December 15, 2021

By email to supreme@courts.wa.gov

By messenger to
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0920

Re: Public Comment On Suggested Amendments to CR 39 and GR 9

Dear Chief Justice and Associate Justices:

I write in opposition to the proposed changes to CR 39 and GR 9 to allow permanent Internet Trials in lieu of Jury Trials and Jury selection over the Internet.

The proposed amendments will directly disenfranchise historically marginalized and diverse people and is a fundamental violation of the right to a Trial by Jury.

The amendments are proposed by King County Judges. Yet, King County's own published studies (cited below) show that even in that most technologically advanced county in the state *25 percent of the population lacks sufficient technology to meaningfully participate in Internet trials*. And of that 25 percent, the burden falls disproportionately falls on disadvantaged and diverse households.

When the entirety of the state is considered, the numbers are worse. In short, *these proposals do the most harm to the very people they purport to help.*

Further, an Internet trial is not a Jury Trial. The proponents conflate having 12 people decide something as being a Jury Trial. A Jury Trial as protected by our Constitution contemplates the direct human interaction of jurors to the witnesses, exhibits, evidence, and the critical ability to have the dynamic of face to face interaction in the jury room by jurors to reach just results. Our office tried an Internet trial during my process of preparing this. We had at least one juror "participate" in bed in her pajamas. Yet another while on their cell phone in their car. Another was caught watching You-Tube (for how long, none really knows). Most of the others are quite obviously "multi-tasking," stealthily typing and eyes darting back and forth on their screen, etc. Yet another asked for a break, mid testimony, to tend to her dog. This is not a Jury Trial.

Even the proponents of the amendments concede an Internet trial is not a proper Jury Trial as they have not proposed Internet trials for criminal matters. That cannot be ignored. If an Internet trial was a true replacement for a jury trial, why not propose them for criminal trials as well? The answer is obvious and reveals the impropriety of the proposal: Internet trials are not a substitute for actual Jury Trials. The Constitution protects the right to a jury trial for both civil and criminal matters. It may be that they are protected by the Constitution in different ways. However, unless we are to say we have lesser as opposed to greater constitutional rights, we cannot say the right to a civil jury trial is less.

The proponents cannot have it both ways. *If we would not tolerate an Internet trial to resolve even a Class C misdemeanor of stealing a shopping cart, we cannot tolerate one for the resolution of no less (and often more) meaningful civil disputes.*

Some courts have taken to Internet trials because of Covid restrictions. That is well and good. Internet trials now are a lesser of evils: it is perhaps better to have an Internet trial than none at all. However, what a person does or tolerates in a time of emergency should not dictate what we do once the emergency has passed.

Consideration of the origin of the proposed amendment cannot be ignored: King County Superior Court. That court is already the State's most restrictive in terms of personal appearances at all levels of its court. It requires no speculation to foresee King County will use such a rule to deny a Jury Trial in all but complex civil matters. De novo MAR cases will never have a Jury Trial. Indeed it is not hard to see how a Civil Rule making internet trials discretionary will *increase* the Courts' case load as parties will be deterred from filing for Mandatory Arbitration lest they be branded a low value case in the event of a de novo. Passage of this will likely *increase* the burden on the trial courts.

Where a person lives or what Judge they are assigned to should not dictate whether they are giving a Jury Trial. Passage of these rules will do that.

Also, there will be no time savings. Internet trials will not allow more cases to be tried: Trials are trials, testimony is testimony, and deliberations are deliberations. They will still take as long as they take.[1] If anything, from our office's experience we have seen that they take longer due to technology and the simple fact the parties are not all in the same room with the judge to deal with things as they arise.

If parties want to waive a Jury Trial in favor of an Internet trial, that is arguably no different than parties waiving the right to any Jury Trial as we have long recognized. However, compelling that is not appropriate.

Finally, the rule is not workable are written. It will lead to a patch work of procedures, result in less community/juror participation, and will further institutionalize economic disparities and access already present in the system.

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[1] And if Internet trials are shorter, one should give close consideration why. Are juries taking less time to deliberate – and is that a good thing. Are attorneys rushing examinations – and is that a good thing. Are parties forgoing using a needed exhibit or not referring to an issue because of a lack quick accessibility due to technological limitations – and is that a good thing.

