

**Superior Court of the State of Washington
for the County of King**

JAMES E. ROGERS
Presiding Judge

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December 29, 2021

Clerk of the Court

Washington State Supreme Court

Re: Proposed Rules for Comment: Judge Rogers and O'Donnell additional comments for the adoption of GR 41 and CR 39 (amended)

Dear Clerk of the Supreme Court,

On behalf of King County Superior Court, the undersigned submit this letter in favor of the adoption of GR 41 and amendment of CR 39. We have reviewed the comments submitted to these proposed Rules and have the following additional comments for your consideration.

What We Are Requesting

Proposed GR 41 proposes remote voir dire in **all case types**. In this letter, we address why we think it should be adopted and address some concerns about the proposed rule.

However, due to the continuation of the pandemic, and its uncertain future, and the unprecedented COVID criminal backlog, **we first ask** that the Supreme Court act outside of the rule-making process and keep virtual voir dire for all case types in place, through emergency order, for the duration of 2022.

For proposed amended CR 39 (trial by videoconference), we have substantially amended our proposal in response to a variety of comments we have received and our own observations during the comment period. Because of our proposed changes, we ask that the time period for consideration of this redrafted rule be extended to allow additional comments and that an appropriate date be set for its consideration by the Court. At the same time, we request that emergency orders remain in place to allow virtual civil hearings, including family law matters, to continue throughout 2022.

A Brief Description of Virtual Voir Dire

Many of the comments to our proposed Rule lead us to conclude that there is a misunderstanding either about what we are proposing or how video voir dire works. As background, we start with a brief description of how video voir currently operates in King County Superior Court.

Approximately five weeks before the trial date, jurors are summoned by mail and they respond either by telephone, email or through a web “portal.” This portal includes a survey on juror diversity and provides videos on the introduction to jury service. We currently summon just under eight thousand jurors a week, and with additional added panels, summon about four hundred thousand jurors a year. By contrast, before the pandemic, for in-person voir dire where we are limited by physical space, we would summon about four thousand people a week.

Managing the “virtual” jury venire is time intensive, because of communication and the increased numbers of people we summon. Prior to the pandemic, many questions were answered in person and at the jury room counter. These questions are now answered by email, by phone or for a few, in person (e.g., when are we starting? How long will my trial take? Can I defer?). Also, once the venire panel has passed off to the trial court bailiff, they have to manage communication with a far larger number of jurors than previously. During the voir dire process (and during all of a virtual trial), great care is taken to make sure all are connected and paying attention.

Venires are then assigned to trial courts, usually about one hundred and twenty jurors at a time. This is a much higher number than in-person voir dire, between 30 and 50 jurors, as a result of COVID’s impact on panel attrition. Once assigned to a court, the trial judge sends out questionnaires to the venire. Jurors respond to the questionnaire electronically or they fill them out, if they come in person. We now have questionnaires in every single case which is a significant change in practice, especially in criminal cases. In the past, many criminal and civil cases had no questionnaires and trial judges used simple bio forms to obtain minimal information about jurors. Now, the lawyers have far more information, through the questionnaires, for every single case before they begin their questioning.

Voir dire, or the actual questioning of jurors, now takes place in two ways. In the first, most jurors in the venire appear in approximately fifteen person panels (at a time) over Zoom, with the parties and lawyers also on Zoom. The voir dire process is broadcast on the courtroom monitor screen for anyone in court to see, including interested members of the public. These 15 person Zoom panels are obviously smaller than past in-person panels. As a result, the parties are able to question far more people. This choice is deliberate. It allows the Court and counsel to ensure that all people may be seen and that all pay attention. The lawyers are far closer to the jurors than in-person voir dire because jurors’ faces are so much closer over the video screen. For jurors who do not want to appear in person but who do not have access to technology to allow

them to appear remotely, King County provides both equipment and private space for those jurors to appear via Zoom for jury selection and sometimes trial.

In the second, some people appear in person for voir dire, either by choice, convenience or necessity. They fill out the same questionnaire in person and are questioned in person. We note here that the Pew Research Center notes the ninety seven percent of all Americans say they own a cell phone, more than own a car. [Demographics of Mobile Device Ownership and Adoption in the United States | Pew Research Center](#). This has mirrored our experience in King County: very, very, few jurors choose to appear in person.

After conducting enough 15 person panels (usually between 3 and 4) the lawyers then exercise their peremptory challenges. The Court then swears in the selected jury. For criminal cases, all jurors, once selected over Zoom, attend trial in person. For civil cases, jurors may hear the case virtually, come in person for certain parts of trials, or come entirely in person. These choices are largely governed by public health considerations.

