

SCLCrR 3.4 PRESENCE OF THE DEFENDANT

Comments

Commenter: Snohomish County Prosecutor's Office

Date Received: 6/8/2021

Comment:

I think that the proposed SCLCrR 3.4 is a helpful resolution of some of the problems created by the new state-wide rule. I do see one problem: The statement that the defendant's presence may be excused if "all parties have agreed to a trial continuance to a particular date and the defendant has signed the order of continuance, or authorized counsel to sign on the behalf of the defendant." The problem is that per CrR 3.3(f)(1), an agreed continuance "must be signed by the defendant." There is no provision for the defendant to authorize counsel to sign on his/her behalf. The Task Force comment to this rule provision specifically pointed out the need to have an agreed continuance signed by the defendant personally:

The task force also discussed the current (and recently adopted) provision's requirement that the agreement must be signed by the defendant, and not just the defendant's attorney. Members noted in their discussion that under some circumstances, such as when a defendant's medical condition prevents him or her from attending a hearing, the defendant's signature might not be available even though good reason exists to grant a continuance. The task force decided, however, that under these circumstances a continuance could instead be addressed under a separate provision - subsection (f)(2), which authorizes continuances on the motion of the court. In light of the importance of securing the defendant's signature to these agreements, the task force proposes that the current signature requirement be retained.

If the motion is not signed by the defendant, there is no "agreed continuance" per CrR 3.3(f)(1). There is only a motion for continuance under CrR 3.3(f)(2) – which requires the court to make specific findings. In the proposed local rule, the language in bold should be deleted.

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Conducting motions in limine on the day of the trial assignment is problematic. While it gets things moving the following week, I don't see why we can't just call jurors in on Tuesdays. I think the Court's pace during COVID has been a relief to everyone because we have the time to be more thorough and jurors wait around less often. Additionally, because trial assignment is so unpredictable, it's difficult to keep Friday afternoons open. And because trial call is such a zoo and you don't get assigned out until the end of the calendar, this doesn't leave a lot of time to review opposing counsel's motions in limine (only about 2 hours to review, research, and attempt to cobble together a response).

Commenter: Kathleen Kyle

Date Received: 6/11/2021

Comment:

The proposed rule requiring the presence of the defendant at trial call when there is an objection as to the "duration" of the continuance contravenes Gelinis in this way: if the parties are in agreement that a continuance is necessary, but just disagree as to what date to continue the matter, a defendant could very easily authorize her or his attorney to sign off on whichever date the court decides. In this way, the defendant's presence would not be necessary to advance the case.

Concern exists with regard to the hearing of motions in limine on the same day as trial call. Here again, the complexity of the case really determines the efficacy of this practice. Anticipating that a trial judge will be

flexible in allowing the more complicated or lengthy motions in limine to be set over to the following Monday for consideration would alleviate the concern of having to respond to motions that would not have been received until approximately two hours before their consideration by the court. This discretionary buffer seems anticipated by the rule's reference to "good cause" to consider motions in limine on another day besides the trial call date, and by the language that MIL will "begin" on the trial call date (as opposed to necessitating a ruling on each MIL on that date).

SCPDA also continues to object to the unlawful restraint of holding people in the penalty box or cage in Courtroom 1A. Washington Constitution Art. I, section 22 protects defendants' rights to appear and defend in person and this right includes "the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands restraint..." State v. Jackson 2020. To participate and defend, a person needs to be next to their attorney and similarly situated in the courtroom as the opposing party. Natalie Tarantino voiced objections to the defendant box back in the planning stage and SCPDA continues to voice those objections now. One attorney was befuddled when one week, the hearing was in one court room and his client was permitted to sit next to him at counsel table and the next hearing in 1A, that right was denied. In one instance, the court tried to justify denying the defense request due to custodial staffing, but the custodial officers voiced that they were staffed sufficiently. The court still denied the request.

SCPDA previously requested a local rule to protect the defendant's right to appear in court. For the purposes of public comment, the SCPDA proposed rule is included below. SCPDA proposed the rule as 3.2.05 which is an arbitrary number. It could be adopted as part of Presence of Defendant rule. If the court followed this procedure, individualized use of the penalty box or cage in 1A may be deemed appropriate. Mandatory use of the cage, or even general, just because a person cannot afford to post bail and appears in court in custody is impermissible. Clear direction would be useful for the use of restraints in whatever form.

RULE 3.2.05 PHYSICAL RESTRAINTS IN THE COURTROOM

- A. Use of Restraints in Superior Court proceedings. Persons detained in custody, who are ordered to appear in court for a hearing, shall not be brought into the presence of the court wearing any physical restraint devices nor shall they be separated from counsel or the proceedings via physical barriers except when such restraints are ordered by the court prior to the hearing, or ordered during the hearing if emergent circumstances require it.
- (1) The use of restraints may be authorized based on the following factors:
- (a) Present behavior of the detainee represents a current threat to his or her own safety, or the safety of other people in the courtroom;
 - (b) Recent disruptive courtroom behavior of the detainee has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm to himself or herself or others; or
 - (c) Present behavior of the detainee presents a substantial risk of flight from the courtroom; and
- (2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm by or to the detainee or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.
- B. Requests Regarding Restraints or Separation: Notice, Timing, and Procedure. The consideration by the court of an order authorizing the use of restraints under section (A), above, shall come before the court by motion, supported by declaration. The motion should be filed with adequate time for opposing counsel to respond in writing, if possible. The court has the discretion to hear a restraint/separation motion, set it over a day for further briefing, or require that it be set on a motions calendar if it involves issues that require live testimony or more time to consider. The court shall use the following procedure in making its ruling:

1. Court's initial determination regarding use of restraints: based on the materials submitted by the parties, the court shall make pre-hearing initial determination whether the use of restraints should be employed at the start of the scheduled hearing. If the court makes a preliminary finding that restraints are warranted, the court will notify the parties and corrections staff.
2. Court's final determination regarding use of restraints: at the beginning of the hearing, in the presence of the defendant, the court will first hear full arguments and consider evidence regarding the motion to employ restraints, and thereafter make a final determination regarding the use of restraints during the substantive aspects of the hearing for which the defendant was scheduled.
3. Other considerations regarding Motions to use Restraints
 - a. All requests for restraints must originate in filings from the prosecutor's office. Requests for restraints, and information supporting a motion for the use of physical restraints, shall not be submitted to the court by any person not a party to the case.
 - b. Corrections staff shall not interfere, discourage, or question a represented detainee regarding the detainee's decision to appear in the presence of the court without restraints. Pretrial detainees have a constitutional right to appear at a hearing unrestrained and the decision to exercise that right should not be questioned or modified in the absence of their attorney.
 - c. This rule does not apply to the employment of restraints on a defendant at the defendant's trial. Any order issued under this rule is not applicable at any trial. Any consideration of the use of restraints at trial are reserved exclusively to the trial judge.
 - d. For the purpose of this rule, "restraint" is defined as shackles, handcuffs, leg restraints, hand restraints, belly chains, restraint chairs, and includes any barrier employed to physically control or separate the detainee from the proceedings.