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Subject: FW: Comment on Proposed Amendments to CR 39 and GR 41
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From: Hermsen, Tyler [mailto:THermsen@williamskastner.com]
Sent: Wednesday, December 29, 2021 4:31 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendments to CR 39 and GR 41

Dear Chief Justice and Associate Justices:

I write in response to the proposed changes to CR 39 and GR 41 related to videoconference trials and videoconference jury selection. I write as a litigator that has tried several civil jury trials to verdict across this state, including two under current COVID-19 emergency orders. I am not outright opposed to videoconference procedure as long as the parties and the Court consent to it for a given case (which I may very well do sometime in the future). However, videoconference procedure should not be mandated on a party over its objection, especially when there is no overriding public health and safety concerns or case backlog present—factors which presently constitute the basis by trial courts to impose virtual procedure over a party's objection.

I am an advocate of our civil justice system and its backbone: the jury trial. Jury trial procedure has been tested and refined in this State for over a century and should not be fundamentally abandoned based upon the present justification for the proposed rule changes. While virtual trial procedure may be more convenient and expedient for some jurors, the trial court and possibly the litigants and their counsel in some circumstances, convenience should not drive the justification for imposing such procedure over a party's objection. As the Fifth Circuit stated: "[I]f the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded." *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996). A virtual environment is not an equal analog to the courtroom. A virtual procedure is masked in the guise of a virtual meeting akin to the many meetings that potential jurors partake in their daily lives. The importance of the task—administering justice—is lost when the appearance of a civil jury trial looks no different than any other zoom meeting in contrast to the physical presence of a judge on the bench and the human interaction between counsel, witness, jury and the sitting judge. CR 77(j) recognizes this reality and the benefit that physical presence in the courtroom inures.

In general terms, due process mandates that a party is allowed a full and fair opportunity to be heard. A remote trial proceeding only lends to the possibility of distraction which counteracts this mandate. I have witnessed jurors participating in voir dire while walking through downtown Seattle, a juror participating in trial while sitting in his car, a juror under a blanket in a reclining chair falling

asleep during key witness testimony, a juror clearly not paying attention to proceedings and looking at another screen multiple times. Such distractions would not occur in a courtroom. The judges on my cases did their best to address such distractions as quickly as possible in order to maintain decorum, however, the above-listed distractions were visible to participants and nonetheless detracted from the task at hand. There is simply no way of ensuring whether a juror is paying attention or watching a movie, checking emails, working or is otherwise distracted by items off camera. In a virtual setting, jurors are more apt to be distracted and the court is less likely to notice any inattentiveness or inappropriate activities, enabling jurors to ignore or misinterpret witness testimony and evidence—intentionally or unintentionally—because they are not all physically in the courtroom and in each other's presence with a judge sitting a short distance away. An inattentive, distracted, and preoccupied jury is not focused on the case, thereby preventing the participants from a full and fair opportunity to be heard.

Remote witness presentation is an inadequate substitute for live witness presentation before a live jury as well. The plain language of CR 43 itself emphasizes this preference by requiring a showing of good cause under compelling circumstances to permit remote testimony. The note accompanying the FRCP 1996 amendment recognizes "[t]he importance of presenting live testimony in court cannot be forgotten." FRCP 43 advisory committee's note (1996). Other decisions around the country recognize the importance of in-person trial testimony. "Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury." *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005). It is not the same because tools to assess credibility and persuasiveness, such as "[t]he immediacy of a living person is lost" with remote testimony as well as "the ability to observe demeanor, central to the fact-finding process, may be lessened." *Id.* (citations omitted). "This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion." *Id.* (citation omitted).

Advances in technology are not a direct analog for live in-person testimony. "[E]ven with the benefits that technology provides, substitutes for live testimony are necessarily imperfect…." it seems obvious that remote transmission is to be the exception and not the rule." *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479 (D. Md. 2010); *see also United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("…virtual reality is rarely a substitute for actual presence even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."). The hinderance presented by virtual witness presentation is exacerbated by the complexities that come with many civil matters. Complex technical or scientific cases are especially at risk of becoming an incomprehensible quagmire due to the multitude of expert witnesses, abstract concepts, and dependence on physical evidence. *See Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) ("When the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed.").

Finally, a virtual trial prevents the trial Court from drawing a venire from a "cross-section of the community" consistent with Washington law because the ability to serve is predicated on access to technology and an internet connection that not all eligible jurors possess. A technological requirement is not a service disqualifier under RCW 2.36.070, yet the proposed changes effectively add conditions for service in conflict with the statute. The virtual requirements include high speed internet access, a modern computer, video camera, microphone and a private space in order to focus. Placing such participation requirements on the venire effectively excludes large swaths of otherwise eligible persons from service based on an unrecognized and possibly prohibited class specification (financial condition and/or access to technology). A court cannot condition a citizen's access to public participation based on access to technology because that is not a jury service disqualifier in Washington, yet a remote proceeding does exactly that; calling into question the very foundation of a jury trial. I have seen first-hand instances where persons were excluded from the process due to a

lack of access to technology or understanding on the videoconferencing software. An in-person voir dire option was available, however, potential jurors that elected that procedure were taken out of order and put at "the end of the line" and never reached; constructively excluding them from the process. I also seen potential jurors "excused for hardship" due to technology access issues or a lack of understanding how to operate videoconferencing software. Simply stated, while the videoconferencing platform may be convenient for judges and most jurors and may improve access to justice for some groups, it nonetheless effectively excludes jurors that would otherwise be able to participate in an in-person process in practice.

I am not outright opposed to virtual trial procedure, and I may very well consent to it for an appropriate case if given the option. But it should remain an "option" and not imposed upon a party that does not consent to it. I have personally experienced the benefits and the deficits and I cannot say that the benefits outweigh the deficits in all applications. The virtual trial procedure that has taken place thus far in Washington was necessitated by a public health emergency—an emergency that will not last forever. A fundamental change to the tried-and-true civil jury trial should not be made in the midst of an ongoing health crisis and extended indefinitely.

I thank you in advance for considering my comment.

Sincerely,

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