Without the Supreme Court authorizing some trials to be conducted remotely, civil justice would have come to a stop in King County. Virtual voir dire and virtual trials have saved civil justice during the pandemic. Jurors have impressed all of our judges with the seriousness in which they take their civic duty, even if it is occurring remotely.

At the beginning of the pandemic, remote voir dire took a great deal more time for counsel and the court than in person voir dire. As lawyers and judges gain practice and experience, their ease and skill conducting video voir dire has improved dramatically. For many courts, there is little difference between the time to select a jury remotely versus in person.

For the jurors' time, it is a completely different, transformed, experience. Instead of being in a room for two days waiting to be called, jurors spend about two hours virtually from office or home. As part of a larger study of our new business practices, we have surveyed our jurors and they love this process as compared to in-person jury selection (many now having done both). It is much easier for jurors to manage work, school, the kids, lunch, or all of the above, over video voir dire than in person voir dire.

There has been one unanticipated, significant benefit to remote voir dire. Formerly, many trials, both criminal and civil, had to wait hours, days or weeks for the Court to summon enough jurors. Parties would report for trial, hold pretrial hearings, and then suddenly a significant murder or sexual assault case would "take" all of the jurors. Lower priority criminal and all civil cases would have no jurors to call for the voir dire process. This delayed many cases and even resulted in many continuances due to lawyers' schedules.

That problem has been largely eliminated through video voir dire. No case waits for jurors for these periods of time because we are not limited in our summonses by the physical space to house the venire panel. The result is that more cases go to trial more quickly, even if some judges still take longer in virtual voir dire. We always have enough jurors, the convenience to them to do their civic duty has increased dramatically, and we are seating fair, conscientious, hardworking citizens on these cases during this pandemic.

For all of the misery that COVID has caused, this has been a major improvement by the judiciary. Our Courts are operating much more efficiently in jury selection while still allowing litigants their opportunity to fairly and fully consider a juror's qualifications and appropriateness to serve.

One final, and perhaps more subtle, benefit of video voir dire has been that lawyers must be less reliant on 'body language' or intuition about a juror in making their decision whether to seat them. The jurors' responses to questions, both written and oral, are guiding peremptory challenges. This practice, it seems, is consistent with GR 37 and the presumptive prohibition on certain unspoken, but historically discriminatory, factors that have been employed when exercising peremptory challenges. Video appearance focuses everyone's attention on the answers being provided, rather than subjective interpretations about someone's physical posture.

This, it seems to us, is a very good thing.

Proposed new GR 41 – Video Jury Selection

We request that the Supreme Court to adopt GR 41 for all case types, including criminal. We recognize this would be a major change to current practices. We also recognize that it is important for a full consideration of this issue to occur.

At a minimum, we ask that the Supreme Court extend its emergency order allowing remote/virtual voir dire through 2022. Neither COVID or the case backlog appear likely to vanish during the next year and video voir dire is far safer for public health as it decreases the number of people in each courthouse. As we noted above, remote voir dire allows the court to get more cases out. This is critical in the midst of an almost overwhelming criminal backlog. Since federal COVID criminal backlog funding lasts only through 2022, we need this year to make progress in the backlog of criminal cases. We also need to be able to keep civil justice alive. Video voir dire will help enormously with this effort.

But we also hope that the Court will adopt our proposed rule in its entirety. This is an improvement that Washington's judiciary should embrace and give local courts the flexibility to adopt video voir dire if it suits their jurisdiction.

Finally, it is very important to understand that remote/video voir dire is not a cost free add-on to in person voir dire. It takes additional dedicated staff to manage the many jurors “in the cloud.” No court, including King County Superior Court, can afford to hold some trials with remote voir dire and others with fully in-person voir dire. That is far too expensive and cumbersome, in staff costs and time. Thus, if the Court decides to separate criminal from civil in adopting GR 41, this decision will effectively end one of the most important innovations of the pandemic: remote voir dire for all case types. We cannot afford (in money and time) to split criminal and civil jury selection between remote and in person panels. After being the nation’s leader during the pandemic, we will return to business as usual, but this will be a significant step backward.

For GR 41, the remainder of this portion of our letter addresses some comments to the proposed rule.

Reports from King County judges since we started video voir dire shows that our juries are more diverse than ever before, but we acknowledge that there is a great deal more study needed. Frankly, even if future results show that this process results no change, the benefits still outweigh the old system.

