



**Snohomish County
Office of Public Defense**
3000 Rockefeller Ave.
Everett, WA 98201-4046

To: Pam Seiber
Court Administration

From: Jason Schwarz
Office of Public Defense

Date: November 4, 2022

Re: Proposed SCLrR 3.3

I write in opposition to the Court's proposed changes to SCLCrR 3.3. The rule should not be adopted for three reasons: 1) the arbitrary selection of January 1 will result in disparate impacts to defendants and their counsel, 2) the rule fails to consider the efficiency of ex parte motions for litigants and their counsel, and 3) the rule prevents continuances at trial call, which is impractical and unrealistic.

The Court's proposed January 1 deadline is arbitrary and will create a disparate impact amongst litigants based solely on the date of the case filing. While I'm uncertain of the purpose for the rule change, this proposal appears to be an attempt to manage how long criminal cases remain in the court. But the blanket deadline of January 1 does not achieve this purpose

Including a January deadline for ex parte v. in person hearing muddies the waters and creates different results for people whose cases were filed one day apart. Cases filed at the first of a calendar year will get up to 729 days of free ex parte continuance. Cases filed at the very end of the calendar year will be limited to 365 days of free continuances. The below chart highlights the disparity.

Filed date:	1/1/2021
Date attempting to submit TC ex parte:	12/31/2022
Preceding calendar year:	2021
Is the request for the continuance filed prior to January 1 of 2021:	No
Can we submit ex parte:	Yes
Days between filing and TC:	729

Filed date:	12/31/2021
Date attempting to submit TC ex parte:	12/31/2022
Preceding calendar year:	2021
Is the request for the continuance filed prior to January 1 of 2021:	No
Can we submit ex parte:	Yes

Days between filing and TC:	365
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Charts 1 and 2 above illustrate how cases filed a day apart would get substantial different length of opportunity to file ex parte motions to continue. But an additional concern arises when comparing the case in the second chart with a case filed on the same day but seeking a continuance one day later:

Filed date:	12/31/2021
Date attempting to submit TC ex parte:	1/1/2023
Preceding calendar year:	2022
Is the request for the continuance filed prior to January 1 of 2022:	Yes
Can we submit ex parte:	No
Days between filing and TC:	366

The second and third chart illustrates how cases filed on the same day, but whose date for requesting a continuance differs by one day results in the lawyer and litigant attending court. Here, a lawyer representing a person seeking a continuance on January 1 will need to set a hearing while a lawyer calendaring a hearing on December 31 will not.

The Court should ultimately not adopt this rule because it sets a one-size-fits-all approach to case management that is not consistent with the nuances of the case. Each case type is unique and carries its own expectations on the time it will take to resolve. It's hard to imagine attorneys getting an aggravated murder trial completed within a year given the complexity of the case, whereas it may be a reasonable expectation on a simple assault with one witness. Applying a one-size-fits-all (or one length fits all) system for all case types creates additional burdens for litigants on serious cases that necessitate repeated in-person continuances.

In addition, there are factual case-specific factors that contribute to the need for continuance which don't neatly fit in the timeline contemplated by the proposed rule. For example, a case involving a defendant's competency to stand trial requiring the defendant's restoration will almost certainly last for over one year given the delays at Western State Hospital. Defense investigations and trial dates are often delayed when witnesses are unavailable for pretrial investigation because they are serving overseas, live in other jurisdictions, or are unable to appear at interviews remotely. Cases requiring experts require more time to get to trial and are harder to schedule for trial given busy expert's professional schedule. A great number of cases have unique factual circumstances like those above; the lawyers should not be required to set an in-person hearing based on factors outside the lawyer's control, particularly when the same result will be achieved with a well-drafted ex parte declaration and motion to continue.

Requiring attorneys and defendants to appear in court is inefficient. Lawyers seeking continuances can file a factual declaration supporting the continuance. From a lawyer's perspective, there is no value or efficiency in attending a court hearing for an agreed continuance when a declaration will suffice. Coming to court is time-intensive and it takes the lawyers away from their other clients and cases, causing unneeded delays in other cases. The only purpose for an in-person hearing is for a judge to question the lawyers' need for a continuance, or to express the Court's displeasure in the case length; neither are efficient for the administration of justice nor for any person involved in the case.

Should the court adopt the proposed rule, it should delete the following language: “requests for continuances on any case filed prior to January 1 of the preceding calendar year must be noted for a hearing.” This language would prevent parties from requesting continuances at trial call. While last-minute continuances at trial call are disfavored, they are practically necessary in many cases, particularly when circumstances arise outside of the parties’ control. For example, under this rule, if a defense attorney were to learn about a witness’s unavailability immediately prior to trial call, this rule would prevent the lawyer from asking for a continuance despite the fact that the lawyer’s ability to present a case to the jury would be significantly curtailed.

If the Court wants to manage continuances, it should use the current ex parte process. When a judge believes that the declaration does not support the continuance, the judge can deny the request and demand a hearing. This would result in fewer hearings and fewer attorneys having to take time away from their cases to sit in court and wait for a judge to scold them about their requested continuance. Furthermore, it is consistent with changes to CrR 3.3 which go into effect in January.

Thank you for the opportunity to comment. Please do not hesitate to contact me with questions or follow-up.