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December 21, 2021

The Honorable Steven C. González
Chief Justice
Supreme Court of the State of Washington

Re: Proposed Amendments of CR 39 and New GR 41 to Allow Civil Trials and Jury Selection by Videoconference

Dear Chief Justice Gonzalez:

The King County Bar Association (KCBA) appreciates the opportunity to comment on the proposed amendments to CR 39 and to new GR 41 which would, together, allow the court to conduct any civil trial and jury selection in any case (civil or criminal) by videoconference. One of the missions of the KCBA is to work with the judiciary to achieve excellence, equity, and accessibility in the administration of justice and the KCBA submits these comments in furtherance of that mission.

The KCBA currently has over 5,600 members who litigate every type of case tried in every superior courthouse of our state. We have had a chance to review the proposed amendments to the rules and had an opportunity to collect feedback from our members. The KCBA's Judiciary and Litigation Committee has also performed an in-depth review of the proposed amendments and has weighed in on them. KCBA starts from the position that conducting voir dire and civil trials by videoconferencing during the COVID-19 pandemic has served an important function. The KCBA recognizes and acknowledges some of the benefits of remote jury selection and potential advantages of conducting civil trials remotely while courts throughout the state address the backlog of cases that the pandemic has created. That said, however, the KCBA is concerned about the way in which these proposed amendments were developed and presented for this Court's consideration and indeed some of the unintended consequences of the proposed amendments. The KCBA thus recommends that the Court commission a work group—with representation by all stakeholders—to study the issues implicated by these rule changes and make recommendations to this Court.

As jury selection has evolved in our state courts, we have moved from individual juror-by-juror questioning to conducting examinations of the panel as a whole. This has allowed parties to use juror comments to test the interaction of the prospective venire and provided insight into jury deliberation dynamics. Concerns have been raised that this interactive aspect would (or could) be lost when the panel is questioned remotely. Additionally, concerns have been raised about the cost implicated in losing the solemnity of in-person voir dire and trials conducted at the courthouse. Concerns have also been raised about the willingness, or indeed ability, of individual jurors appearing through videoconference to be as focused and attentive as they would otherwise be with the variety of other matters clamoring

for their attention. Although everyone gets a chuckle from catching someone's child or pet appearing unexpectedly on screen, those distractions undoubtedly affect juror's ability to focus and detract from the importance and solemnity of voir dire. Additionally, videoconferencing may degrade access to justice for some, including for those who are low income, are visually or hearing impaired, speak a language other than English, or have limited technological access or proficiency. Courts may also lack perjury and contempt authority over out-of-state witnesses and participants and jury selection by videoconference may reduce or eliminate the ability to engage the panel members with one another, reducing the efficacy of voir dire in identifying biases and prejudices.

The KCBA recognizes that there are several potential advantages to remote voir dire and to conducting civil trials by videoconference that should certainly be evaluated in considering the proposed amendments to CR 39 and new GR 41. These potential advantages include: (a) the possibility of a more diverse jury pool (although the evidence to date is far from conclusive on this issue); (b) a decrease in the cost of trying certain types of cases because of the reduced travel and housing costs for expert and lay witnesses; and (c) the ability of persons with decreased mobility to participate in trials (as parties, witnesses, or jurors). Additionally, KCBA appreciates that the security issues specific to the Seattle courthouse of the King County Superior Court provides further impetus to these proposed rules but remains hopeful that those issues can (and will) be addressed through other means.

Given the conflict between the concerns regarding and potential advantages of the revisions to CR 39 and new GR 41, the KCBA recommends that the Supreme Court commission a work group to study the issue and expeditiously propose a course of action. Before this Court adopts any permanent rule change—affecting superior courts throughout the state—much needs to be done to determine whether, on the whole, conducting voir dire and civil trials by videoconference will improve or degrade excellence, equity, and accessibility in the administration of justice. If the work group's proposed course of action is to allow voir dire and civil trials by videoconference, it should draft and propose rules, which could certainly incorporate some or all of the proposals suggested by the King County Superior Court. In the interim, the KCBA recommends that the Supreme Court continue to allow the superior courts of each county to authorize voir dire and civil trials by videoconference, even if the public health emergency abates. Such a course of action would be consistent with the acknowledgement by the proponents of these rule changes that “as long as emergency rules remain in place, no expedited consideration is needed.” GR 9 Cover Sheet for Amendment to CR 39.

In the alternative, if this Court elects to adopt rules allowing voir dire and civil trials by videoconference on a more expedited basis, the KCBA respectfully requests the Court to consider the following:

- Implementing the rules on a test basis, by either sunseting the provisions after a fixed period or by setting a review cycle.
- Whether changing the language regarding participants being able to “see, hear, and speak with each other” is exclusionary as to certain persons given the acknowledged shortcomings of videoconferencing.
- Whether a court's considering the impact of using interpreters in its determination whether to order a videoconference trial (proposed in CR 39(d)(2)(A)(i) and (d)(2)(B)(ii)(a)) disadvantages non-English speakers.
- Whether the discretion afforded the courts disadvantages certain populations, parties, or cases.

- An option for hybrid trials in which some witnesses appear in court in person and others by videoconference.
- The weight courts should give to the parties stipulating to voir dire and/or civil trials being conducted over videoconference. The conduct of the parties over time will be the clearest indicator of whether the advantages of these rule changes outweigh the disadvantages.
- Whether the last sentence of CR 39(d)(3) is necessary or desirable.
- Issues of jurisdiction for imposing penalties for perjury by witnesses and misconduct by counsel for cases in which some or all participants are in other states and whether legislative action is necessary to secure such remedies and insure just outcomes.

As always, we appreciate the opportunity to comment on the proposed rule changes and remain ready to work closely with the Court and the WSBA to improve access to justice in our state.

Yours sincerely,



Kaustuv M. Das
President 2021-2022
King County Bar Association

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Good afternoon. Attached please find comments by the Board of Trustees of the King County Bar Association on behalf of the KCBA in relation to the proposed amendments to CR 39 and to new GR 41. The KCBA appreciates the Court's rule-making efforts and its consideration of the KCBA's comments.

Best regards.
Kaustuv M. Das
President, 2021-2022
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