As we noted earlier, jurors greatly favor virtual voir dire, according to our surveys. We cannot over emphasize the service to the public this provides. People want to do their civic duty as jurors, even during a pandemic. With almost no dissent, jurors have embraced this new format enthusiastically. The benefit to them is profound.

Some of the comments state that virtual voir dire should only be allowed when a criminal defendant or party in a civil case where there is a statutory right to a lawyer, waives the “right” to in-person voir dire. We are not convinced that such a right exists. Early in the pandemic, some defense lawyers made this very argument, that defendants had a right of confrontation in jury selection.¹ They argued that prospective jurors were in some sense “accusers.” Jurors are fact finders. They are not accusers. There is no constitutional right to in person voir dire. If there was, we are confident that this Court would have not allowed it during the pandemic.

¹ In King County Superior Court, there are some lawyers who object to every use of video in every criminal and civil proceeding. We have come to accept that they will never agree, regardless of any safeguards put into place. The objections have continued throughout the entire pandemic. We agree that procedural safeguards are very important but we fear that this notion of waiver, as opposed to safeguards, is really proposed as a way to end virtual voir dire.

In these comments, we do not see commentators repeating this argument. Instead they state that procedural justice requires safeguards, and with this statement, we completely agree. There are already existing rules providing such safeguards. CrR 3.4(e) includes extensive safeguards for video hearings that include release decisions, which are frequently cited as one of the most important decisions made in a case.

King County Superior Court agrees to any such safeguards as deemed necessary while still allowing jurors to appear remotely. Courts across the State have many years of experience with procedural safeguards in virtual hearings, as well as experience with CrR 3.4. We have, and can continue, to make this a successful experience for the parties, lawyers and citizens doing their civic duty.

In closing, we refer you to the comments in the Access to Justice Board's submission. December 13, 2021. We agree with many of these comments and the writers take a thoughtful approach to the issues presented.

Proposed amended CR 39 – Video Trials

CR 39 is the proposed rule allowing trials by video. CR 39 is a civil rule, not a criminal rule. We are not proposing a criminal video trial rule. Some of the commentators appear confused on that point.

We have significantly changed our original rule. On further consideration, we believe that the best method is to only allow the Presiding Judge of a County to make the decision for virtual trials when a litigant or the litigants do not agree on whether to proceed to trial by video.

The revised proposed Rule allows for individual trial judges to order virtual trials when that format is agreed upon, but affords that the Presiding Judge resolves any disputes whether to proceed with a video trial.

As noted above, we recognize that this new language comes at the end of the comment period and we re-emphasize our request to extend the current Emergency Order for video trials for the entirety of 2022. It is highly likely that without this extension or continuation, civil trials will be all but eliminated in King County in 2022 given our criminal case backlog.

Video trials have been a life line for civil justice and we encourage the Court to allow this process to continue as we work through the case backlog and all of the uncertainties that COVID presents.

Our proposed revised language is as follows:

**Proposed Amendments to CR 39
TRIAL BY JURY OR BY THE COURT**

(-) – (c) [Unchanged.]

(d) Videoconference Trials

- (1) A trial may occur over videoconference, in which all participants can simultaneously see, hear, and speak with each other. The video and audio should be of sufficient quality to ensure participants are easily seen and understood. The court shall ensure that all hearings conducted pursuant to this rule are open to the public and that the public shall be able to simultaneously see and hear all participants.
- (2) If the court or a party proposes to have a trial held by videoconference, a hearing shall be scheduled at least 30 days before trial, with at least 7 days' notice to the court and parties. At the hearing, the court shall announce its decision on a trial by videoconference and address appropriate safeguards. The parties may agree to this hearing occurring fewer than 30 days before trial.
- (3) If a party objects to a videoconference trial, there is a rebuttal presumption that the trial or appearance will not occur by videoconference. The decision to hold a videoconference trial when not agreed to by a party or the parties must be made by the Presiding Judge of the court in which the case has been filed. The presumption that a trial will not occur by video conference may be rebutted if the Presiding Judge finds that a videoconference trial is necessary to achieve substantial justice. In making their decision, the Presiding Judge shall consider the factors outlined in paragraph (4) of this rule, and any other relevant circumstances, including the court-wide impact of video conference trials. The Presiding Judge shall make written findings outlining their reasons for ordering trial or appearance or testimony by videoconference.
- (4) Before ordering any videoconference trial, the trial court or Presiding Judge shall consider the nature of the case, the length of time trial has been pending, the availability of witnesses and preservation of evidence, the number of witnesses, the impact of videoconferencing on the presentation of testimony and evidence, the parties' access to necessary technology, the need for interpreting services, prejudice to the parties caused by delays in commencing the trial and any other relevant circumstances.

