

WSR 22-08-081
RULES OF COURT
STATE SUPREME COURT
[March 31, 2022]

IN THE MATTER OF THE ) ORDER
SUGGESTED NEW RULES CrR 4.11 ) NO. 25700-A-1421
-NOTICE OF COURT DATES TO )
DEFENDANT AND CrRLJ 4.11- )
NOTICE OF COURT DATES TO )
DEFENDANT )

The Board for Judicial Administration COVID Recovery Task Force Adult Criminal Committee, having recommended the suggested new rules CrR 4.11-Notice of Court Dates to Defendant and CrRLJ 4.11-Notice of Court Dates to Defendant, and the Court having approved the suggested new rules for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested new rules 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 January 2023.

(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, 2023. 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 31st day of March, 2022.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

PROPONENT: Proposed new rule CrR 4.11 is submitted and endorsed solely by the Adult Criminal Committee of the BJA Court Recovery Task Force. This proposal does not necessarily reflect all of the BJA Court Recovery Task Force members' perspectives.

SPOKESPERSON: Amy Muth, Chair; 206-940-0294; amy@amymuthlaw.com

PURPOSE: The proposed rule provides a different hearing notice procedure for courts to follow before issuing a bench warrant for non-appearance in light of the adoption of CrR 3.4. Historically, defendants have been provided notice of court dates solely through the court either on the record or via a summons. With the adoption of CrR 3.4, however, defendants may now appear through counsel unless they have received prior notice that their physical presence is required. When defendants appear through counsel, defense counsel provides notice of new court dates to the defendant, not the court.

CrR 3.4 has created substantial and significant benefits for courts, attorneys, and defendants; courts can process continuance requests much more efficiently, attorneys save courtroom time, and defendants do not have to take time off from work and travel to court for routine matters. However, when defense counsel provides notice of

a hearing for which the defendant fails to appear, defense counsel is ethically prohibited from revealing whether their client received actual notice or when notice was provided, because doing so causes them to reveal attorney-client confidential communications in violation of RPCs 1.6 and 3.3. The Washington State Bar Association Committee on Professional Ethics reached the same conclusion when previously asked to examine this issue:

The Committee reviewed your inquiry concerning informal meetings between you as a public defender and the presiding judge, during which the judge asks whether clients have been meeting with you. The Committee was of the opinion that such information would constitute confidences or secrets of your client, and that pursuant to RPC 1.6 you could not disclose such information unless your client consented to disclosure or you were ordered to do so by the court. The Committee was further of the opinion that RPC 3.3 would prohibit you from making evasive answers to such questions.

WSBA Advisory Op. 1311.

Revealing these communications also risks placing defense counsel in the position of becoming a witness, potentially leading to withdrawal from the case and appointment or retention of a new attorney, which adds court costs and causes delays.

Because of the risks and collateral consequences of issuing a warrant for arrest, when the defendant's notice is constructive, many stakeholders have asked courts to attempt additional service of notice prior to issuing a bench warrant for failure to appear. If service is mailed by the court, the court can confirm service was timely completed *without* requiring a declaration or testimony from defense counsel. Our proposed rule ensures that a mailed summons for the hearing has been attempted prior to issuance of a bench warrant when notice of that court date was provided through defense counsel. This process preserves the integrity of the attorney-client privilege while retaining the efficiencies of CrR 3.4. This process is not intended to apply when the defendant has been provided other forms of notice, such as when the court instructs the defendant of their hearing date on the record in court.

Under this rule, when a defendant fails to appear for a hearing for which notice was provided only through defense counsel, the court will issue a summons to the defendant to appear for a new hearing. The court will also note the nonappearance so as to suspend the time for speedy trial consistent with CrR 3.3 (c) (2) (ii). Should the defendant fail to appear for the new hearing, the court has provided two forms of notice to the defendant and a bench warrant may issue at the court's discretion. We believe this proposal strikes the right balance between preserving the benefits of CrR 3.4 and ensuring that defense counsel follow through on their ethical obligations.

Regarding where to place the proposed language in the court rules, the Adult Criminal Committee discussed at length whether this proposal should be submitted as a proposed amendment to CrR 3.4 or as a stand-alone rule. The Adult Criminal Committee decided to submit this proposal as a separate rule because there are other proposals seeking to amend CrR 3.4, and it was unclear to the Adult Criminal Committee where the proposed language would best fit. Otherwise, as CrR 3.4 is currently written, the proposed language could be added to CrR 3.4(d).

