

7-4

Proposal by Judge Alexander to amend Section 37-1 regarding waiver of the presence of the defendant at arraignment. On 1-22-19, RC tabled matter to February meeting to receive comments from CCDLA, CSA, CPD, OVS, OVA, and domestic violence victim groups. **On 2-11-19, RC tabled to March meeting. Counsel to redraft with Judge Alexander. Placed research re: "critical stage of proceeding" on SharePoint and sent to Committee members.**

Del Ciampo, Joseph

From: Alexander, Joan
Sent: Monday, March 4, 2019 6:34 PM
To: Del Ciampo, Joseph
Subject: rule changes

Hi Joe-

I sent Christine Rapillo (public defenders), Kevin Kane (prosecutors), and Morgan Rueckert (criminal defense attorneys association) an email telling them that any concerns or suggestions should be sent to us before our March 18th meeting. The state victim's advocate (Linda Cimino) and the CCADV are in support of the rule change for arraignments.

I will update you if I get any other responses.

Thanks!

jka

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Hon. Joan Alexander  
Judge, Superior Court  
State of Connecticut  
Email: [joan.alexander@jud.ct.gov](mailto:joan.alexander@jud.ct.gov)

**Del Ciampo, Joseph**

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**From:** Alexander, Joan  
**Sent:** Wednesday, March 13, 2019 7:18 PM  
**To:** Del Ciampo, Joseph  
**Subject:** FW: Rule Change Proposal, CCDLA

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**From:** Rueckert, Morgan [mailto:MRueckert@goodwin.com]  
**Sent:** Wednesday, March 13, 2019 7:13 PM  
**To:** Alexander, Joan <Joan.Alexander@jud.ct.gov>  
**Subject:** RE: Rule Change Proposal, CCDLA

Judge Alexander,

Our board met last week and discussed the two proposals. CCDLA is in full support of the proposal to amend PB §43-36 and §23-42 regarding sealing the Court's memorandum in Anders situations.

✓ With respect to the proposed change to PB §37-1, regarding hospital arraignments, the Board had a lengthy and robust discussion of the issues. While there was consensus that hospital arraignments are cumbersome, awkward and inefficient, and delay the commencement of proceedings, CCDLA is concerned that permitting an arraignment without the presence of the defendant would compromise the ability of counsel to obtain information from the defendant necessary to make a bond argument or otherwise argue issues such as protective orders, confiscation of firearms, competency evaluations, suicide watch, medical needs, special conditions or other matters that come up at arraignment. CCDLA would want to ensure that the any counsel appointed to represent an individual at arraignment had a prior opportunity to meet and confer with the defendant.

In addition, the absence of the defendant would also prevent the defendant, bail commissioner, prosecutor and court from conducting an "eyeball assessment" of the defendant, and to interact with the defendant to assess any particular issues that may come up at arraignment that are not apparent on the papers. Even if counsel had an advance opportunity to meet the defendant, it would not resolve this concern.

All said, while recognizing the practical appeal of asserting court oversight over the defendant at the earliest possible point in the kinds of cases that typically warrant a hospital arraignment, the Board was very reluctant to recommend a procedure that authorizes the formal institution of legal proceeding outside the presence of the defendant.

We appreciate very much that you seek our input on these matters and want to accommodate the Court and the practical and other concerns the proposed rule change would address. However, there was collective unease at the proposal and none of the alternatives that we discussed to try to address them, including having a video link to the hospital with appointed counsel present with the defendant, could sway the Board (which is comprised of experienced private and public defense counsel, including those with substantial hospital arraignment experience). So I am afraid that I am unable to even offer a suggestion to modify the proposal.

We are always willing to work with the Court to process these issues so I am happy to meet with you with another member(s) of the Board to discuss this issue further to see if there is a way to address our concerns.



**Morgan P. Rueckert**  
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~~6/5~~

Proposal by Judge Alexander to amend Section 37-1 regarding waiver of the presence of the defendant at arraignment.