I suggest the proponents of the rule confabulate fast with good. In their cover letter, the proponents fairly reveal their motivation and perspective by belittling attorneys in voir dire who are simply trying to rush the questioning of 60 people to determine bias in the little time allowed as "speechifying." If more time was allowed for voir dire, attorneys could *meaningfully* question jurors and not be put to resort to "speeches" to reach the greatest number possible all at once. Having tried over 50 Jury Trials I agree there is room for efficiency and improvement but throwing out Jury Trials for that goal is the very definition of throwing out the baby with the proverbial bath water. Justice cannot be served up fast, like fast food.

We should look to leverage technology for efficiency at all levels but that cannot be done at the expense of the very core of what we protect: the Jury Trial itself.

1. Internet Proceedings Will Further Disenfranchise Diverse and Disadvantaged Populations And Will Erect A Barrier To Access To Justice

The lack of technology and connectivity is endemic. A study *by* King County *of* King County, undisputedly the most technological accessible county in the State, found *only half* of families with incomes of $25,000 a year or less have "adequate" Internet access. Broadband Study, p. 9.[2] (only fifty-five percent reported having a sufficient high-speed connection, i.e., forty-five percent do not). Of those, they are "significantly more likely to rely on cellular data" for their streaming access. Id. at p. 59-60. In other words, their only access is their little cell phone. Also, they are "significantly less likely to have" a highspeed connection necessary for streaming. Id. Not surprisingly, this is both a lack of technology and an "affordability" issue. Id.

A different King County study found lack of access extends to "households making less than $75,000 a year."[3] According to King County's own statistics, *that is nearly a 70 percent*[4] *of King County* that does not have a reliable high-speed connection.[5]

In that regard, it is important to bear in mind those numbers are not where a provider (typically Comcast) *offers* the service. No doubt, high speed internet is 'available' to more than 70 percent of the King County population. *These numbers are specific to who can afford, and actually do, purchase those high-speed services.* That is the real means test to the question presented: we cannot conflate availability (where the services are available for purchase) with actual "access" – who can afford it.

When consideration of other counties is considered, (the proposed rule change is state wide), the problem is much worse. *Close to one-million Washington residents have no Internet access at all at*

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[2] https://kingcounty.gov/~/media/depts/it/services/cable/202002-Broadband-Access-Study.ashx?la=en, 01/04/2020.

[3] https://kingcounty.gov/depts/health/covid-19/data/~/media/depts/health/communicable-diseases/documents/C19/impacts-web-access.ashx, 10/04/2021.

[4] https://statisticalatlas.com/county/Washington/King-County/Household-Income, 10/06/2021, Chart #2, identifying "relative household income percentiles," 68.9 percent of King County makes less than $78,800 a year (the data is not broken down to $75,000).

[5] In candor to the Court, the US Census web site pegs that number much higher. However, if time is taken to drill down on the actual questions the Census asked it is clear that number is at best wildly imprecise if not wholly meaningless in this context. To obtain its number, the US Census only asked if "any member of the household accesses the internet... whether or not they pay for the service." In other words, question did *not* ask about access at home, it was as broad to include access at work, school, etc., and most notably the census did not ask whether it was broadband. It simply assumed all access now is broadband. Why the Census would be so imprecise is perhaps best understood by the scope of its task. It is suggested King County's more specific surveys have more weight and the proponents should not be heard to distance themselves from data by their own governmental entity. For evidence of the Census questions asked, see https://www.census.gov/quickfacts/fact/table/kingcountywashington/INT100219#INT100219, 10/06/2021. To get at those precise questions a person must click on the "*i*" next to that demographic on broadband internet and the actual questions asked are shown.

home.[6] An additional half a million "rely solely on limited cellphone data plans." Id. Many still rely on old-style, "dial-up" connections Id. In Mason County, fifteen percent of families have no Internet access at home at all.[7]

In terms of even bare *availability* of broadband service (e.g., streaming sufficient) across the state: Adams County has only 74-percent, Garfield 75-percent, Klickitat 52-percent, Okanogan 46-percent, Skamania 62-percent, and Whitman 73-percent.[8] In those counties, the 'other half' of those percentage cannot buy broadband service for any price; it simply does not exist. And again, that is only basic *availability*, it is not those who can actually *afford* it due to economic pressures which as the studies above show pushes the numbers of those without it even higher.

