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Bonnie Middleton Sterken
Equity and Justice Specialist
bonnies@wsba.org

Diana Singleton
Chief Equity and Justice Officer
dianas@wsba.org



THE ALLIANCE
for Equal Justice

MEMBER

December 13, 2021

Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314

RE: Proposed Changes to CR 39 and Proposed New GR 41

Dear Justices Johnson and Yu,

We write on behalf of the Access to Justice Board with comments concerning: (1) proposed amendments to Civil Rule 39 (Trial by Jury or by the Court); and (2) proposed new General Rule 41 (Jury Selection by Videoconference.) The Board thinks both rules have the potential to increase access to justice for parties and make jury service more accessible. The Board also thinks the Court should consider: (1) the potential impact on historically marginalized communities; (2) the likely disparate ability of jurisdictions across Washington to conduct remote proceedings; (3) the potential to disenfranchise individuals lacking sufficient access to technology; (4) the impact of remote jury selection and remote trials on individuals living with disabilities; (5) the impact of the rules on court users requiring interpreters; (6) the ability of courts to ensure that litigants can consult with counsel during remote proceedings; and (7) how courts can avoid singling out prospective jurors and litigants who may wish to use virtual backgrounds.

Both amended CR 39 and new GR 41 have the potential to increase access to the courts for parties and jurors. Among the barriers to jury service potential jurors cite, compensation, childcare, and transportation are frequently raised. With remote jury selection, prospective jurors may have to take less time away from work (e.g., a few hours for a remote hearing versus a full day at the courthouse), might not need to arrange for as much childcare, and can avoid having to navigate parking or public transportation to a courthouse. With remote bench and jury trials, parties, attorneys, jurors, and witnesses might similarly avoid the challenges of traveling to a courthouse, minimizing the disruptions attendant with moving people and evidence in and out of courthouses and courtrooms. Unrepresented litigants and others who may feel uncomfortable in a courthouse setting might be more willing to seek to vindicate their rights if they can do so from home, for example. Thus, for these reasons and perhaps others, remote jury selection and remote trials could increase access to justice.

As much promise as the amended and new rules have to increase access to justice, the Board is concerned that proposed new GR 41 not further exacerbate underrepresentation of jurors of color in the jury selection process. See Alexis Krell, *Juries Have a Diversity Problem. What's Being Done to Address it in Washington*, The News Tribute (Apr. 17, 2021),

available at <https://bit.ly/30SRwnu>. Should the Court approve GR 41, the Board suggests that the Minority and Justice Commission oversee study of the impact of remote jury selection on historically underrepresented communities.

Apart from the potential promises and impacts of the proposed rules on prospective jurors, parties, and attorneys, the Board notes that the ability to conduct remote proceedings may vary significantly among Washington's numerous jurisdictions. For example, in King County Superior Court, prospective jurors receiving a paper summons via U.S. mail are directed to an online portal where they can provide their email addresses and take other actions concerning their jury service. With that information, jury staff in places like King County are able to provide email addresses to courts needing jurors, thereby aiding the remote jury selection process. However, many Washington jurisdictions will not have in place the ability to contact jurors by email, and might not have the staff to manage the remote jury selection process. This raises the prospect that courts, parties, attorneys, and jurors will have very different levels of access to remote jury selection and remote trials, from jurisdiction to jurisdiction. The Board suggests that the Court consider whether proposed amended CR 39 and new GR 41 would negatively and disproportionately impact jurisdictions with fewer resources and jurisdictions serving historically marginalized communities. Such communities should be able to enjoy the potential benefits of these rules as much as communities with more resources who have not faced as many barriers in accessing justice.

The Board also urges caution to ensure that prospective jurors and parties are not disenfranchised on account of technology access. The Board appreciates that GR 41 provides that a court cannot exclude a juror from jury selection "due to lack of resources or access and shall arrange for alternative methods," GR 41(c), and that CR 39 provides that a court shall consider "the parties['] ability to conduct a videoconference trial," CR 39(d)(2)(A)(i) and CR 39(d)(2)(B)(ii)(a). With respect to alternative methods for remote jury selection, courts should take care that such alternative methods are not, in themselves, potentially discriminatory. For example, a potential juror who lacks the ability to remotely access jury selection from home may face other barriers in coming to the courthouse to participate in in-person jury selection while other prospective jurors with access continue to participate remotely. The juror without remote access may be forced to deal with all of the barriers prospective jurors cite with respect to in-person jury selection, e.g., the financial impact of time away from work, childcare, and transportation. Courts should consider ways to accommodate such jurors in their homes (e.g., through the provision of Internet hotspots and electronic tablets), or find ways to accommodate such jurors in the community, at places other than a courthouse, where necessary.