HEARING: We do not believe that a public hearing is necessary.

EXPEDITED CONSIDERATION: We do not believe that expedited consideration is necessary.

[NEW]

### Proposed CrR 4.11

#### NOTICE OF COURT DATES TO DEFENDANT

The Court shall provide notice of new hearing dates to the defendant by delivering a copy of the notice to the defendant or the defendant's attorney, by mailing the notice to the defendant's last known address, or by providing notice to the defendant on the record in open court. Notice of new hearing dates provided to the defendant only through the defendant's attorney shall not constitute notice sufficient to issue a warrant for failure to appear for a hearing that requires the physical presence of the defendant under CrR 3.4. When a defendant fails to appear at a hearing where the defendant's physical presence was required under CrR 3.4 and the only notice of that hearing was provided to the defendant through the defendant's attorney, the court shall note the non-appearance in accordance with CrR 3.3 (c) (2) (ii) and summons the defendant to a hearing where, if the defendant fails to appear, the court may order the clerk to issue a warrant for the defendant's arrest.

PROPOSER: Proposed new rule CrRLJ 4.11 is submitted and endorsed solely by the Adult Criminal Committee of the BJA Court Recovery Task Force. This proposal does not necessarily reflect all of the BJA Court Recovery Task Force members' perspectives.

SPOKESPERSON: Amy Muth, Chair; 206-940-0294; [amy@amymuthlaw.com](mailto:amy@amymuthlaw.com)

PURPOSE: The proposed rule provides a different hearing notice procedure for courts to follow before issuing a bench warrant for non-appearance in light of the adoption of CrRLJ 3.4. Historically, defendants have been provided notice of court dates solely through the court either on the record or via a summons. With the adoption of CrRLJ 3.4, however, defendants may now appear through counsel unless they have received prior notice that their physical presence is required. When defendants appear through counsel, defense counsel provides notice of new court dates to the defendant, not the court.

CrRLJ 3.4 has created substantial and significant benefits for courts, attorneys, and defendants; courts can process continuance requests much more efficiently, attorneys save courtroom time, and defendants do not have to take time off from work and travel to court for routine matters. However, when defense counsel provides notice of a hearing for which the defendant fails to appear, defense counsel is ethically prohibited from revealing whether their client received actual notice or when notice was provided, because doing so causes them to reveal attorney-client confidential communications in violation of RPCs 1.6 and 3.3. The Washington State Bar Association Committee on Professional Ethics reached the same conclusion when previously asked to examine this issue:

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Under this rule, when a defendant fails to appear for a hearing for which notice was provided only through defense counsel, the court will issue a summons to the defendant to appear for a new hearing. The court will also note the nonappearance so as to suspend the time for speedy trial consistent with CrRLJ 3.3 (c) (2) (ii). Should the defendant fail to appear for the new hearing, the court has provided two forms of notice to the defendant and a bench warrant may issue at the court's discretion. We believe this proposal strikes the right balance between preserving the benefits of CrRLJ 3.4 and ensuring that defense counsel follow through on their ethical obligations.

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HEARING: We do not believe that a public hearing is necessary.

EXPEDITED CONSIDERATION: We do not believe that expedited consideration is necessary.

[NEW]

### Proposed CrRLJ 4.11

#### NOTICE OF COURT DATES TO DEFENDANT

The Court shall provide notice of new hearing dates to the defendant by delivering a copy of the notice to the defendant or the defendant's attorney, by mailing the notice to the defendant's last known address, or by providing notice to the defendant on the record in open court. Notice of new hearing dates provided to the defendant only through the defendant's attorney shall not constitute notice sufficient to issue a warrant for failure to appear for a hearing that requires the physical presence of the defendant under CrRLJ 3.4. When a defendant fails to appear at a hearing where the defendant's physical presence was required under CrRLJ 3.4 and the only notice of that hearing was provided to the defendant through the defendant's attorney, the court shall note the non-appearance in accordance with CrRLJ

3.3 (c) (2) (ii) and summons the defendant to a hearing where, if the defendant fails to appear, the court may order the clerk to issue a warrant for the defendant's arrest.