This revised proposed rule allows lawyers to stipulate to a virtual trial or allows the Presiding Judge² to allow a virtual trial in a disputed case, based upon certain factors.³ The rule provides a process and procedural safeguards for any virtual civil trial-as almost all commentators have requested.

Parenthetically, we agree with the Court Recovery Child Welfare Committee of the Board for Judicial Administration Court Recovery Task Force, that it is far more likely that post-pandemic, civil trials will be hybrid, to the benefit of the parties, and not all virtual. CR 43 (a)(1) already authorizes witness appearances in civil cases. We see criminal defense lawyers in our courts calling witnesses virtually (no, this rule does not apply to criminal cases-this is just an example). Nevertheless, this rule is required for many case types that are likely, in our experience, to remain virtual as a matter of practice, such as family law, and for other circumstances that may arise.

One of the comments from the WSBA Committee on Public Defense proposes that a rule requiring waiver must apply where there is a statutory right to counsel (in a civil case).⁴ The basic argument is that procedural justice is important and must be safeguarded. We agree. But the pandemic was not the first time that many of Washington's trial courts have conducted virtual hearings in civil cases. Washington Courts held virtual proceedings for years in many courts when significant liberty interests are at stake. For example, pre-pandemic, and for many years, the King County Superior Court Involuntary Treatment Act courts have held either entirely virtual or hybrid systems in alliance with hospitals across King County, allowing patients to remain in their hospitals. Another example of the benefits of virtual trials during the pandemic has been dependency cases. There have been many, many virtual dependency trials that have reached fair and timely conclusions because of the ability to conduct remote trials. It would be deeply counter-productive to eliminate this option for Courts once the pandemic ends.

We submit that the courts have been careful on matters of procedural justice and responsive to substantial stakeholder comments and input, predating the pandemic. Many courts also hold virtual criminal proceedings already and it is not clear whether the comments here are intended to import a waiver requirement into CrR 3.4. We believe that would be a mistake and that it conflates a proposed civil rule with a criminal law concept.

² This is the major change in our new proposed rule.

³ RCW 71.05.820 already authorizes video for all ITA hearings.

⁴ The proposed waiver request is also peculiar because it is suggested to apply to cases involving a statutory right to a lawyer. It is a strange notion to create a two class system dependent on the legal right to counsel.

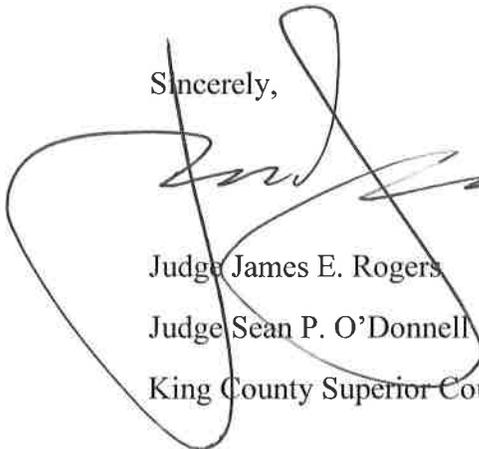
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We wish to point your Court and the Supreme Court Rules Committee to the Access to Justice Board's submission and the comments of the General Civil Litigation Committee of the Court Recovery Task Force. The comments there are helpful in guiding this analysis.

In summary, we request that additional comment time be allowed for our revised proposed Rule on trial by video conference so that it may be fully considered by the public and justice system stakeholders. We ask that in the interim you extend the Emergency Order for the entirety of 2022 to allow video trials to continue in civil and family law cases, as they have been conducted so successfully during this terrible pandemic.

Sincerely,



for both Judges

Judge James E. Rogers
Judge Sean P. O'Donnell
King County Superior Court

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To: [Linford, Tera](#)
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From: Rogers, Jim [mailto:Jim.Rogers@kingcounty.gov]
Sent: Wednesday, December 29, 2021 2:18 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: O'Donnell, Sean <Sean.ODonnell@kingcounty.gov>
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Dear Clerk of the Court,

Please accept this letter comment to the proposed rule GR 41 and proposed amended rule CR 39. You hopefully will receive the mail version shortly, but with the uncertainty of mail in light of the snowstorms, we send this electronically as well.

Please forward a copy of this to Chief Justice Gonzalez, and the chairs of the Rules Committee, Justices Yu and Johnson.

Happy New Year.

James (Jim) E. Rogers
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