From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Proposed changes to CR 39
Date: Friday, November 12, 2021 8:06:26 AM

From: Ted Buck [mailto:tbuck@freybuck.com]
Sent: Thursday, November 11, 2021 1:57 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed changes to CR 39

Dear colleagues:

I write in response to the proposed changes to CR 39 related to virtual trials. As a trial lawyer with nearly three decades of experience in courts around the state and across the west I have grave concerns over the scope and extent of the proposed revisions.

Preliminarily, I am a whole-hearted proponent of the jury trial system. Dozens of times I have seen jurors collectively sift, consider and weigh complicated facts, emotional testimony, anger, frustration – the whole panoply of the human experience – and steadfastly toil to a credible and supportable resolution. I frankly love juries, the concept behind them and the remarkable results we experience through their dedicated work.

Virtual trials jeopardize the jury system in countless obvious, and not-so-obvious ways. Being in a box with fellow citizens and developing a rapport and confidence in one another to tackle the herculean task of weighing often diametrically opposed perspectives is an essential element of the success of the jury system. Virtual trials strip the jury of that immense benefit. Absent the common experience in person, the end deliberation is little more than an online chat room – jurors do not have the same patience for each other and contrasting positions, the willingness to be gracious in deliberation, the common confidence to make the difficult decisions as part of a justice-bound team,

Our experience to date with virtual trials, to their credit, suggests that they can be economical and relatively efficient. Justice, however, is not guided by those parameters. What value is efficiency in a hotly contested case with significant ramifications if a juror is distracted by the screen next to him? If the dog is at the door begging to be let out? Text messages continue to arrive? Ten thousand other obvious

distractions beyond these examples? Juror attention is essential to justice, and virtual trials are woefully ill-equipped to assure focus and attention. We have personally experienced jurors repeatedly sleeping, obviously working on other devices during testimony, disappearing from the screen altogether during vital testimony, moving about in their homes and even their cars during testimony – there is no credible basis to argue that jury involvement in a virtual environment is the equivalent to a live environment. With lessened juror attentiveness the only logical result is a deterioration in the prospect of a thorough and conscientious evaluation of fact and law, and accordingly less chance of that sweet goal of justice.

The virtual environment necessarily dilutes the jurors' capacity to weigh the credibility of witnesses. A face on a computer screen is a poor substitute for being able to assess eye contact, subtle body language, the endless ways that we develop our gut feeling for a speaker's credibility. We know that credibility lies at the heart of the truth-seeking process. We also know that virtual proceedings diminish the accuracy of that assessment. How does that further justice?

In complicated technical or scientific cases the virtual process presents other concerns. Physical evidence often must be examined carefully and/or physically manipulated for a full understanding of its import; plainly that cannot happen in a virtual environment. Manipulable demonstrative exhibits are also often essential to juror understanding of facts in such cases. Depriving the jurors of the capacity to experience such exhibits in person, from different angles and from different perspectives necessarily increases the risk that they will not fully or accurately assess those facts. Zooming in with a camera or other contrivances is a poor substitute for a live demonstration. Some may argue that animation is a simple solution to that problem. That, however, presents a different problem. Often litigants on one side are self-funded, while the other has either insurance backing or corporate heft to advance their case. A litigant that can't afford a $20,000 animation would hardly be fairly positioned against a party that could afford $200,000 worth of animations. Even the capacity of counsel must be considered – a well-resourced firm with a dedicated virtual studio would necessarily shine in comparison to a smaller firm struggling to keep its connections working and its appearance professional. To this extent, this rule change effects a *regressive* alteration to the status quo – right now a solo practitioner with talent can enter a courtroom anywhere in this state and hold her own against a leviathan; that would not be possible in the virtual environment. Many of these deficits impact the very idea of due process of law, the fundamental tenet of our system. In person proceedings have been valued and supported by our system forever – Fed.R.Civ.P. 43 is an excellent example of that fact: "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.

There are scenarios where a virtual trial, despite the accompanying drawbacks, could well be an appropriate vehicle to conflict resolution. On cases with relatively straightforward factual disputes, where the application of fact to law is uncomplicated, where documents comprise the majority of the evidence of import, here the virtual trial's shortcomings are minimized and the efficiency of the process

may outweigh the deficits. I do not suggest that virtual trials should not be part of the arsenal, rather I suggest they should not be the only arrow in the quiver. This rule is plainly prompted by an emergency, one that will abate – fundamental changes to our trial processes should not be made in a time of crisis to extend beyond the actual emergency. Any transition to the possibility of virtual proceedings should be non-mandatory, case specific and dependent upon the parties' good-faith considerations.

We would giggle at the idea that all should be required to wear raincoats because we were once caught in a downpour. COVID will pass, and its temporary public health impacts should not, and must not, turn our time-tested and successful jury trial system on its head. As a practitioner who honors this cranky, at times awkward, somewhat inefficient but nevertheless proven system of justice, I implore you to decline these changes. Justice is peeking at us from under the blindfold – will we honor her or place her in peril for the sake of efficiency?

Ted Buck
Frey Buck, P.S.
1200 Fifth Ave., Ste. 1900
Seattle, WA 98101
206-486-8000