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STATE OF CONNECTICUT  
SUPERIOR COURT  
JUDGE'S CHAMBERS

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Chambers of  
Honorable Joan K. Alexander  
Chief Administrative Judge  
Criminal Division

Telephone: (860) 515-5050  
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January 3, 2019

Joseph J. Del Ciampo  
Director of Legal Services  
State of Connecticut  
Judicial Branch  
100 Washington Street/3<sup>rd</sup> Floor  
Hartford, Connecticut 06106

Dear Attorney Del Ciampo:

I would like to propose a change to Practice Book 37-1. This change would allow the court to waive the presence of a defendant in the courtroom after a finding of good cause shown on the record. This change would allow the court to appoint counsel, to preserve any discovery requests, to issue orders of protection and to take any other steps necessary for the arraignment without undue delay. The following language is proposed:

**Proposed Change to Practice Book Section 37-1**

A defendant who is not released from custody sooner shall be brought before a judicial authority no later than the first court day following arrest. Any defendant who is hospitalized, has escaped, or is otherwise incapacitated shall be presented no later than the next court day following such defendant's medical discharge or return to police custody. Upon a finding of good cause shown that is placed on the record, the judicial authority may waive the presence of the defendant at the arraignment. A defendant not in custody shall appear for arraignment in person at the time and place specified in the summons or the terms of release, or at such other date or place fixed by the judicial authority. (Effective Oct. 1, 2019)

Joseph J. Del Ciampo  
January 3, 2019  
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Thank you for your time and assistance in this matter. Please let me know if you need any additional information from me regarding this proposal.

Very truly yours,



Joan K. Alexander  
Chief Administrative Judge  
Criminal Division

jka  
cc: Honorable Patrick L. Carroll III,  
Chief Court Administrator  
Honorable Elizabeth A. Bozzuto,  
Deputy Chief Court Administrator



**LEGAL SERVICES**

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**Memo**

To: Director Joseph Del Ciampo  
From: Shanna O'Donnell  
Date: February 7, 2019  
Re: Proposed revision to Practice Book §37-1, item 5-9 on the 1/22/19 Rules Committee agenda.

You asked to me to review the proposed amendment to Practice Book § 37-1. This amendment was proposed by Judge Alexander and allows for a judge to waive the presence of a defendant at arraignment for good cause shown.

This revision may conflict with a defendant's right to be present at critical phases of a criminal proceeding. If this section of the Practice Book is amended as suggested, there are other Practice Book provisions and statutes that would also need to be amended to address conflicting language.

**Federal Law Regarding the Right to Be Present**

The Fifth Amendment of the United States Constitution provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ..." and the Fourteenth Amendment specifies that "[n]o State ... shall deprive any person of life, liberty, or property, without due process of law..."

The courts have held that one element of this right to due process is the right to be present during certain proceedings, and is not limited to the defendant's rights under Sixth Amendment to confront witnesses. In *United States v. Gagnon*, the United States Supreme Court explained that "[t]he constitutional right to presence [...] is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." 470 U.S. 522, 526 (1985).

Other cases have made clear some of the situations in which this right to presence would apply, and they have further specified that this right is to a "personal presence." In *Rushen v. Spain*, the United States Supreme Court stated "the right to



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personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant.” 464 U.S. 114 (1983).

The types of proceedings that meet the definition of “critical stages” are enumerated by several different cases. Arraignment, which is at issue here, is generally one of those “critical stages.” While the United States Supreme Court at one time considered each state’s rules and procedures for arraignments separately to determine whether they would be “critical stages”, *see e.g. Hamilton v. Alabama*, 368 U.S. 52 (1961), more recent cases do not. For example, *Missouri v. Frye* includes arraignments in the list of “critical stages” with no further distinctions made. *Missouri v. Frye* states that “[c]ritical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” 566 U.S. 134 (2012).

### **State Law Regarding the Right to be Present**

Connecticut’s Supreme Court has also held that arraignments are critical stages, given that arraignments provide the defendant with the opportunity to raise certain defenses, to enter a plea, and to be informed of their rights. “[T]he arraignment in this matter was a critical stage of the proceedings. Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail” *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 482–83 (2013).

