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Subject: FW: Comment on Amendments to CR 39
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From: Roberts, Ryan [mailto:ryan.roberts@bullivant.com]
Sent: Friday, December 10, 2021 1:47 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Amendments to CR 39

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To whom it may concern:

I am writing to you today to voice my concerns on the proposed amendments to CR39.

I believe that these amendments are born out of an overreaction to the need to incorporate video conferencing trials because of delays in administering the judicial process of the COVID-19 pandemic. It is my understanding that video conferencing creates greater flexibility but brings with it greater distractions and a loss of intrapersonal communication both verbally and through body language. Shortly, the number of efficiencies gained in putting forth video conferenced trials will not exceed the risks of creating an error either due to technological difficulties or the inability for the importance of the judicial process to be affected on a jury by virtual means.

I ask the writers of the amendment to ask, would this amendment have been brought forward but for the emergency requirements of the COVID-19 pandemic? If not, then please review those reasons. The fact that we are still currently battling the pandemic is not lost on me and in these times emergency procedures are necessary. However, when this pandemic is over, we must revert to the tried-and-true method of conducting juries. Sometimes flexibility and efficiency are the undoing of the democratic process. I would be despondent if this undoing were to begin with the judiciaries short sighted desire to lighten its docket through inappropriate means.

I also adopt wholly in these comments the contentions made by the Washington Defense Trial Lawyers against the amendments to CR39:

- While the inclusion of a procedural mechanism to authorize the use of online platforms for trial pursuant to stipulation may make sense, forcing parties to participate in online trials,

absent emergency circumstances, does not.

- Rules created to address the realities of courthouse closures necessitated by a pandemic should not be used to establish permanent civil practice procedures which will apply long after those emergency circumstances are gone.
- Forcing non-consenting parties to trial by video, in the absence of emergency circumstances, raises substantial due process concerns.
- Non-consensual video by trial is inconsistent with the CR 77(j), which requires all trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom.
- Although there may be occasions justifying the taking of remote testimony, as the drafters of Federal Rule Civil Procedure 43, upon which CR 43 is based, made “the importance of presenting live testimony in court cannot be forgotten,” and that “the opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.” 1996 Committee notes to Fed. R. Civ. P. 43.
- Parties should not be forced into a format, without their consent and over their objection, where inevitable technical errors may be improperly blamed on the parties themselves.
- Parties should not be forced into a format, without their consent and over their objection, where the risk of jury misconduct is increased.
- Parties should not be forced into a format, without their consent and over their objection, where the physical evidence cannot be accurately reproduced.
- The parties should not be forced into a format, without their consent and over their objection, where the makeup of jury panels may be economically, racially, or geographically unbalanced, given unequal access to broadband and technology.

Thank you for the time and opportunity to express my concerns with the proposed amendments to CR39.

Respectfully,

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