However, to bring this focus back to King County as it is the proponent of the rule, even it has problems. A report by the King County Public Health Office assessing on-line learning during Covid found "almost 500,000 people" (or 25 percent of King County)[9] have challenges accessing the Internet and the technology necessary to access on-line meetings, i.e, remote trials. Public Health Report, p. 2.[10] Even for those with access and the money to pay for it, a large proportion of people (often older or of different cultures) simply lack the ability to navigate the technology required. Id.

Those technology and Internet barriers disproportionately impact individuals at risk, marginalized, and the diverse. Id. at. p. 7.

> Relative to their size in the population, a high number of Access Limited and Device Limited are Black and Hispanic, Asians are over-represented among the Digital Skills Limited segment.

Id. at. p. 8. (Digital Skills Limited is the 25 percent referenced above).

Anecdotally, (particularly relevant as the rule proponents rely heavily on anecdotal impression) this court may take judicial notice of the fact it was widely reported by media that over the last year many people reported having to park in their cars outside of fast food restaurants, Starbucks, etc., to access online learning or meetings. Yet, the proposed rule amendment assumes every person over 18 can easily simply dial into a Zoom meeting to participate. Not only does that stand on the shoulders of an unreasonably King County biased perspective, *it founders on the simple fact that it is incorrect.*

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[6] https://crosscut.com/2020/05/pandemic-shows-why-washington-needs-universal-Internet-access, 10/04/2021.

[7] https://www.king5.com/article/news/education/rural-washington-school-districts-struggle-with-moving-classes-online-due-to-lack-of-Internet-access/281-a89524d1-75f8-4662-9e3d-e2669ba1b1ed, 10/04/2021.

[8] https://broadbandnow.com/Washington, 10/07/2021.

[9] The most recent U.S. census pegs King County's population at 2,252,782. The precise percentage based on 500,000 is 22 percent. https://www.census.gov/quickfacts/kingcountywashington, 10/06/2021

[10] https://kingcounty.gov/depts/health/covid-19/data/~/media/depts/health/communicable-diseases/documents/C19/impacts-web-access.ashx, 10/04/2021.

Despite challenges of some accessing technology, history has shown that for the most part people from all walks of life *are able to drive or get to the court* in some manner and participate. Logically, more people opt to have some type of vehicle or take the bus versus paying $100 a month[11] for high-speed Internet and a $1,500 laptop computer.

When a person called to jury duty has a challenge such as childcare or a job, those often have human solutions and despite those challenges we see they are more often than not met. But, no amount of asking a family member to babysit, or a manager for the week off, is going to enable somebody who is marginalized to get high-speed Internet at their home and pay for it when they cannot or a computer and other technology to use it.

The rule proponent suggests that doing virtual voir dire has led to more diverse jury pools. *The rule Proponent says that "anecdotally" it has seen more participation.*

The rule's proponent should not need to rely on anecdotes when we have – when they have – actual statistics and studies.

It would have been a very simple task for the rule's proponent to track the demographics of those who appeared for video voir dire. The proponents' failure to track those demographics even during that time should not be ignored when asking for this great of a change.

In fairness to the rule's proponent, it was not given advance notice of the court shut down and might not have comparison and contrast numbers for diverse populations pre Covid. Assuming it does not. Perhaps it does. That is not known.

However, the rule proponent *does* have records of how many jury notices it sent out before and during Covid. It would have been a very simple thing to compare those numbers to demonstrate whether a *meaningfully* greater number of people are now appearing for their jury summonses. Even if it lacked demographic information for those numbers that would have been something. That it did not do so should not be ignored particularly as King County's own numbers on internet access demonstrate the proponent's justification appears to be without objective basis: imposing a high-speed connection as a barrier to entry is a direct barrier to access to participation that falls even more harshly on disenfranchised communities.

5. <u>The Rule Offered Is Inadequate For Achieving Its Stated Purpose</u>

The rule as drafted is insufficient to achieve its stated goal. Which is not to say that any rule could ever be sufficient as the Internet can *never* be a forced substitute for a Jury Trial. However, even if we were to accept the fiction it is, this rule fails.

