

The Supreme Court
State of Washington

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Sent via email

To: Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee

Re: Suggested amendments to the proposed CR 39

Dear Associate Chief Justice Johnson and Justice Yu:

The Court Recovery Task Force was formed by the Board for Judicial Administration to address the effect of the pandemic on the justice system. During the pandemic, access to courts and the continuation of litigation has been made possible in part through the use of videoconference technology. I am writing to you on behalf of the General Civil Litigation Committee of the Court Recovery Task Force, which supports the proposal to amend Civil Rule (CR) 39 to add a section concerning the ability to perform civil trials, or portions thereof, via videoconference technology. Please find enclosed for your review the committee's suggestions to the published proposed amendments.

The General Civil Litigation Committee is composed of general civil litigation practitioners and judges at every level of court. Not represented on this committee are practitioners in the fields of family law, civil commitments, unlawful detainers, child welfare, and other specialized areas of civil practice. The committee has shared its comments and suggestions with other Task Force committees wherein those practices are represented and we anticipate the court may receive additional comments from them.

The attached draft seeks to amend CR 39 to reflect the availability and effectiveness of utilizing videoconference technology during trials or portions thereof. Previously, under appropriate circumstances and for good cause shown, it has been possible for select portions of a trial to occur utilizing videoconference technology. The amendments to this rule increase that ability in recognition of the viability of videoconference technology in civil trial settings.

While the committee as a whole agrees the use of videoconference technology during the pandemic has been extremely useful and has promoted access to justice, the committee has differing opinions as to the scope of videoconference technology for all trials permanently going forward. For example, there are differing opinions within our committee regarding whether the Court should be

able to compel parties to in person trial versus videoconference trial when the parties are in agreement for a videoconference trial. Issues implicated are access to justice in terms of the difference in cost between in person and videoconference proceedings, the court's inherent ability to control the manner of proceedings before it, forum shopping if parties know one judge will agree to videoconference trial while others will not, jury pool considerations, etc. These thoughtful differences are reflected in the suggestions to the draft amendment.

The committee highlights the increased diversity in the jury pool, continued access to justice during times of public health concerns, litigation cost savings, and the ability to help with court backlog as benefits of videoconference technology in trial.

The committee also highlights the difficulty with technology and broadband access, clarity of testimony over videoconference, the ability to fully see and hear the Court, attorneys, parties, witnesses, and jurors throughout the entirety of the trial, the ability to assess the credibility of participants to the proceeding, and loss of the solemnity of courtroom proceedings as disadvantages of videoconference technology in trial.

This committee recognizes stakeholder input is crucially important in the rulemaking process and welcomes further review of our comments and suggested revisions to the proposed amendments to CR 39. Thank you in advance for the Supreme Court's consideration of our submission.

Sincerely,



Debra L. Stephens, Justice
Washington State Supreme Court

On behalf of the General Civil Litigation Committee:

Judge Timothy Ashcraft
Judge Lisa Mansfield
Judge Richard Melnick (ret.)
Judge Bruce Weiss
Vivienne Alpaugh
Alice Brown
Michael Cherry
P.J. Grabicki
Noah Jaffee
Ray Kahler
Christopher Love
Colleen Peterson
Luke Phifer

cc: Chief Justice Steven González
Jennifer Benway, AOC
Jeanne Englert, AOC

Proposed Amendments to CR 39
TRIAL BY JURY OR BY THE COURT

(-) – (c) [Unchanged.]

(d) Manner of Trials.

(1) *Generally.* Except as otherwise authorized by these rules, ~~or by statute, or by court order,~~ all trials upon the merits shall be conducted in open court. ~~and, so far as convenient, in a regular courtroom. .~~

(2) *Videoconference Trials.*

A. *By the Court.* On the court's own initiative, or on motion ~~of the~~ by a party ~~ies~~ or their attorneys of record, a trial by the court or portions thereof may occur over videoconference in which all participants can simultaneously see, hear, and speak ~~with each other~~ at all times. The video and audio should be of sufficient quality to ensure participants are easily seen and understood.

i. Before ordering a video-conference trial or portion of the trial by the court, ~~the court shall state the reasons for its decision and may consider the nature of the case, the court shall consider~~ the number of parties, the number of trial witnesses, the type of evidence to be presented, whether the parties have significant financial and nonfinancial interests at stake, whether the use of remote interpreting services will detract from the presentation of evidence, the parties ability to participate by ~~conduct a~~ videoconference ~~trial~~, the length of time trial has been pending, the potential impact of not conducting the trial by videoconference, such as the availability of witnesses and preservation of evidence, and any other relevant circumstances.

B. *By Jury.* On the court's own initiative, or on motion ~~by a party of the parties~~ or their attorneys of record, a jury trial or portions ~~thereof~~ trial by jury may occur by videoconference. ~~While on the record, the Any jury trial occurring by videoconference must allow all participants to~~ must be simultaneously visible and able to hear and speak ~~at all times. see, hear, and speak with each other.~~ The video and audio should be of sufficient quality to ensure participants are easily seen and understood. Jury trials may be conducted by videoconference only:

i. When there is written agreement of the parties that has been approved by the court. If approved, the court shall sign an order allowing the remote video trial or portions of the trial, and attach the agreement of the parties to its order. ~~the agreement shall be filed with the court before the start of trial and the court is in agreement; or . The agreement shall be filed with the court before the start of trial; or~~

ii. Over objection of a party or parties for good cause in compelling circumstances. In conducting trial or portions thereof by jury over videoconference, the court shall ensure appropriate safeguards are in place; and:

- (a) ~~May~~ Shall consider the nature of the case, ~~including~~ number of parties, number of trial witnesses, the type of evidence to be presented, whether the parties have significant ~~financial and~~ non-financial interests at stake, whether the use of remote interpreting services will detract from the presentation of evidence, the parties ability to ~~participate by~~ conduct a videoconference ~~trial~~, ~~the length of time trial has been pending, the potential impact of not conducting the trial by videoconference, such as the availability of witnesses and preservation of evidence, and any other relevant circumstances. ; and~~
- (b) ~~Shall enter written findings outlining its reasons for conducting trial by videoconference. The court shall analyze the length of time trial has been pending, the potential impact of not conducting the trial by videoconference, such as the availability of witnesses and preservation of evidence, and any other considerations in support of its decision.~~

C. Nothing in sections (2)(A)-(B) above precludes the court from revisiting the decision regarding videoconferencing should technical or other circumstances arise.

(3) *Notice.* Whether on its own initiative or by motion ~~of the~~ of a partyies or their attorneys of record, no videoconference trial or portion thereof shall be heard unless the court holds a hearing no fewer than 30 days before the trial date. At the hearing, the court shall announce its decision ~~regarding a trial by~~ videoconference proceedings and address appropriate safeguards. The parties or their attorneys of record may agree to this hearing occurring within 30 days of trial. For agreed matters, the court may waive the hearing in its discretion.