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15 November 2021

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

Washington State  
Supreme Court

Re: Proposed Amendments to CR 39

Dear Clerk:

We are a trial firm. We are writing to object to the proposed amendments to Civil Rule 39 which would allow the judge to force the parties to have their trial by video conference or "Zoom" trial. It is a very bad idea. In fact, it is totally contrary to CR 77(j) which requires all trials on the merits to be conducted in open court and so far as convenient in a regular courtroom.

Juries, judges and lawyers need to see the parties and their witnesses in person. We not only communicate through the spoken language, but also through body language. A video trial only allows a face or head shot. The technology is not reliable and is subject to interruptions and abuse, all of which can disrupt a trial. Although there may be occasions when the parties want to utilize video presentations of various witnesses, allowing a court to mandate them raises serious constitutional due process concerns. The federal rules of civil procedure have no similar provision. Indeed, the committee notes to FRCP 43 recognize the importance of presenting testimony live.

Because of the pandemic, we have been engaged in video depositions. Uniformly, the attorneys involved hate them. We have not agreed, and will not agree, to a video trial. Trial courts have a difficult job under a variety of circumstances. But fundamentally, the judge must be an impartial arbitrator of the law. Judge do not represent parties. They must be unbiased and allow the parties to frame the issues and present their case for a decision. The court has no business inserting issues or *sua sponte* issuing rulings that are not directly related to that primary function. The use of a procedural mechanism to allow a stipulation for a video trial may make sense, but forcing the parties to participate in them – over their objection – simply does not.

Very truly yours,  
Martens + Associates | P.S.



Richard L. Martens  
[rmartens@martenslegal.com](mailto:rmartens@martenslegal.com)



705 Union Station, 1st Floor  
705 Fifth Avenue South, Suite 150  
Seattle, WA 98104-4436

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