[11] It is not just the internet charge that is at issue. Comcast, for example, in addition to the internet service price it advertises, also charges a per month fee for *both* the cable modem and the cable box the modem must be plugged into to access its service. Nor does its advertised price include sales tax and other governmental fees tacked on that use internet and cable access as a means to tax for other infrastructure.

The rule purports to require "good cause" to impose an Internet trial but does not define what good cause is. Under current case law, "good cause" is somewhat of a moving target and is dependent on the specific subject matter.

Good cause under the proposed rule refers to witnesses and exhibits as considerations. That is no guidance. All cases have witnesses and exhibits. Ostensibly, the proposed rule views cases with fewer exhibits and witnesses as being less worthy of a Jury Trial and under the proposal that would be good cause to deny a Jury Trial in those cases. *Reducing the issue of whether a case is worthy of a Jury Trial based on how many exhibits are used or witnesses called is like evaluating the merit of a brief based on how many pages it has.* And as illustrated below, the issue is not so much the number of witnesses and exhibits, it is how they interact and are used in front of a jury.

Further, what is complicated in terms of anything including a trial is always in the eye of the beholder. While our judges are impartial, it cannot be disputed they are influenced by the experience they take with them to the bench.[12] An attorney taking the bench after a long career of complex litigation might view any case worth less than $300,000 to be simple regardless of the number of witnesses or exhibits. Indeed, their threshold could be even higher. This is yet another illustration of how the rule can never be consistently applied and thus would land disproportionately on litigants given their circumstance and what judge they draw.

I am not advocating the following, but if we are to deprive litigants of a Jury Trial there ought to be an objective standard: (1) Cases with a value less than $100,000; (2) where the parties only identify six witnesses between them; (3) where the parties only identify 10 exhibits, etc.. Or, and I loathe saying this, (4) all arbitration de novo cases – at least those the plaintiffs have already stated they are willing to accept less than $100,000.

If this is a true attempt to ferret out cases the judiciary no longer deems worthy of seeing the inside of a courtroom, *we ought to define precisely what those are and not leave it to the digestion of any one judge.*[13] Otherwise, despite the proposed amendment requiring the trial court to issue an order showing good cause, with an abuse of discretion standard (which is the effect of a "good cause" standard) whether a person actually gets a Jury Trial will be based more on who they are assigned to and what County they are injured in; that is the very definition of an arbitrary standard.

Further, as discussed above, the rule takes no account of the lack of universal and reliable technological access even assuming any amount of technological access would substitute for an in person Jury Trial. Although the rule requires the judge enter an order to ensure a fair presentation, the rule does not say what that is. As my firm has already experienced, that was a juror taking testimony and considering exhibits on a little cell phone while in bed while another was watching You-Tube.

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[12] Indeed, this Court's own Commission *rightly* observes diversity and minority perspectives of potential judicial officers is an important factor precisely because Judges are influenced by their experience. http://www.courts.wa.gov/committee/pdf/Diversifying%20the%20Bench%20Guidebook.pdf, 10/06/2021.

[13] Edington v. Fitzmaurice, 29 Ch. D. 459, 483 (CA 1885) ("The state of a man's mind is as much a fact of the state of his digestion.")

Putting that aside, must judges dictate the download speed of jurors' internet connection, how big their computer screen is, where they are viewing the trial, distractions, etc. The rule provides no guidance. What are fair presentation procedures?

How a trial is presented should be reasonably consistent and not contingent on what specific judge a litigant finds themselves in front of. That cannot be minimized or dismissed under the rationalization that every judge has the inherent discretion to determine what constitutes orderly proceedings for their specific court. In a Jury Trial – a real one in a real courtroom – while some minor things vary, for the most part procedure is standardized. Everyone, in every court, in every county, more or less has the same experience. However, under this rule, the procedures and requirements dictated by any one judge under this proposed rule will be determined by that judge's experience. Are they a newer and dare I say younger judge more conversant with technology or are they a more tenured judge who needs help opening their email. I say that not to be derisive but for us to ignore the technology gap is no service.

Related to that, the rule as drafted enforces economic inequities. As to jurors and their participation, those inequities land most harshly on marginalized and diverse communities. As to parties, they land more harshly on injured plaintiffs.