In addition, regarding a party's ability to conduct a videoconference trial, courts should take care to ensure that such ability provides a party a meaningful opportunity to pursue their case. This is particularly so for unrepresented litigants, who face significant barriers irrespective of trial medium. It might not be enough to ensure that a party has, for example, a computer and an Internet connection. In order for a party to actually pursue their case and not be prejudiced in a remote proceeding, they might need additional hardware, software, Internet bandwidth, training, technology support, and a physical space conducive to conducting trial remotely. For those parties (e.g., unrepresented persons) who lack those important resources to conduct trial remotely, they will not be able to avail themselves of the advantages of remote trial, which parties with resources can access. This raises a concern that remote jury selection and remote trials could exacerbate the existing divide between resourced and under-resourced individuals when accessing our courts. It follows that proposed amended CR 39 and new GR 41 may need to be revised to provide for a more

detailed inquiry concerning technology access, and that legal aid providers may need additional resources to equip communities with the ability to access proceedings remotely. At a minimum, access under proposed amended CR 39 and new GR 41 should be assessed against the Access to Justice Principles adopted by the Court. *In the Matter of the Adoption of Access to Justice Technology Principles*, No. 25700-B-627 (Wash. June 5, 2020); Alliance for Equal Justice, *Access to Justice Technology Principles*, (July 2, 2020), available at <http://allianceforequaljustice.org/resources/access-justice-technology-principles/>.

The Board also hopes that any rules concerning remote jury selection and trial protect the rights of members of the community living with disabilities. The Board appreciates that remote jury selection and trial could potentially increase access to justice for individuals living with disabilities, to the extent coming to a physical courthouse is in itself a significant barrier. The Board does suggest consideration concerning the implications of language in the proposed rules. Proposed amended CR 39 and new GR 41 each include requirements that remote participants being able to “see,” “hear,” and “speak with each other.” CR 39(d)(2)(A); GR 41(d)(1). The proposed rules could be clarified to ensure that they do not disenfranchise prospective jurors and parties with disabilities. For example, the requirement that persons be able to “see” should take into account that individuals with vision impairments must be accommodated when possible, including serving as jurors, even if completely blind. A juror with a vision impairment might need screen-reading software, for example, to navigate a remote platform like Zoom. As another example, a prospective juror with a hearing impairment might require captioning and a sign language interpreter on a remote software platform. Additionally, a person with a speech-related disability or physical disability might need an augmentive alternative communication device, eye gaze technology, or switching devices to control the software necessary to access a remote trial.

The Board also suggests that courts ensure that parties to trials involving interpreters not be treated differently than parties to trials without interpreters. Among the considerations a court shall consider when ordering a remote trial under the proposed changes to CR 39 is “whether the use of remote interpreting services will detract from the presentation of evidence.” CR 39(d)(2)(A)(i); CR 39(d)(2)(B)(ii)(a). Remote software such as Zoom have interpreter functionality, and the presence of an interpreter should not have any bearing on the receipt of evidence by the court. Courts should work to ensure that parties to cases requiring interpreters are not denied the ability to participate in a remote trial on account of the need for the language access they are entitled to.

In addition, the Board suggests that courts take measures to be sure that parties be able to communicate with their attorneys during remote jury selection. As a recent case decided by Division 3 of the Court of Appeals demonstrates, remote proceedings present issues when parties and their advocates are not in the same physical location. *State v. Anderson*, No. 37590-1-III, 2021 WL 4998543, at *3-4 (Wn. Ct. App. Oct. 28, 2021) (“Given Mr. Anderson participated by video from the jail and his attorney was appearing by telephone from a separate location, it is not apparent how private attorney-client communication could have taken place during the remote hearing.”).

