a trial court may only issue a warrant for a defendant's failure to

appear if the defendant's appearance was necessary to advance the case. If neither a defendant nor an attorney appear at a hearing, a hearing cannot take place and thus the case cannot advance.

Finally, the DMCJA recommends moving former paragraphs (e) and (f) related to when "videoconference" proceedings to a new ARLJ or GR. The pandemic forced, and the Supreme Court's emergency orders permitted, courts around the state to adopt new methods and invest in technology to improve the quality and efficiency of video or remote hearings. The location within the rules of the current remote hearing guidelines could be interpreted as limiting their application to pre-trial proceedings. A new ARLJ or GR would be able to address remote hearing requirements for all civil, infraction and criminal proceedings. General remote hearing guidelines could be established with the ability of local courts to adopt procedures consistent with their access to technology.

Because of the benefits of this proposal, the efficiency of video proceedings; the holding in Gelinas, and aiding general language clarification, the DMCJA requests adoption of the proposed amendments.

D. Hearing: A hearing is not recommended.

E. Expedited Consideration: Expedited consideration is requested because of the change in the law and to facilitate the continuation of video proceedings.

Reviser's note: The typographical errors in the above section occurred in the copy filed by the agency and appear in the Register pursuant to the requirements of RCW 34.08.040.

CrRLJ 3.4 PRESENCE APPEARANCE OF THE DEFENDANT

~~(a) **Presence Defined.** Unless a court order or this rule specifically requires the physical presence of the defendant, the defendant may appear remotely or through counsel. 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. **Appearance Required.** The appearance of the defendant is required at all hearings set by the Court.~~

~~(b) **Definitions.** For purposes of this rule, "appear" or "appearance" means the defendant's physical appearance, remote appearance or appearance through counsel.~~

~~(1) "Physical appearance" means the defendant's appearance pursuant to the CrRLJ 3.3(a) definition of appearance.~~

~~(2) "Remote appearance" means the defendant appears through a telephonic or video conference platform approved by the Court.~~

~~(3) "Appearance through counsel" means that counsel appears on behalf of the defendant. Appearance 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.~~

~~(b)(c) **When Physical Appearance Is Required Necessary.** The defendant's physical appearance shall be present physically or remotely (in the court's discretion) is required at arraignment (if one is held), at every stage of the trial including the empaneling of the jury, and the returning of the verdict, and at the imposition of imposing the sentence, and at hearings set by the Court upon a finding of good cause, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.~~

~~(c)(d) Effect of Voluntary Absence.~~ The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing with the trial to and including the return of the verdict. A corporation may appear ~~by its lawyer~~ through counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the defendant's written consent ~~of the defendant~~, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

~~(d)(e) Defendant Not Present. Failure to Appear.~~ In order to require the defendant's physical or remote presence at any hearing other than those listed in subpart (b), the court must find good cause. If in any case the defendant fails to appear is not present when his or her personal attendance appearance is necessary required, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

~~(e) Videoconference Proceedings.~~

~~(1) Authorization.~~ Preliminary appearances held pursuant to CrRLJ 3.2.1(d), arraignments held pursuant to this rule and CrRLJ 4.1, bail hearings held pursuant to CrRLJ 3.2, and trial settings held pursuant to CrRLJ 3.3(f), 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 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.

~~(2) Agreement.~~ Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrRLJ 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

~~(3) Standards for Video Conference Proceedings.~~ 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 video and audio should be of sufficient quality to ensure participants are easily seen and understood. Video conference facilities must provide for 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. For purposes of videoconference proceedings, the electronic 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. 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.

~~(f) Videoconference Proceedings under RCW 10.77.~~

~~(1) Authorization.~~ Proceedings held pursuant to chapter 10.77 RCW, may be conducted by video conference 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 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 Proceedings under Chapter 10.77 RCW.* 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.~~