If a judge requires jurors have a sufficient internet speed and sized monitor in order to meaningfully participate, they immediately disqualify vast swaths of the population. And if they do not, they immediately render those litigants' experience insufficient as a juror watching on their cell phone while streaming with a phone carrier is not fully taking in the evidence.

Although economic inequities already exist to some extent in regard to insurance companies and large corporations being more capable of discovery and simply litigating a case, historically once the parties end up before a jury those inequities are more often than not equalized. *In the courtroom, all are equal. Everyone must present the same exhibits and take the stand equally.*

That is untrue under this rule. As illustrated below, large companies are able to put on a Hollywood production. Injured parties, admittedly often in smaller cases and more likely than not finding themselves with solo practitioners, are not going to have the same access and their presentation to the jury may likely suffer. The rule as written codifies and reinforces those as systemic inequities. While this is offered to identify a failing in the rule it also illustrates how no rule denying Jury Trials is proper because no rule can address this.[14]

3. A Jury Trial Is Not An Internet Zoom Conference – Internet Trials Favor The Wealthy Over The Less Privileged

> The right of trial by jury shall remain inviolate...

Washington Constitution, Art. 1, Sec. 21.

[14] Personally, I know of at least one firm that has created what is only a little short of a TV studio for Internet trials. Likely that firm sees that simply a cost of doing business. But, that illustrates the point: that firm is an insurance defense firm and has a steady stream of insurance carrier clients and is able to build that overhead into the defense of those cases.

It does not require strict construction or a so-called "originalist" perspective to appreciate we cannot divorce what was *intended* by the Constitution protecting a "Jury Trial" when considering what an Internet trial is.

A "Jury Trial" is not defined simply as 12 people deciding a dispute.

A Jury Trial has always been understood to be what we have always understood it to be.

A Jury Trial is 12 people taking a *direct measure* of evidence to reach a just result, focused on nothing else but the trial.

A Jury Trial is the *entire gestalt* of 12 people in the same room as attorneys, the Judge, witness, and exhibits. A Jury Trial is the human interaction of the witness on the stand with an exhibit, subject to cross-examination which at times may be intense; but, as has long been accepted as a truism:

> Cross-examination is the greatest legal engine ever invented for the discovery of the truth.[15]

That "engine" does not run on a distant wi-fi connection, a person participating by a screen of unknown size and exhibits that may be hardly discernable depending on the witnesses' personal piece of technology. Nor does it run on a script. Cross-examination practiced at its highest form is the *immediate* response to the unknown. Being able to quickly pull out and actually use a meaningful exhibit for impeachment or drilling down on one sentence in a 500 page document. All of that is gone by an Internet trial which relies heavily on scripted presentation of exhibits or at the very least their pre-distribution to Judge, Clerk, and opposing counsel: *it effective nullifies impeachment by use of impeachment exhibits*.

Further, in the time of Covid we have focused only on how evidence is presented and have *ignored* how a jury during deliberation reviews exhibits, weighs testimony, and most importantly interacts *together as a jury* when placed into the same room sitting across a jury conference room table. Physically looking at exhibits. Having a human, face to face, give and take. An Internet trial is not that. Attempts to call it that willfully ignore the importance of the direct human interaction with evidence and deliberation. And, that says nothing of the lack of attention during trial as identified above.

More importantly, even if the technology gap is ignored, if an Internet trial was truly a just substitute for a Jury Trial, why limit them to civil matters. Why have the proponents not proposed the same as to criminal trials? The answer is clear: an Internet trial is simply not the same as a Jury Trial and the proponents know suggesting an Internet trial to resolve a criminal matter would not pass even cursory scrutiny.

However, a civil matter is as important to the parties of that trial as a criminal matter is to a criminal defendant. Although a criminal trial may bring Sixth Amendment confrontation right issues to bear, *both* are Constitutionally protected and demand equal consideration. If we would not tolerate Internet trials for

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[15] John Wigmore on Evidence, 5 Evidence sec. 1367, at 29.

criminal matters, we should not tolerate them absent this Covid exigency for civil matters. Plainly, there is no justification for handling civil matters with less regard than criminal matters.