The Board is also concerned that courts not inadvertently humiliate individuals who prefer to use a virtual background when appearing remotely for jury selection. Proposed GR 41(d)(5) would provide that jurors are prohibited “from using filters or virtual backgrounds or other programs or applications to alter their appearance in any way or the appearance of the space in which they are physically located while participating in jury selection,” and that a “juror may use a virtual background with prior approval of the court.” The Board appreciates that

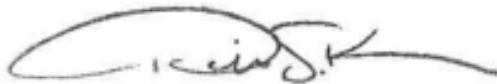
these types of measures are important to ensure the integrity of the jury selection process, particularly where the presence of other individuals in a prospective juror's space or certain virtual backgrounds could detract from the proceeding. However, given the level of discretion the proposed rule provides to judges concerning virtual backgrounds, the Board suggests that, if the rule is adopted, there be training and monitoring to ensure that prospective jurors who may lack access to a completely private space or who may, for privacy reasons or out of embarrassment, wish to obscure their space, not be singled out and scrutinized if they wish to use a virtual background.

Finally, the Board suggests that, if the Court adopts or at least wishes to further consider proposed amended CR 39 and new GR 41, the Court assemble a working group to consider further developing the rules, provide training recommendations for their implementation, and monitor their use. The Board is aware of a study proposed to begin in spring 2022, involving Indiana University Maurer School of Law Professor Victor D. Quintanilla, funded by Pew Charitable Trusts, with the Indiana Supreme Court, the Indiana Office of Court Services, the Coalition for Court Access, and Indiana University's Center for Law, Society, and Culture, to study how remote proceedings help or hinder access to justice for unrepresented litigants from vulnerable, low-income communities. Marilyn Odendahl, *Through Pro Se Eyes: IU Maurer-Led Study Looks at Impact of Virtual Hearings on Self-Represented Litigants*, *The Indiana Lawyer* (Sept. 29, 2021), available at <https://www.theindianalawyer.com/articles/through-pro-se-eyes-iu-maurer-led-study-looks-at-impact-of-virtual-hearings-on-self-represented-litigants>. If the Court convenes a working group concerning rule changes allowing for remote jury selection and remote trials, the Board suggests that the Court consider a similar study.

The Board would be happy to be represented in any working group or other effort concerning remote jury selection and remote trials, and is available to answer questions or assist the Court in any way.



Francis Adewale, Chair
Access to Justice Board



David Keenan, Co-Chair
Access to Justice Rules Committee

Cc: Terra Nevitt, Executive Director, Washington State Bar Association

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: ATJ Board Comments Regarding Proposed Changes to CR 39 and Proposed New GR 41
Date: Monday, December 13, 2021 12:21:26 PM
Attachments: [Outlook-omfjh3m3.png](#)
[2021.12.13.CR 39 - GR 41.ATJ Board Comment.Final.pdf](#)

-----Original Message-----

From: Bonnie Sterken [<mailto:bonnies@wsba.org>]
Sent: Monday, December 13, 2021 12:09 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Good afternoon

Attached, please find comments from the Access to Justice Board regarding proposed changes to CR 39 and proposed new GR 41.

Take care,

[cid:d178e9b7-bbe0-481d-a783-c79639f9ceb5]

Bonnie Middleton Sterken | Equity and Justice Specialist

Washington State Bar Association | bonnies@wsba.org <<mailto:bonnies@wsba.org>>

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | <https://smex-ctp.trendmicro.com:443/wis/clicktime/v1/query?url=www.wsba.org&umid=3899cd93-7f73-473b-a4a0-f499af8eff3a&auth=307af4a8b3e2584c3e2a57c41227f86cfbf88d45-c253c1d9865bdf4dd6579dd5fce2dbd20d0d65f> <<https://smex-ctp.trendmicro.com:443/wis/clicktime/v1/query?url=http%3a%2f%2fwww.wsba.org&umid=3899cd93-7f73-473b-a4a0-f499af8eff3a&auth=307af4a8b3e2584c3e2a57c41227f86cfbf88d45-95e0f9ed0b777a7f8ee8944cc2f40ae5cf1a9174>>

Pronouns: She/Her

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