BULLIVANT
HOUSER

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Via Email and US Mail

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Proposed Amendments to CR 39

Dear Chief Justice and Associate Justices:

I write behalf of the law firm of Bullivant Houser Bailey to express our opposition to the proposed changes to Washington State Superior Court Civil Rule 39. The proposed change would require civil litigants to submit to virtual trials, with jurors appearing remotely via videoconferencing platform, even over a party's objections. Lawyers in our firm have tried several cases using this technology during the exigencies created by the COVID-19 pandemic. While we understand the desire to adopt a procedure to conduct proceedings safely during the unique circumstances caused by the pandemic, the obvious shortcomings of that procedure lead us to question the wisdom of continuing it after those circumstances have ended. A virtual trial is no substitute for an in-person trial. And requiring parties to accept virtual juries is inconsistent with the spirit, if not the letter, of our state's constitutional guarantee that the right to trial by jury remain inviolate. For these reasons, we oppose the proposed change and recommend against its adoption.

In our experience, a jury viewing the evidence remotely and through the lens of a videoconferencing platform falls short of what the Constitution requires. Article I, Section 21 of the Washington Constitution demands that:

> The right of trial by jury shall remain inviolate, but the legislature may provide … for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Washington Const., Art I, § 21. The protection afforded by this provision is broader than that afforded by the Seventh Amendment to the United States Constitution. *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008). By using the word "inviolate," the Washington Constitution dictates that courts and legislatures must afford the right to trial by jury "the highest protection" as it represents "the essential component of our legal system…." *Davis v. Cox*, 183 Wn.2d 269, 288–89, 351 P.3d 862 (2015). Consistent with this textual command, this Court has long held that actions triable by jury must "continue to be so triable without *any* restrictions or conditions which materially hamper or burden the right." *State Bd. of Med. Examiners v. Macy*, 92 Wn. 614, 159 P. 801 (1916) (emphasis added); *see also Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 ("The right to a jury *may not be impaired* by either legislative or judicial action.") (emphasis added); *Furnstahl v. Barr*, 197 Wash.App. 168, 175, 389 P.3d 635 (2016) ("Where the question is doubtful, the right to a jury trial is always preserved.").

We fail to understand how adopting a type of jury trial so obviously inferior to the one envisioned at the time of the Constitution's ratification can plausibly be said to ensure that the right "remain inviolate." The question whether legislation impairs or burdens the right is a "purely historical inquiry." *In re Detention of S.E.*, 199 Wash.App. 609, 615, 400 P.3d 1271 (2017). By requiring the right to *remain* inviolate, this provision explicitly guarantees what Washington courts have described as a "historical right." *S.E.*, 199 Wash.App. at 615. "It is the old right," in other words, that "must remain inviolable." *State ex rel. Goodner v. Speed*, 96 Wn.2d 838, 841, 640 P.2d 13 (1982) (quoting *Byers v. Commonwealth*, 42 Pa. 89, 94 (1862)). And this is as true of its extent—that is, the types of actions to which the right applies—as it is of its "scope" or "mode of enjoyment." *Goodner*, 96 Wn.2d at 841; *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989). Thus, as this Court instructed long ago, the right to a trial by jury "remains inviolate," within the meaning of Article 1, Section 21, "so long as the jury continues to be constituted substantially as the jury was constituted when the Constitution was adopted." *State Bd. of Med. Examiners v. Macy*, 92 Wn. 614, 159 P. 801 (1916).

In our view, the proposed amendment falls short of that requirement, not because videoconferencing platforms did not exist in 1889, but because videoconferencing platforms do not guarantee civil litigants a jury equally capable of performing its core constitutional function. The "primary role" of a jury is, and has always been, to decide disputed factual questions by weighing the evidence and, in particular, assessing the credibility of witnesses. *Blackmon v. Blackmon*, 155 Wash.App. 715, 722, 230 P.3d 233 (2010); *Calhoun, Denny &*

Ewing v. Whitcomb, 90 Wn. 128, 136, 155 P. 759 (1916). If the case is one of the few that make it to trial, it will necessarily involve conflicting testimony from witnesses who disagree about the relevant facts. Fulfilling its unique role of distinguishing the truthful and accurate from the misremembered or fraudulent requires the jury to consider more than just *what* those witnesses said, but *how* they said it.

Courts have adopted various formulations in their attempts to articulate the full "human experience" that goes into this assessment. A jury instruction approved by this Court in 1916 instructed them to consider witnesses "bearing and demeanor on the witness stand" as "indicating fairness and frankness on their part." *Calhoun*, 90 Wn. At 137. The current pattern jury instructions instruct the jury to consider the "manner of the witness while testifying," among several other factors. WPI 1.02. A recent decision described those factors as including "cadence, tone, inflection, delivery, and facial expression," all of which are "as vital to due process as is the applicable statute or case law." *Infernal Tech, LLC v. Sony Interactive Entertainment, LLC*, 2:19-CV-00248, Dkt. 261, n.4 (E.D. Tex. Nov. 23, 2020). In a recent opinion-editorial, United States District Judge John C. Coughenour echoed these sentiments, describing the jury's ability to consider "physical cues and a rapport between parties" as a "necessity" to fulfilling its role as "finder of fact and seeker of truth."[1]

Our experience with remote juries over the last two years leaves no doubt that a jury appearing over video conference is drastically inferior to the type envisioned by Article I Section 21 due, in large part, to the absence of this "human experience." In-person testimony allows jurors to consider witnesses' body language, such as whether they are fidgeting, sweating, blushing, tapping their feet nervously, or any number of the "physical cues" which provide indicia of "frankness and fairness." A remote trial, by contrast, restricts jurors to that which happens to be captured on video and filtered through a two-dimensional screen, leaving out much of what our legal system deems crucial to determining the believability of competing testimony. By failing to adequately capture this "human experience," even the highest quality virtual trial will be sadly inferior to its in-person counterpart.

