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**Subject:** FW: Comments in Opposition to Proposed Amendments to CR 39  
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**From:** Stuart Cassel [mailto:stu@christielawgroup.com]  
**Sent:** Friday, December 10, 2021 10:42 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Comments in Opposition to Proposed Amendments to CR 39

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Good morning,

I am writing to express my opposition to the proposed amendment to CR 39. Judges should not have the power to force litigants into virtual trial over their objections. I fear that judges will give undue weight to the convenience of Zoom trials at the expense to litigants' due process rights. Forcing non-consenting parties to trial by video, in the absence of emergency circumstances, raises substantial due process concerns. Further, 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.

While Zoom has been a useful tool during the pandemic, it is by no means perfect. Zoom calls can drop out, audio issues can arise, and some litigants simply do not have access to the necessary resources to properly use Zoom. 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. This is especially true for smaller counties in Washington that lack the resources and internet infrastructure of larger counties.

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. should not be forced into a format, without their consent and over their objection, where the physical evidence cannot be accurately reproduced.

In my personal experience, Zoom proceedings are unpredictable. Sometimes the proceedings occur

without any technical error, but other times they do not. 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. Given the substantial rights and interests that trials involve, the courts should not adopt rules that leave the efficacy of court proceedings to chance. Parties should be free to engage in Zoom trials if they agree to do so, but the courts should not have the option to force parties into an unreliable and unpredictable method of appearance over an objection.

Thank you for your consideration of these comments.

Sincerely,

Stuart A. Cassel

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