As noted above, our firm tried an Internet trial while this was prepared, for a Snohomish County matter. Below are pictures. Attorney in one room. Client in a different room - required for a variety of technical and rule reasons. Judge, opposing counsel, and jurors all apart. There is no interaction. No ability for a client to assist their attorney. ***This is not a Jury Trial.***

In this case our client's potential liability is insured by its carrier. *We had a blank check from the insurance company to put the defense trial on*. We hired an audiovisual company who, smartly seizing on this Covid moment, specializes in setting these mechanisms up for law firms. We had no less than six different computer monitors, stage lights, very expensive unidirectional microphones, at some point a dedicated person who did nothing but click a mouse to be sure exhibits were at the ready, etc.

Contrast that with an injured plaintiff on the other side. What will their presentation be: a $50 integrated camera/ microphone from Amazon propped up on some books on their attorney's desk? What will be missed in the plaintiff's presentation. How will the jury consider the lack of flow and persuasiveness over that form of presentation and what impact will it have on their award; negatively, obviously. We know for a fact juries consider those issues.

Or, perhaps the plaintiff's attorney does write some checks to have the type of show we put on as shown above. *That money comes from the injured plaintiff as part of the costs to put on the case*. The client is responsible for those costs and it will diminish their recovery. This proposal takes money directly out of the pockets of injured people so they can equally compete.

I respectfully suggest the proponents of this rule failed to account for what is required to put on an Internet trial. Judges have the technology laid out before them and staff already paid by the County to assist. That is not how it works in law firms.

However, even with the best of technology on both sides (which does not exist) Jury Trials are critically and uniquely human experiences. The core of trials is lost over video. There is no ability to immediately react to a response nor appreciate the inherent humanity of those involved.

As an anecdote, I have conducted at least one mandatory arbitration by Zoom. I sat at my conference table with my young client obviously struggling to explain the trauma of their injury. The pain on their face across my desk was moving; it nearly moved me to tears.

Then I turned my head 90 degrees to look at my commuter monitor to see what the arbitrator was seeing. All I saw was a face. There was no emotion. *There was no humanity.* My client was robbed of his ability to provide the evidence of the emotion of his harm.

Internet trials inherently and disproportionately favor defendants and insurance companies. The emotion of pain and anguish is what drives damage awards. When you take that critical factor out as Internet video testimony does, you inherently drive down awards to the benefit of defendants and the greater injury of injured plaintiffs.

In the end, I suggest there is no greater truth determining mechanism than 12 people sitting in a jury box and then going in a conference room to deliberate face-to-face. As an attorney approaching 30 years in practice with in excess of 50 Jury Trials, I have lost count of how many times jurors told me how they thought something I completely missed or I was unaware of was critical to them but that they picked up on watching a witness. Whether that was observing a witness on the stand (either in pain or not), noticing how the witness reacted to a given exhibit, or even how the trial flowed itself are all things jurors in a courtroom see, experience, and consider.

Yet in an Internet trial, all jurors see are faces reducing our jury process to a game of Hollywood Squares. I say that not to diminish the trials that are going on currently. As stated above, we are in an emergency situation and some accommodations must be made. And, going forward if parties agree to waive a true Jury Trial then fine; they are already able to do that. However, the notion we will not merely continue those restrictions absent that emergency but would vest in trial judges the ability to unilaterally impose them when no emergency exists should be rejected out of hand.

4. <u>The proposed rule will lead to unjust results</u>.

Coming to court, walking through those hallowed halls and taking a seat followed by a person raising their right hand to swear under oath and the penalty of perjury means something. We have always accepted that. While voir dire is not testimony in the classic sense, potential jurors are required to take an oath and tell the truth. They are in every sense giving their own testimony. I suggest it is a fiction indeed to expect the same level of truth telling from somebody who is answering questions over their cell phone.

We make proper accommodations in a courtroom because we have control over that. Listening and sight impaired individuals are properly accommodated and can admirably serve as jurors. Of course, they have long navigated those challenges and know how to adjust. However, that we properly make those adjustments for a few jurors provides no support for the type of distractions that take place by jurors participating off-site while the distractions of the world and limitations of technology impede them.

The proponents of the rule may protest distractions are limited and jurors have not missed anything important. I ask: how would they know. If a juror missed something because their Internet connection dropped for a moment, or were distracted by their cell phone in a car or any manner of things, how would we ever know. We will not.

