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December 29, 2021

VIA EMAIL
supreme@courts.wa.gov

Erin L. Lennon
Clerk, Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed CR 39 Amendments

Dear Ms. Lennon:

I am the Chair of Witherspoon Kelley's Litigation Department and write on behalf of the firm to comment on the CR 39 amendments proposed by the King County Superior Court for remote civil jury trials. As a firm that has actively litigated cases since its founding in 1885, Witherspoon Kelley is opposed to any proposal that allows the court, over objection, to order a videoconference trial.

For good reason, the Civil Rules have long reflected the importance of in-person trials, which cannot be faithfully replicated by videoconference technology. As set forth below, the experience with remote trials in Spokane County does not mirror that of King County. In the experience of the litigators in this firm, videoconference trials diminish the ceremony and decorum rightfully due to civil judicial proceedings. They also reduce public access to judicial proceedings and impair or fully negate a juror's ability to perform the essential fact-finding function of assessing the parties and witnesses.

The Spokane County Experience Does not Mirror That of King County.

While videoconference trials have been embraced as a success in King County, that is not the case in Spokane County. The few videoconference trials of which we are aware yielded (admittedly anecdotal) comments from two experienced Spokane County Superior Court Judges regarding the various problems attendant to video trials including the inability to personally monitor the parties, witnesses and jury.

The skepticism of videoconference trials held by our firm's litigators and other practitioners in Spokane County has been shared by other notable jurists and practitioners throughout the state. Last June, Judge Coughenour, who has served on the United States District Court for the Western District of Washington since 1981 and as a King County trial lawyer before that, authored an Op-Ed in the Seattle Times on Zoom/videoconference trials. Two paragraphs in that piece bear repeating. As to the location of a trial, Judge Coughenour wrote:

The venerable courthouse, with its majestic halls and stately courtrooms, engenders a respect for the rule of law upon all that enter. This is a place where life-changing decisions happen. Holding court on Zoom is like church in a supermarket parking lot. There's a reason that parishioners who tried it during the pandemic were eager to return to their sanctified spaces – the experience is different. The same is true for courts. Remote proceedings cheapen and trivialize the sacred ceremony that is a trial.

As to juries, Judge Coughenour wrote:

My greatest fear, though, is the impact of remote proceedings on the jury's critical role in our justice system. An impartial, observant and engaged jury is a necessity. It is the ultimate finder of fact and the seeker of truth. A remote juror is inherently different from one who serves in person. There are physical cues and a rapport between parties that a juror can only fully observe and appreciate in person. But this is far from the only issue. Whether it be checking email, making purchases, or simply surfing the internet, we all have been guilty of multitasking during an online meeting. This is an issue. A juror's engagement and focus must remain on the matter at hand.

The fears articulated by Judge Coughenour have been the reality experienced by practitioners in Spokane County attempting to navigate the challenges of remote videoconference trials. While this does not diminish the success enjoyed by those practicing in King County, it underscores that one size does not fit all and that the convenience of technology does not necessarily translate to a better result.

The Existing Rules Adequately Balance the Benefits of Videoconference Technology with the Importance of In-Person Proceedings.

In response to the COVID-19 pandemic, courts have enacted emergency orders providing for remote proceedings, including trials by videoconference. Such measures are permitted by the Civil Rules, which allow for remote proceedings where good cause and compelling circumstances so require.

However, the Civil Rules also reflect the deference rightfully due to in-person proceedings. For example, CR 77(j) requires that "all trials upon the merits shall be conducted in open court." Likewise, CR 43 states that, absent good cause and compelling circumstances, "in all trials the testimony of witnesses shall be taken orally in open court."

Notably, the 1996 Notes of the Advisory Committee to Federal Rule of Civil Procedure 43, upon which CR 43 is modeled, caution against an overreliance on testimony via "contemporaneous transmission from a different location":

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and presence of the fact finder 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.

King County and its judges are to be lauded for their transition into videoconference trials as a result of the ongoing pandemic. Nonetheless, this solution to a persistent but, ultimately, temporary pandemic should not be the basis to erode our most fundamental traditions by mandating post-pandemic remote civil trials.

Thank you for the opportunity to comment.

Very truly yours,

WITHERSPOON • KELLEY


WILLIAM M. SYMMES

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Please find attached a letter from Mr. Bill Symmes.

Janet Jackson, PLS | Witherspoon • Kelley
Paralegal to William M. Symmes and Amy M. Mensik
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