As with the United States Supreme Court, the Connecticut Supreme Court has also held that the defendant has the right to be present at critical stages of criminal proceedings. *State v. Strich*, 99 Conn. App. 611, 622 (2007). This right is derived from the due process clause as well as the confrontation clause. “Although the constitutional right to be present is rooted to a large extent in the confrontation clause of the sixth amendment, courts have recognized that this right is protected by the due process clause in situations when the defendant is not actually confronting witnesses or against him.” *State v. Lopez*, 271 Conn. 724 (2004), citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 108 (1934).

### **Right to Counsel**

It is unclear from the proposed amendment how the court would address the appointment of counsel without the defendant’s presence and input, but this change to procedure could also create issues under the Sixth Amendment of the United States Constitution, which provides for the right to the assistance of counsel in criminal prosecutions. In Judge Alexander’s proposal, she indicates that the court would be able to appoint counsel, but it is unclear how this would occur in the defendant’s absence. Generally, the defendant can ask for a public defender at their court date and they are

then provided the opportunity to fill out an application form so that the court can decide whether or not to appoint an attorney. This would also be the defendant's opportunity to let the court know if they are intending to retain private counsel, or if they want to proceed without representation.

### **Protective Orders**

In Judge Alexander's proposal, she indicates that the court would be able to issue orders of protection if the defendant's presence were waived by the court under the proposed Section 37-1. It is my understanding that Family Services make inquiries regarding the factors for family violence when they meet with defendants waiting for arraignment, which are then used to help the court make a determination of whether or not to enter protective orders. If the defendant is not present for the arraignment, it is unclear if the defendant would be able to provide relevant information to Family Services before the court makes its decision. There would also need to be procedures to notify an absent defendant of the issuance of a protective order.

### **Related Rules**

Practice Book § 44-7<sup>1</sup> provides that defendant has the right to be present at the arraignment. If the proposed amendment to Practice Book § 37-1 is adopted, § 44-7 would need to be amended as well.

Practice Book §§ 37-3 and 37-4 provide that the defendants shall be advised of their rights.

General Statutes § 54-1b<sup>2</sup> provides that at arraignment the defendant must be advised of certain rights. If the proposed amendment to Practice Book § 37-1 is adopted, the defendant would not necessarily be present to be advised of those rights. General Statutes § 54-1b also provides that the defendant should have the chance to consult with counsel, which would also not be possible if the defendant is not present.

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<sup>1</sup> "The defendant has the right to be present at the arraignment, at the time of the plea, at evidentiary hearings, at the trial, and at the sentencing hearing, except as provided in Sections 44-7 through 44-10. Whenever present, the defendant shall be seated where he or she can effectively consult with counsel and can see and hear the proceedings. An incarcerated defendant or an incarcerated witness shall not be required during the course of a trial to appear in court in the distinctive attire of a prisoner or convict." Practice Book § 44-7.

<sup>2</sup> "Any accused, when he is arraigned before the Superior Court, shall be advised by a judge that he has a right to counsel, that he has a right to refuse to make any statement and that any statement he makes may be introduced in evidence against him. Each such person shall be allowed a reasonable opportunity to consult counsel." General Statutes § 54-1b.

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Several statutes are predicated upon the defendant being "presented" before the court. There would need to be modifications to allow the defendant to be "presented in absentia" in order to address the conflicts created by the proposed amendment to § 37-1.

A few examples:

General Statutes § 54-1d provides that the defendant shall be presented for arraignment and specifies the court to which this presentment shall be made. If the proposed amendment to Practice Book § 37-1 is adopted, this statute would need to be amended to allow for situations where the defendant is not presented.

General Statutes § 54-1g provides that arrested persons should be presented before the court within certain time periods. If the proposed amendment to Practice Book § 37-1 is adopted, this statute would need to be amended to allow for situations where the defendant is not presented.