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VIA EMAIL

December 23, 2021

Clerk of the Supreme Court
P.O. Box 40929
Olympia WA 98504-0929
supreme@courts.wa.gov

Re: WDTL Comments On Proposed Amendments To CR 39

Dear Chief Justice and Associate Justices:

The Washington Defense Trial Lawyers (“WDTL”) has served as a voice for the civil defense bar since 1962. WDTL members defend small and large businesses, individuals, and other entities in supporting balance and fairness for all in civil trials. WDTL submits these initial comments to the proposed changes to CR39(1).

The WDTL supports the inclusion of a procedural mechanism to authorize the use of online platforms for trial pursuant to stipulation. The reality of modern practice, particularly during this time of COVID-19-related courthouse closures, necessitates that parties, in certain instances, may want to proceed to trial through the use of remote technologies, after due consideration of all of the issues presented. The WDTL believes it is important and appropriate for the Civil Rules to provide a mechanism authorizing such an agreement and providing related procedural rules to facilitate successful remote trials.

On the other hand, the WDTL opposes the portions of CR39(1) that would force parties to participate in online trials, over their objection, absent emergency circumstances. Rules created to address the realities of courthouse closures necessitated by an unprecedented global pandemic should not be used to establish civil practice procedures when such urgent circumstances no longer exist. To do so not only presents substantial due process concerns, but also risks jeopardizing fundamental fairness to all litigants.

A. Due Process Does Not Support Forcing An Unwilling Party To Proceed Remotely, Absent Extraordinary Circumstances.

A live, in-person jury is the cornerstone of our civil and criminal justice system. Article One Section 21 of the Washington State Constitution: “The right of trial by jury shall remain inviolate.” By definition, a civil lawsuit involves a deprivation of property, requiring due process protections required under Article I, Section 3 of the Washington State Constitution. In general, due process requires an opportunity to be heard at a “meaningful time and in meaningful manner.”¹

¹ *Smith v. Smith*, 1 Wash. App. 2d 1017 (2017).



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This requirement is flexible and calls for such procedural protections as a particular situation requires given: (1) the private interest involved; (2) the risk the procedures will deprive a party of that interest; and (3) the government interest involved.²

During courthouse closures associated with COVID, the due process required by Article I, Section 3 necessarily came into conflict with Article I, Section 10, which requires justice be delivered “openly and *without unnecessary delay*.” (emphasis added). While the WDTL takes no position on whether delays associated with courthouse closures are sufficient to force a virtual trial over the objection of a party, it believes that forcing objecting parties into a virtual trial absent the unprecedented delay caused by courthouse closures during the pandemic, is improper, and inconsistent with principles of due process.

B. The Civil Rules Require That Trial Be In Open Court and So Far As Convenient In A Regular Courtroom.

As the Court Rules make clear “all trials upon the merits shall be conducted in open court *and so far as convenient in a regular courtroom*.” CR 77(j) (emphasis added). This preference for in-person trials is more than symbolic. As Senior Federal Judge John Coughenour recently wrote in his Seattle Times Op-Ed encouraging a return to in-person proceedings, “The venerable courthouse, with its majestic halls and stately courtrooms, engenders a respect for the rule of law upon all that enter.”³ As a result, “Remote proceedings cheapen and trivialize the sacred ceremony that is a trial.”⁴

This simple reality has been borne out repeatedly by Courts across the country in the pre-Covid era. The Sixth Circuit wrote of video that “[t]he immediacy of a living person is lost.”⁵ The Fourth Circuit further noted that “watching an event on the screen remains less than the complete equivalent of actually attending it.”⁶

The drafters of Federal Rule of Civil Procedure 43, which authorizes remote testimony in certain circumstances, and upon which CR 43 was based, also recognized this fundamental truth. In the 1996 Committee notes, in urging selectiveness in allowing a witness’s remote testimony, they note that “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.”⁷

² *Morrison v. State Dep’t of H&D*, 168 Wash. App. 269 (2012).

³ Coughenour, John C., What gets lost when Zoom Takes Over the Courtroom, The Seattle Times (June 1, 2021), available at <https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/>.

⁴ *Id.*

⁵ *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993)

⁶ *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

⁷ See also *State v. McCabe*, 161 Wash. App. 781, 787, 251 P.3d 264, 267–68 (2011)

(recognizing that contemporaneous transmission “while permitted in some jurisdictions today



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While concerns over the pandemic may have justified a finding under CR 77(j), that in-person trials were not “convenient,” that is simply not so in the absence of such an unprecedented worldwide emergency. Parties may well view proceeding via remote means as more “convenient,” and the WDTL takes no issues with affording a procedural mechanism to allow such parties to mutually consent to proceed in that manner. However, forcing the parties to forgo their right to trial in a courtroom, over objection, simply ignores the Court Rules, along with centuries of jurisprudence and research recognizing the importance of in-person, live proceedings, to our legal system.

C. While Witness Testimony May Be Conducted Remotely, Under Existing Law, Each Witness Must Be Evaluated Individually; Forced Virtual Trials Eliminate The Careful Analysis That Must Be Undertaken Pursuant to CR 43.

As noted above, the drafters of Federal Rule of Civil Procedure 43, upon which CR 43 was based, recognized that “the importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.”