But of course it is impossible to guarantee litigants the highest quality virtual trial. Each individual juror will determine the particular device through which he or she will view the trial. This could be anything from a laptop computer to a tablet, or even a smart phone.[2]

[1] John C. Coughenour, *What gets lost when Zoom takes over the courtroom*, SEATTLE TIMES (June 1, 2021), https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/

[2] *See* Remote Jury Trials Work Group, *Best Practices in Response to Frequently Asked Questions (FAQ)*, available at:

Moreover, jurors must rely on their own internet connection, as to which there is no guarantee of consistency or reliability. Inevitable connectivity and device issues will therefore degrade an already inferior mode of perception further below the sharpness and precision of in-person testimony.

Then there are the inevitable distractions at home or elsewhere—ranging from the presence of other persons and activities, household chores or hobbies, or simply browsing the internet—that simply do not exist within the walls of the courthouse. In a widely-published California case, jurors were observed participating in a number of extra-curricular activities, including cooking, exercising, lying in bed, interacting with others, and, using mobile devices—all while ostensibly participating in *voir dire*.[3] In another publicized example, the defendant filed a notice of "irregularities" with respect to jurors who were "very clearly working" or attending to personal matters during the trial.[4] These concerns are not speculative or hypothetical, but have been observed, in varying degrees, by members of this firm. The existence of these distractions is clearly inconsistent with the captive audience that has always been the norm of a jury trial.

Finally, there are intangible disadvantages to dispensing with the solemnity and formality of a courtroom. To adopt Judge Coughenour's analogy, "[h]olding court on Zoom is like church in a supermarket parking lot"—it "cheapens and trivializes" the process.[5] In much the same way social media has widened and exacerbated society's differences by attenuating our words and actions from those to whom they are directed, we can expect that remote juries will naturally have less empathy for the real-life people on the other end of their verdicts.[6] While it is difficult to measure these intangibles, we believe that difficulty only counsels in favor of preserving the system of jury trials as it has existed and served our state well for hundreds of years.

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https://www.courts.wa.gov/newsinfo/content/Best%20Practices%20in%20Response%20to%20FAQ.PDF

[3] *See Wilgenbusch v. Amer. Biltrite Inc.*, No. RG19029791, at 4–5 (Cal. Super. Ct. Alameda Cty., July 16, 2020), https://images.law.com/contrib/content/uploads/documents/292/70974/ Asbestos-trial-foloup-mtn-for-mistrial.pdf.

[4] *Ocampo et al. v. Honeywell International Inc.*, No. RG19041182 (Cal. Super. Ct. Alameda Cty., Sept. 3, 2020). *See also*, Dorothy Atkins, "Judge to Zoom Trial Asbestos Jury: 'Pay Attention, Please," LAW360, Aug. 24, 2020, https://www.law360.com/articles/1303820 /judge-to-zoom-trial-asbestosjury-pay-attention-please-?copied=1.

[5] *See* Coughenour, *supra*.

[6] *Id*.

The fact that the proposed amendment applies only to the *Civil* Rules, and the absence of any analogous proposal for criminal trials, we think, operates as a tacit recognition of the legitimacy of these concerns. Yet the Constitution demands that the right to a trial by jury "remain inviolate" in both civil and criminal cases. Whatever the benefits of virtual trials during the height of the COVID-19 pandemic, we see little reason to permanently hamstring civil litigants with an inferior jury system long after the pandemic has ended. Nor do we see how degrading the system in this way can possibly be regarded as consistent with the constitution's command that future generations preserve the right to a jury trial "inviolate."

For all of these reasons, we urge against the adoption of the proposed amendments to CR 39.

Sincerely,

Jared F. Kiess

JFK

4855-2878-3880.1

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
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From: Anderson, Kristin [mailto:kristin.anderson@bullivant.com]
Sent: Wednesday, December 29, 2021 3:14 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Kiess, Jared <jared.kiess@bullivant.com>; Winters, Evelyn <evelyn.winters@bullivant.com>; Guadagno, Michael <Michael.Guadagno@bullivant.com>
Subject: Proposed Amendments to CR 39

Good afternoon,

Please see the attached letter from Jared F. Kiess, on behalf of the law firm of Bullivant Houser Bailey, PC, objecting to the proposed change to CR 39.

Sincerely,

KRISTIN ANDERSON
Legal Assistant

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Please be advised that all offices of Bullivant Houser are working remotely at this time.
