

To: Supreme Court Rules Comments

From: Ken Henrikson #17592

Re: My comment to proposed GR 41 Remote Jury Selection

12/28/21

After reading the other comments, I see GR 41 as unenforceable, so I suggest adding a *new section 6 to your GR 41*:

6 (a) After informing the parties and potential jurors as provided in paragraphs (1) through (5) above, the court shall inform the parties that any juror who fails to comply with said instructions may be subject to challenge for cause as provided under RCW 4.44.150 (2).

6 (b) Upon such challenge, or on its own motion, the court, shall apply the criteria under RCW 2.36.110 to determine whether to excuse the juror.

90% of baseball is who's pitching. 90% of a fair trial is who's on the jury.

The purpose of voir dire is to identify disqualified jurors.

The court "manifests" (uncovers) the jurors who are unqualified ("unfit") under the statutory fitness criteria* in [RCW 2.36.070](#).

[RCW 2.36.110 requires court to excuse the following jurors as statutorily "unfit".](#)

1. bias,
2. prejudice
3. indifference
4. inattention
5. any physical or mental defect

"Manifested" via:

conduct that is incompatible with proper and efficient jury service.

Remote Voir Dire rules should give you the same exposure to identify unfit jurors as does in person Voir Dire:

Physical reactions to anything the litigants, courts, or other jurors say that manifest any of the above statutory manifestations of fitness.

The court, parties, and public are present to see when a juror is distracted and what is distracting them.

Off camera distractions prevent court and parties from distinguishing whether jurors are reacting to the court proceedings or something else, so the parties miss asking follow ups on reactions. Remote jurors are near family with sympathies/ideologies naturally hostile to one side. Certain verdicts can disappoint friends and families and their social norms.

Temptations to indulge in multiple screens, respond to Email, social media, etc. need not be intense without a chance of getting caught.

Common sense sees the violations described in the comments (jurors playing video games and texting) are just a sample. Certainly texting while adjudicating would be even more routine than texting and driving, with consequences for inattentiveness are equally devastating.

In order for the court, parties, and jurors to take the rules seriously, my suggested section (6), like Miranda warnings, serves to credibly instruct that the rules will be taken seriously by and to protect everyone. The act of such instruction alerts the parties, and the court itself of its duty of vigilance to take up the slack that remoteness creates.

Texting during voir dire, not being attentive enough to physically or verbally react in such as way to manifest bias or fitness, has grave consequences which cumulatively corrupt the trial process. i.e. What if a lawyer asks an apparently sleepy or inattentive juror if he agrees with what the previous juror just said? Some lawyers will ask a juror who is present and thinks they didn't pay attention. It's a difficult decision because you don't want to embarrass a juror but don't want a senile juror either. That dilemma is just as acute in remote voir dire with its greater challenge to detecting attentiveness and distractions.

One example: many find the “beyond a reasonable doubt” standard is mere slogan not to be taken seriously, so he’s visibly eye-rolling and snickering upon hearing it. Such juror could be disqualified. A distracted remote juror wouldn’t “manifest” such bias/prejudice in his “conduct”.

I’ve served on juries and administrative panels where during the hearings and even deliberations, the chair repeatedly admonishes my fellow “professionals” to turn off phones and stay off the internet. If professional lawyers in positions of trust are reminded to put away distractions, then surely these lay jurors need as much encouragement, which the remote “honor system” lacks.

Would you like to have your child’s life depend on jurors who are playing video games during her homicide trial?

We know the reluctance to call out a juror on the possibility that he isn’t paying attention, so the suggested section (6) gives lawyers permission to do so as their unpleasant duty. Paragraph (6) informs that jury that the court takes GR 41 voir dire as seriously, and so should the jurors themselves participate in its enforcement as the right thing to do.

Lawyers with reasonable suspicion should to ask the court to ask a juror to pan the room or explain odd behavior of furtive glances and typing. This helps jurors comply with the rules. In one case, a jury room had a newspaper comic strip on the wall mocking the insanity defense. Jurors should be made aware that it’s not worth circumventing the rules.

Lawyers should feel free to “trust but verify”. With in-person voir dire, you can, without embarrassment, identify jurors who suffer from some form of intoxication, dementia, or inability to sit up straight or be alert, which cannot be detected if you can only see their head on a screen. Statutory fitness criteria don’t manifest themselves as readily if the jurors aren’t impressed with how seriously the court and parties take the GR 41 rules. I only suggest keeping everyone on the same page as this:

(a) We’re serious about it. We won’t overlook it even though it looks like no chance of being caught. Even lawyers have a hard time with distractions.

(b) Examples of injury a juror inflicts on innocent parties for non-compliance.

(c) All parties and the court will be watching to see if you manifest any signs of distraction and may have you pan your camera or do what is needed to assure us you are complying.

(d) If you violate these rules, the reasons why it should disqualify you.

(e) All parties have a right and duty to bring any violations to my attention so don't blame them.

Here, your commenter proposes the added enforcement language to inform the parties and court as to the enforcement process everyone can expect consistent with the statutes.

AFTER THE EXISTING LANGUAGE BELOW:

1. Confirm that all potential jurors can see and hear the court and parties;

2. Inform potential jurors that their cameras must remain on and that they must remain in camera view throughout jury selection;

3. Instruct potential jurors that (i) their full care and attention must be on jury selection, (ii) that all other devices should be turned off during jury selection, and (iii) they should be alone in the space in which they are participating in jury selection unless extraordinary circumstances are present that the court finds sufficient to allow the jurors participation;

4. Inform the parties and potential jurors that any visual, video, or audio recording of the hearing, other than the official record is prohibited absent court permission; and;

5. Prohibit jurors from using filters or virtual backgrounds or other programs or applications to alter their appearance in any way or the appearance of the space in which they are physically located while participating in jury selection.

New section 6 to your GR 41:

(a) After informing the parties and potential jurors as provided in paragraphs (1) through (5) above, the court shall inform the parties that

any juror who fails to comply with said instructions may be subject to challenge for cause as provided under RCW 4.44.150 (2).

(b) Upon such challenge, or on its own motion, the court, shall apply the criteria under RCW 2.36.110 to determine whether to excuse the juror.

Another possibility would be to make this a WPI instruction, train judges to put that in their own court's rules on how it conducts V.D., including some instruction to make sure no officer of the court is intimidated by the prospect of being made the bad guy for enforcing GR 41.

NOTES:

*RCW [2.36.110](#)

Judge must excuse unfit person.

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, **has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW [4.44.160](#)

General causes of challenge.

General causes of challenge are:

(1) *A want of any of the qualifications prescribed for a juror, as set out in RCW [2.36.070](#).*

(2) *Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.*

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
Subject: FW: Comment on proposed GR 41
Date: Tuesday, December 28, 2021 4:48:56 PM
Attachments: [GR 41 comment jury remote xc q enforcement.docx](#)

From: HENRIKSON [mailto:henrikson@prodigy.net]
Sent: Tuesday, December 28, 2021 4:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed GR 41

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, **DO NOT DO SO!** Instead, report the incident.

To: Clerk of the Supreme Court of Washington (Rules Comments)

From: Ken Henrikson #17592

Re: My comment to proposed GR 41 Remote Jury Selection

12/28/21

Please consider my attached comment to proposed GR 41, due on 12/29/21. It is after closing on 12/28/21 at 4:40 PM so I assume you will receive this in order to be considered submitted by 12/29.

--KH