As such, CR 43(a) requires that each witness’s testimony be given in open court, unless “[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” This rule not only requires that the testimony still be taken in court (through contemporaneous transmission from a different location), but necessitates an individualized analysis as to the circumstances necessitating such findings as to *each witness*.⁸ While a wholesale determination as to all witnesses may be appropriate in the context of a global pandemic affecting all witnesses, the same cannot be said outside that unique and unprecedented context.

D. Parties Should Not Be Forced, Over Objection, Into a Format Where They May Be Blamed for Technological Difficulties.

With the Court, the lawyers, the witness, and the jury all attempting to log on through their own respective systems, it is without question that there will be

under compelling circumstances, is nonetheless recognized as inferior, depriving the opposing party and the jury of important demeanor evidence.”)

⁸ *In re Marriage of Swaka*, 179 Wash. App. 549, 556, 319 P.3d 69, 72 (2014) (“Determining whether a party has shown ‘good cause in compelling circumstances’ involves a fact-specific inquiry that rests in the sound discretion of the trial court.”); *Eller v. Trans Union, LLC*, 739 F.3d 467, 478 (10th Cir. 2013) (“the rule is intended to permit remote testimony when a witness’s inability to attend trial is the result of “unexpected reasons, such as accident or illness,” and not when it is merely “inconvenient for the witness to attend the trial.”).



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technical issues that will frustrate the jury. “Technological glitches happen, and research suggests that they may subconsciously impact judges’ or jurors’ perceptions of witnesses who testify remotely. . . . technological difficulties may cause judges or jurors—improperly and subconsciously—to turn their frustration with technology against an attorney or witness who, through no fault of their own, experiences a glitch during a court proceeding.”⁹ Again, the benefits of a remote proceeding in a global pandemic may outweigh this substantial burden on a party’s right to a jury trial. However, forcing parties to participate, over their objection, once these once-in-a-lifetime circumstances have waned, has serious potential to impact the parties’ rights, and should not be considered.

E. Parties Should Not Be Forced, Over Objection, Into a Format Where The Potential For Jury Misconduct Is Increased.

There can be no serious doubt that juror attentiveness issues are more severe online than in-person. In court, jurors do not have a screen they control in front of them, are unable to have phones out in the open, and are free from the outside distractions of work or home. The lack of availability of such distractions facilitates the fundamental and critical focus on the proceedings necessary for the jury to perform their essential role in our legal system. The same cannot be said of remote proceedings. In recent months, there have been reports that while listening to evidence, remote jurors have simultaneously engaged in other activities, such as cooking, cleaning, and childcare duties. The same is true with respect to accessing materials outside of the court’s control and outside of evidence.¹⁰ When jurors are physically present, they can police each other’s behavior and counsel can observe their actions. Again, while a calculus may need to be made to address the unprecedented global pandemic, or upon mutual agreement, a party seeking justice before a jury should not be forced to accept the increased risks of juror misconduct.

F. Parties Should Not Be Forced, Over Objection, Into a Format Where Physical Evidence Cannot Be Accurately Reproduced.

While there are certainly means of producing written documents over remote platforms, the same is not true with respect to cases involving physical exhibits. Non-consenting parties should not be forced into a format where the use of critical evidence is substantially limited.

⁹ Chang, Angela, Post: Zoom Trials as the New Normal: A Cautionary Tale, The University of Chicago Law Review Online (Nov. 19, 2020) available at <https://lawreviewblog.uchicago.edu/2020/11/19/zoom-chang/>

¹⁰ See, e.g., *Garrison v. Honeywell Int’l Inc.*, No. CGC19276790 (Cal. Super. Ct. Aug. 11, 2020); Mark Jacobson, No One Has Been Paying Attention For A While Now: What Recent Experiences With Remote Juries Tell Us About Our Distracted World, Los Angeles Daily Journal (September 11, 2020).



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G. There Is Inadequate Study Of The Impact On The Makeup Of Jury Panels, Given Unequal Access to Broadband and Technology

There is currently inadequate study of the impact of remote proceedings on the make-up of jury panels, given unequal access to broadband and technology. The importance of jury diversity and equity is fundamental to providing a fair and just system. Jury diversity is not limited to race, but necessarily includes various other categories such as age, class, geography, and countless others. Initial studies have noted substantial changes in composition of juries in remote trials vs. in-person trials.¹¹ Because of the infancy of these studies, it remains unclear whether remote trial afford the parties a representative cross-section of the community. Again, given these uncertainties, non-consenting parties should not be forced to trial online.

We sincerely appreciate the opportunity to submit these preliminary comments and look forward to continued involvement with honing these amendments to ensure that our Court Rules reflect a fair and pragmatic litigation process for all in our state.

Sincerely,

Michael Chait
Chair, WDTL Rules Committee

¹¹ Thomas O'Tool, Ph.D., Jury Pool Differences with Remote Jury Trials, Sound Jury Consulting (Feb. 24, 2021), available at <https://soundjuryconsulting.com/jury-pool-differences-with-remote-jury-trials/>

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Dear Madame Clerk of the Supreme Court,

Please see the attached comments to the proposed amendments to CR 39.

Kind regards,

Maggie

Maggie S. Sweeney
Executive Director



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