Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Administration Division
PO Box 40100 ● Olympia, WA 98504-0100 ● (360) 753-6200

December 29, 2021

Sent via email to supreme@courts.wa.gov

Honorable Charles W. Johnson, Co-Chair
Honorable Mary I. Yu, Co-Chair
Washington State Supreme Court Rules Committee
P.O. Box 40929
Olympia, WA 98504-0929

RE: June 2021 Request for Comment on Proposed Changes to CR 39

Dear Justices Johnson and Yu:

On behalf of the Attorney General's Office, thank you for the opportunity to comment on the proposed amendments to Civil Rule (CR) 39, which address trial by videoconference.

During the last nearly two years, our office has represented clients in numerous trials by videoconference in courts across the state. Our attorneys have participated in such trials before both juries and judges. While videoconference trials present their fair share of challenges, it is difficult to imagine how courts would have been effectively able to function during the pandemic without an option for videoconference appearances. While this option has been necessary during the pandemic, we also have experienced firsthand the significant limitations in some areas in which we practice, including the difficulty of fully assessing the credibility of witnesses appearing by video, the limitations in connecting and rapport-building with jurors, as well as the difficulty of holding the attention of participants (particularly jurors) when the proceeding is entirely by video. We all have learned much about the advantages and limitations of the technology and support the proposal to make trials by videoconference a permanent option when it is clear that the trial can proceed by video effectively and without prejudice to the parties. We also support consistent statewide rules governing how judges should decide when a videoconference trial is appropriate.

We would like to offer several suggestions for the draft currently being considered. First, we submit that whether a trial by videoconference would promote or hinder access to justice should be the predominant factor in determining whether this format should be used. Access to justice should be the guiding principle behind the factors currently listed in subsections (d)(2)(A)(i) and (d)(2)(B)(ii). Furthermore, we believe that judges should be asked to consider and memorialize

on the record whether appearance in person or by video allows the greatest access to justice for all the parties. For some, limited access to technology may mean that an in-person trial is the most effective way to participate, so an in-person appearance should not be foreclosed even when most or all of the other participants are appearing by video. For others, particularly those with health issues, appearance by video allows effective participation while avoiding the health risks of travel to the courthouse and an in-person appearance.

Second, the draft amendments to CR 39 do not explicitly offer the option of a "hybrid" videoconference model where some parties or participants appear in person and some appear by videoconference or where portions of the trial are held by videoconference. CR 43 offers the option of taking the testimony of witnesses by telephone or video, but it would be helpful for CR 39 to address video appearances by other participants. We believe the rules should address this situation and indeed make this option available. As with the options of holding a trial fully in person or fully by videoconference, we believe that with regard to a "hybrid" model, the rules should address considerations of access to justice for the parties as described above. Sections (d)(2)(A) and (d)(2)(B) could each be amended to specify that a trial, portions of a trial, or appearance by some or all participants may occur by videoconference. Explicitly addressing whether or not such a model is allowed also decreases the possibility that different courts or judges will interpret the rule inconsistently.

Third, we believe the process outlined in (d)(3) of the draft could be clarified to ensure that parties are given adequate notice and sufficient time to brief the court (should that be desired) on the merits of an in-person or videoconference trial and the position they are taking prior to the hearing envisioned in the rule. The current draft states that "[w]hether on its own initiative or by motion of the parties or their attorneys of record, no videoconference trial shall be heard unless the court holds a hearing no fewer than 30 days before the trial date." We expect that the drafters anticipated that parties or courts would provide notice of the purpose of the hearing and provide sufficient time for briefing, but the rule may benefit from clarification on that point as well. This ensures that an informed decision is made at least 30 days before trial, allowing the parties time to address any technological and logistical issues as they prepare for trial.

Thank you again for the opportunity to provide our comments.

Sincerely,

Kristen Kg Mitchell

KRISTEN K. MITCHELL
Deputy Attorney General

KKM/eg

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Subject:	FW: Attorney General"s Office Comments Re: Proposed Changes to CR 39
Date:	Wednesday, December 29, 2021 2:13:41 PM
Attachments:	WSSC Letter Re Proposed CR 39 122921.pdf

From: Poulin, Raelynn G (ATG) [mailto:raelynn.poulin@atg.wa.gov]
Sent: Wednesday, December 29, 2021 2:12 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Mitchell, Kristen (ATG) <kristen.mitchell@atg.wa.gov>
Subject: Attorney General's Office Comments Re: Proposed Changes to CR 39

Dear Ms. Lennon,

On behalf of the Attorney General's Office, attached are comments regarding the proposed changes to CR 39.

Thank you,

Raelynn Poulin

Executive Assistant

Washington State

Office of the Attorney General

(206) 389-2773

raelynn.poulin@atg.wa.gov