5. <u>This Court Should Consider How The Rule Will Be Used Over Time In The Backdrop Of The Rule Proponent's Already Present Limitations Of In-Person Appearances</u>

The motivation of a rule proponent should be irrelevant. A proposed rule is either a benefit or it is not; the motivation for it being proposed perhaps should not matter. However, it is suggested sometimes considering the motivation behind a proposal is important as it illustrates *how the rule may be used.*

King County Superior Court is not the only county doing Internet trials in this emergency time yet it is the only one suggesting making them permanent.

King County has long prohibited physical appearances on motions other than summary judgment. Even as to that, it is at times almost impossible to get one on a King County calendar. What should be a simple motion to note on 28 days' notice requires asking permission first and hoping a judge will allow you access to their court. Cutting down the number of summary judgment motions may not have been an overt goal of requiring litigants to pre-schedule them but it undoubtably had that direct impact.

It is all but impossible to present a simple order ex parte in King County without first navigating all manner of procedural barriers. In essentially every other court, a litigant could go to a Commissioner docket or even their assigned judge on a motion day with an order. That is another important, even if small, cog in the overall wheel of the court system. That is either completely foreclosed in King County or made so difficult to do as to be impossible.

This lack of personal access is a meaningful aspect of access to justice and has already been considered in great detail by the WSBA.

Several years ago the WSBA engaged in what was itself a several year process geared toward proposing Civil Rule amendments to reduce the cost of civil litigation. One of the proposals was to recommend statewide that *all* motions be heard only on the briefs except summary judgment motions. That was soundly rejected for exactly the reasons described above: *personal appearances matter.* Personal access in the courtroom is critical to justice.

I have had complex trials in King County where I could not begin to cut into bias in the panel on voir dire and my judge, impatient to get their calendar going which is *fully understandable,* did not budge a single minute to allow more time for questioning. In one case, an incredibly complex wrongful death/medical malpractice case, I was given no more time in voir dire than if the case was an admitted, rear end fender bender.

Now, King County wants to dispense with yet another critical aspect of the court system: an in-person, Jury Trial including voir dire. Or said accurately: A Jury Trial. The heart of our system of justice.

Although the term slippery slope is often overused, it is well put here.

And to bring this full circle, while perhaps a proponent's motivation in proposing a rule should not matter, in this case it cannot be ignored.

Here, the proponent's statement supporting the proposal provides insight how such a rule would be used by them: to its highest degree to reduce Jury Trials to the greatest extent possible. One need look no further than how they characterized attorneys conducting voir dire in person. They went as far as belittling attorneys' efforts as simply "speechifying" when done in person, expressing their perception that Internet voir dire has cut down on that.

Attorneys do not speechify in voir dire – not too much. What they are trying to do is somehow have a meaningful discussion with over 60 people in only a little more than an hour to explore and learn personal past experiences that might make them unfair jurors for a particular case.

Perhaps a juror loathes and despises all insurance companies because they feel they were taken advantage of by an insurance company and want to punish all civil defendants knowing it is really the insurance company's money – or so they thing. Perhaps another does not believe in suing others and no one should receive anything. Perhaps another had the exact same injury and could not help but consider themselves in the plaintiff's position.

Anyone who has tried enough cases has heard all of those statements in voir dire. Yet, attorneys are expected to discover and explore all of that, with the full panel, in about an hour. At times that indeed requires moving fast and perhaps exercising more of what we used to call the "Phil Donahue" method than strictly asking questions. Attorneys would like to *not* make speeches in voir dire. What they would like to have is a meaningful opportunity to actually conduct voir dire. When I have asked, I have never been granted that time. So, we do what we can with the little time we have.

But, the proponents call attorneys doing what they can, in the little time they have, as "speechifying" they want to cut down on.

I suggest nothing more need be said. I accept the good faith of the proponents; both in their motivations for these proposals and the reasons they give for them. However, I respectfully submit that *in practice*, these proposals if adopted will be used to push every trial possible to the internet. King County has demonstrated that proclivity with its motion docket. Does this court believe trials will be any different when the proponents already stated as to voir dire, even without realizing it, that perspective.

6. Conclusion

Out of adversity comes invention. I do not speak against that here.

