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December 20, 2021

Via Electronic Mail

Honorable Charles W. Johnson, Co-Chair
Honorable Mary I. Yu, Co-Chair
Washington State Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendment to CR 39: Trials by Videoconference

Thank you for the opportunity to comment on the proposed amendments to CR 39, which would authorize civil jury trials by videoconference in certain circumstances. As a trial lawyer with over forty years' experience, I would like to make three points.

1. The proposed rule erroneously assumes virtual and in-person trials are constitutionally equivalent.

The proposed amendment assumes that virtual jury trials comport with Article 1, Section 21 of the Washington Constitution, which requires that the right to jury trial "remain inviolate" in both civil and criminal cases. The Court should not adopt the proposed amendment without first determining whether virtual trials are constitutionally equivalent to in-person trials. *See State v. Duckett*, 141 Wn. App. 797, 808, 173 P.3d 948 (2007) (court rules must meet constitutional requirements). The form order used by some King County judges does not sufficiently answer this fundamental question.

The essential purpose of Article 1, Section 21 is to preserve the right to jury trial as it existed when the constitution was adopted in 1889, including both scope and practice. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989). The term "inviolate connotes deserving of the highest protection and indicates that the right must remain the essential component of our legal system that it has always been." *Davis v. Cox*, 183 Wn.2d 269, 288-89, 351 P.3d 862 (2015). The right "must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie* at 656.

As regards in-person trials, "the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process." *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010) quoting *Estes v. Texas*, 381 U.S. 532, 561, (1965) (Warren, C.J., concurring). Consistent with the constitutional

conception, CR 77(j) provides, “Except as otherwise authorized by these rules or by statute, all trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom.” This requirement means that judges, parties, counsel, witnesses, jurors, and the public come together in a courtroom, where they have equal ability to hear testimony, view evidence, hear argument, and otherwise observe the entire proceeding. Further, since Territorial days, Washington law has required that deliberating juries “be kept together in a room provided for them, or some other convenient place....” RCW 4.44.300.

These are among the essential elements of the constitutional right to trial by jury, which are not preserved “inviolable” when trials are conducted virtually. Viewing headshots of witnesses, counsel, and jurors on a screen of unknown size and hearing testimony and argument over the internet is not nearly the same experience as a “traditional” jury trial. Indeed, I recently had the opportunity to try to a civil jury case in hybrid mode—part live and part virtual. When questioned following their verdict, the jurors unanimously reported it was much easier for them to follow testimony of witnesses appearing live and that they much preferred that mode to a virtual experience.

Recent experiences with virtual trials point up other problems bearing on their constitutionality.

- **Jurors do not have equal opportunity to view the proceedings.** In addition to the quality of their internet connections, there is no uniformity in the quality of audio-visual equipment used by jurors. Some jurors have large or even multiple monitors and high quality speakers, while others may view the proceedings on a nine-inch tablet screen with poor quality audio.
- **Juror behavior cannot be effectively policed during a virtual trial.** Although some judges who support virtual trials claim they can detect jurors who are “multitasking,” it is in fact impossible on a consistent basis to effectively detect whether remote jurors are checking email, social media, or doing online research about the case. Virtual trials also provide inadequate protection against outside influences during deliberations, as compared to a real courthouse and jury room. *See State v. Smalls*, 99 Wn.2d 755, 766-67, 665 P.2d 284 (1983) (noting that jurors are subject to subtle yet prejudicial influences when outside the jury room). In virtual deliberations, jurors need only turn off their audio and video connections to the virtual jury room, making whatever excuses to their fellow jurors (eat, bathroom break, feed the dog, etc.).
- **Presentation of evidence is resource dependent.** The challenges involved in effectively presenting evidence to juries, particularly documentary and illustrative materials, are compounded in a virtual trial. To be maximally effective in that setting requires a “Zoom Studio” equipped with adequate computers, monitors, lighting, and microphones for witnesses and counsel. In many cases, because it is beyond the ability of counsel to operate this equipment, the services of specialized technical support staff are required in order to operate this equipment. But not everyone has access or ability to pay for this equipment or staff. While some of these inequities exist in an in-person trial, their effect on the presentation of evidence is not nearly so severe.

2. The Court should not allow case-by-case determinations whether compelling circumstances warrant virtual jury trials.

If the Court adopts the proposed amendment in any form, it should specify what circumstances are sufficiently compelling as to justify ordering a virtual jury trial over objection, and establish a process for a state-wide or perhaps county-wide determination whether compelling circumstances exist. This should not be left to individual judges to decide. In this regard, although the COVID-19 pandemic is a compelling reason, it seems that the King County court intends to order virtual trials for other reasons, including unsafe conditions at the Seattle courthouse, difficulties in recruiting a sufficient number of jurors, and perceived “convenience.” With all respect to those who support this approach, these are bad reasons to abandon in-person trials because they permit county and state government to continue to escape their obligations to provide adequate facilities and resources for the court. And, even if they are good policy reasons, they are not constitutionally compelling.

3. The Court should specify that orders requiring virtual jury trials must be narrowly tailored to address the compelling circumstances justifying departure from standard practice.

Assuming the Constitution permits courts to order virtual jury trials over objection, the rule should be modified to specify that any such order must be narrowly tailored to fit the specific compelling interest upon which the court bases its order. *In re M.G.*, 103 Wn. App. 111, 118, 11 P.3d 335, 339 (2000). For example, during the pandemic, it may be possible to safely take evidence and hear argument in person, but not possible to safely place jurors in a physical room for deliberations. The guiding principle should be that, even if there is a compelling reason, the virtual aspects of the trial should be narrowly drawn so as to preserve the attributes of an in-person trial as much as possible.

Thank you again for the opportunity to comment on this proposed rule.

Very truly yours,

BENNETT BIGELOW & LEEDOM, P.S.



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Please see attached, thank you.

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