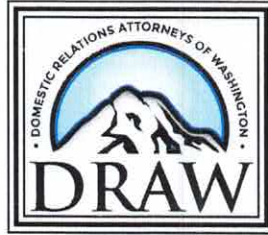


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December 28, 2021

Clerk of the Supreme Court
P.O. Box 40929
Olympia, Washington 98504-0929

E supreme@courts.wa.go

Re: Amendments to Civil Rule 39 — TRIAL BY JURY OR BY THE COURT

Dear Supreme Court Justices:

On behalf of DRAW (Domestic Relations Attorneys of Washington), a non-profit organization with over 600 members who are family law/domestic relations attorneys, I write to comment on, and express support for the proposed amendments to CR 39. The 15 members of the DRAW Board of Directors has discussed the proposed Amendment at length, and voted to approve the basic concept of the Amendment, if certain concerns can be addressed as discussed more fully below. Additionally, the Board submitted the proposed Amendment to the DRAW membership and any feedback received has been incorporated herein.

AGREEMENT IN THEORY. Recognizing the specific dangers and challenges presented by the ongoing COVID-19 pandemic, DRAW fully supports the presumption for open court trials on all matters, as stated in CR 39 (d)(1). Videoconference trials lack a certain gravity inherent with a court appearance. That being said, jury and non-jury matters should be decided based on the same criteria. Considering the weight of issues routinely determined in family court matters, they should be treated no differently than other civil matters, or even criminal cases.

As the court considers the final version of these proposed amendments, a compelling consideration should be the lack of uniformity in the manner in which videoconference trials are conducted. Counties have developed widely varying manners of conducting trials, including broad differences from court to court within the same county. A presumption in favor of actual appearance in court fosters a return to a predictable trial experience for practitioners and parties alike.

CONVENIENCE. Video trials include numerous conveniences, but also involve truly significant limitations. Video trial requires little to no travel, which provides a level of convenience for all

involved. For witnesses, particularly those residing some distance from court, a video trial facilitates appearance, and avoids scheduling conflicts. This is particularly true for expert witnesses, whose schedules are often overloaded, and their travel is expensive to the party attempting to utilize their service.

However, trial by its very nature is unpredictable. Evidence and trial notebooks may prove much more difficult to use and get evidence admitted, particularly in counties that do not allow online notebooks and electronic transmission of exhibits. Examination of any given witness can be more difficult, risking a waste of court time (and patience), and thus a less reliable decision which may not consider all relevant evidence.

The challenges of a video trial are especially apparent in moments of cross-examination. When a witness offers unanticipated testimony during direct examination, such testimony may be challenged or contradicted by evidence in the attorney's possession. However, because it was unexpected, such evidence was not provided in the pre-trial exhibit list. Locating and providing that new piece of evidence becomes more challenging depending on the specific manner in which the court manages documents.

It is noteworthy that numerous counties do not allow online evidence, including Spokane, Lincoln, Stevens, and Whitman counties. In at least one county (Stevens), an absent attorney cannot even see the witness box. Others, such as Snohomish County, require physical delivery of any proposed exhibit. In these instances, presentation of that vital evidence will be delayed, and may not even be presented to the court.

ASSESSING CREDIBILITY. One of the central duties of a trial court as fact finder is to weigh credibility of witnesses. In fact, courts of appeal often cite to a trial court's unique role in determining credibility as a basis to defer to trial courts. In fulfilling this duty, the importance of gauging demeanor and body language cannot be overstated. That ability is substantially hampered when a court is limited to viewing any given witness from the shoulders up. Thus, video trials are extraordinarily vulnerable to evidentiary abuse. Attorneys can text and coach testimony. Parties can text and coach testimony of non-party witnesses. Third parties can be present off camera during the testimony of any party or witness. The mere possibility of such abuses undermine the credibility of the judicial system and any decisions issued.

PROPOSAL. For your consideration, we propose a tiered approach, which addresses the issues of judging credibility of the witnesses, incorporates the convenience of videoconferences for experts, and provides some guidance to define "good cause," or "compelling circumstances."

December 28, 2021

Re: Proposed Amendments to Civil Rule 39 — TRIAL BY JURY OR BY THE COURT
Letter to Justices of The Washington Supreme Court

1. Parties should be required to appear, except by agreement or a heightened finding of good cause.
2. Fact witnesses should appear in person except by agreement or “reduced” finding of good cause.
3. Good cause in (1) and (2) above could include the following non-exhaustive list in no particular order, or weight: considerations of geographical proximity, work schedule, health and contagion, childcare, and transportation. Good cause should be balanced with need for reliable results, especially when there are issues pertaining to drug use, drug abuse, mental illness, domestic violence, rehabilitation from RCW 26.09.191 findings, parenting and financial mismanagement.
4. Experts should generally be allowed to appear via Zoom except upon finding that there is good cause to require experts to appear in person.

The DRAW Board of Directors and its members greatly appreciate the opportunity for input on this important issue. If you have any questions, or desire further input, please do not hesitate to reach out to us.

Respectfully,

DOMESTIC RELATIONS ATTORNEYS OF WASHINGTON



Lisa E. Brewer
LEB/ajs

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Comment on Proposed Amendments to CR39 (Trial formats0
Date: Tuesday, December 28, 2021 4:49:21 PM
Attachments: [CR39 Amendment Comments to Supremes 12-28-2021.pdf](#)

From: Lisa Brewer [mailto:lbrewerlaw@msn.com]
Sent: Tuesday, December 28, 2021 4:46 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendments to CR39 (Trial formats0

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Greetings:

Please find attached as a pdf document containing DRAW's formal letter commenting on the proposed amendment to Civil Rule 39 regarding use of Zoom/video formats for trials. Please confirm receipt of this document.

Respectfully,

Lisa Brewer
President of Draw