However, what a person does and deems acceptable when their house is burning down is not what they do or deem acceptable when the house is not burning down.

That we as a judiciary and bar have done the best we could to deal with Covid to have some trials as opposed to the greater evil of none, and that we have tolerated the diminishment of a true Jury Trial because *something* was better than *nothing*, does not in any way point the direction forward when this emergency has passed.

No doubt the last year and half has led to realizations of how the courts may leverage technology for the betterment of litigants and society in general. I am a strong proponent of amendments to the civil rules on discovery and other matters where we can use technology to be more efficient.[16]

However, *simply because something is easier does not make it better*. I have no doubt but that allowing a potential jury panel member to participate in voir dire on their two-inch cell phone screen is easier – for the court and for them.

And, given the restrictions of videoconferences a judge might well be able to better control more loquacious attorneys. But is that justice? Does that lead to more just results? I say: no, it does not.

The rule proponent is focused on the belief that electronic appearances allow for greater participation. As noted above, given the proponent has actual objective numbers it could have offered and did not, to say nothing of the fact King County's own studies show the opposite, I suggest that argument is without weight and should be rejected.

However, let us assume for the moment it is true. Let us assume more people in terms of numbers appear for voir dire: does answering questions on a two-inch cell phone screen lead to a more just result. *Is simply showing up what our goal is?* Are they taking the process as seriously as opposed to standing up, raising their right hand, and being seated in a courtroom?

I say to you: no. I say to you: that is impossible. I say that any person who suggests that a potential juror answering questions waiting to go to work, waiting to go out on an errand, or whatever it is that their little cell phone voir dire questioning is interrupting, is in no way giving their full attention or full self to the process as someone in a courtroom. And that says nothing of when that is transferred to trial.

The answer to logistic hurdles to administering justice is not to lower the bar for justice; it is to fix the logistic hurdles. Lowering the bar for justice in picking a jury or having a Jury Trial is not a solution. It does more harm than good. While this court should unreservedly embrace technology and learn from the last year and a half to improve our system with technology, *it should also be careful and judicious to identify that some shortcuts are indeed only and exactly that: shortcuts*. Justice is not easy. It takes work; not only by the Courts, but also attorneys, parties, and society at large.

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[16] This year the President of the WSBA asked me to chair a WSBA task force to explore and recommend additional proposed Civil Rules amendments to do exactly that. However, before commencing work we appreciated this Supreme Court was already undertaking the same task and rather than take duplicative time of the same stakeholders I recommended to the WSBA that we yield to this Court's work. The notion I am against technology or changing the Civil Rules to leverage that would not be well taken. We should continue the option of Internet hearings. And, there are likely a great many proceedings that are better done over the Internet. Those should be embraced. However, not the sacrosanct process of a Jury Trial.

No one wants to inconvenience 60 people, 46 of which will be turned away not being selected on a jury, to drive down to the King County Courthouse for no reason. But, *they are not driving down to the King County Courthouse for no reason. Their mere physical presence fulfills a purpose.* And while that is an inconvenience, it is the price we all pay for the privilege and right to live in a society governed by laws and not people, and a process of justice which although not perfect is the best in the world.

I urge that you reject the proposed amendments. Not only are they not tenable, they lack sufficient demonstrated factual support and will have a ripple effects far beyond those even imaginable at this time. They are overly King County centric and do not address the disproportionate impact compelled Internet trials will have on a marginalized members of society who will be unable to breach the walls of highspeed internet, sufficient computer equipment, and sufficient technical knowledge to participate *meaningfully*.

Sincerely,

Dan'L W. Bridges

C:\ASUS\Documents\Comment GR 9 - Jury Selection By Computer Final.docx

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Rule Making Comment
Date: Friday, December 17, 2021 12:42:29 PM
Attachments: Comment GR 9 - Jury Selection By Computer Final.pdf

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From: Dan Bridges [mailto:dan@mcbdlaw.com]
Sent: Friday, December 17, 2021 12:37 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Rule Making Comment

Hello:

I am offering this as a combined comment on the proposed amendments to both CR 39 and GR 41.

These are signed by me and are my comments. They are not a comment from my firm – albeit we all agree. But for publication, these should be attributed to Dan Bridges

Thank you,
Dan

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