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From: Flint Stebbins [mailto:stebbins@abclawgroup.net]
Sent: Thursday, October 28, 2021 5:51 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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A court should not be permitted to determine, “on its own initiative,” that “a **trial** by the court may occur over videoconference” absent an emergency or some exigency that threatens the health or safety of the public or participants of that trial.

Subsection 2(A)(i) describes factors for the courts consideration in making the determination whether to order a video-conference trial. These factors primarily relate to issues of convenience. A court cannot and should not elevate convenience over the proper administration of justice. The court should not permit a temporary practice implemented to protect lives and permit continuation of a vital governmental function during a global emergency to become a standard practice because of its convenience. The sacrifices to the administration of justice made to protect public safety during such a crisis as a pandemic should not be sacrifices that are maintained in the future to promote convenience.

The administration of justice is not intended or designed to be fast, efficient, convenient, or simple. It is designed to be fair and to reach the right result, by providing a forum in which litigants present their case and their evidence and challenge the case and evidence of their opponents before a neutral decisionmaker who scrutinizes that evidence, including witness testimony. This is done through a complex mechanism, highly refined by the rules of evidence and courtroom practice, where subjective determinations of credibility and how the weight of the evidence falls decides the outcome of these controversies. Trials are not a sterile practice where data is objectively analyzed. The means for scrutinizing that evidence must be the most effective and critical means that is available to the litigants, particularly defendants and respondents.

Many of the solemnities of court have been diminished or entirely abandoned. Rarely, if ever, do people stand when the judge enters the courtroom when the viewers are sitting in their own offices, living rooms, bedrooms, etc. Individuals can mute their own audio and engage in other activities.

They can turn off their video. They can eat, drink, drive, walk around their house, outdoors, or public places. All of these means of controlling one's own participation in the proceeding diminishes the seriousness and the gravity of the occasion of appearing in court.

These are serious matters that do not simply occur in one's living room on a daily basis, and yet, that is the direction the administration of justice is headed, not out of necessity to protect public health, but now for convenience.

A trial can rarely be properly conducted by videoconference and the more frequently it is permitted to occur, the more certain failures and abuses of the process will arise. Then, we can already anticipate, appellate courts will face determinations about whether those abuses, individually or collectively, effected the outcomes of the trials or deprived litigants of their due process right to a fair proceeding.

There are countless issues that are readily foreseeable. A witness can look away to avoid being observed while testifying. The lightening for a witness may make them, effectively, unobservable. A witness can turn off their audio or video, have documents or other screens available for their review, other people present with them out of the view of the court, cuing them, influencing their testimony. There is no reliable way to police these means of manipulating testimony during trial.

The handling of exhibits, the challenging of witness testimony with documentary evidence on the stand is severely impaired or completely eliminated in some cases, when a remote trial is occurring. The flow of a presentation is highly disrupted when a witness cannot simply be handed a document, when records must be exchanged by remote communication, trial must be paused. A court cannot determine whether a witness's delay in answering is a delay while they await an exhibit, review that exhibit, or try to formulate some explanation rather than providing a candid answer to the challenge put to them.

Not all litigants have equal access to technology. Audio and video often are not properly synchronized, compromising interpretation of the witness's demeanor and responses. Portions of questions and answers may be dropped for some participants but not others without all parties being aware that something had been lost. Transcripts may be less precise. Objections may be lost or failed to be made timely if an issue arises with the signal for the court or the objecting attorney.

Simple issues that are otherwise unthinkable for a trial occurring in person are predictable and inevitable for remote trials.

While videoconference testimony will inevitably persist and continue to some degree, permitting trials to occur in large part or in their entirety by videoconference is unquestionably a degradation of the administration of justice that should not occur absent agreement of the parties, especially defendants and respondents, or some necessity on par with a global pandemic.

Please do not adopt a rule that allows videoconference trials without agreement of all parties or severe emergency.

Respectfully,

Flint Stebbins, Attorney | [ABC Law Group, LLP](#)

6303 Wetmore Avenue, Everett, WA 98203 | Cell: (425) 418-3028 | Office: (425) 953-5699 | Fax: (425) 953-5688

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