

WASHINGTON STATE BAR ASSOCIATION

Office of the Executive Director

November 9, 2021

Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314

Dear Justices Johnson and Yu,

We are writing to share the Washington State Bar Association Council on Public Defense's comments to the proposed new GR 41 and amendments to CR 39. The Council's full comment is attached. This position has been approved through the WSBA's Legislative and Court rule comment policy and is the position solely of the Council on Public Defense.

The Council on Public Defense unites members of the public and private defense bar, impacted persons from the criminal and family law courts, the bench, elected and appointed officials, prosecutors, and the public to address new and recurring issues impacting the public defense system.

The Council appreciates the Court's consideration of this comment.

Sincerely,



Terra Nevitt

Executive Director

Cc: Judge Brian Tollefson, President
Travis Stearns, Chair, Council on Public Defense
Bonnie Sterken, Staff Liaison to the Council on Public Defense



WSBA Council on Public Defense Comments to proposed new GR 41 and amendments to CR 39

If the Court is to adopt the new GR 41 and amendments to CR 39, the following language should be included in both rules:

In all cases where there is a constitutional, statutory, or otherwise provided right to counsel, virtual proceedings under GR 41 or CR 39 must require the consent of the defendant or civil respondent, following an informed on-the-record waiver of in-person proceedings.

The Council on Public Defense recognizes there may be circumstances where virtual proceedings benefit everyone. However, to ensure the rights of those entitled to counsel, the proposed new rule GR 41 and amendments to CR 39 must include the requirement that virtual trials and voir dire can only go forward after the defendant or respondent has made an informed on-the-record waiver of in-person proceedings.

Because the Council only comments where there is a right to counsel, these comments focus on cases where there is a constitutional, statutory, or other legal right to counsel, including criminal matters, 71.09 and 71.05 proceedings, contempt of court, and dependency and termination matters.

Procedural Justice

Where there is a right to counsel in criminal or civil matters, defendants or respondents should get the choose whether to proceed virtually. There may be very good reasons for holding court online, but there are many times when there are not. Repeatedly, the Washington Supreme Court has recognized the importance and constitutional imperative of in-person proceedings.

Being in the same room as witnesses, counsel, jurors, and the court creates more fair proceedings. Jurors can gauge witnesses better, lawyers are more able to communicate with their clients, and judges can better assess those who appear before them.

Requiring a waiver from the defendant or respondent allows that person to determine whether a virtual proceeding can be fair to them.

Technological Capacity

While access over the internet has improved, equal access to technology should also cause this Court to require a waiver. Many parts of Washington lack access to reliable and speedy internet. Even where the internet is available, indigent defendants and respondents may not have easy access to high-speed internet or tools to access it or may not be able to afford it. Jurors and witnesses who appear before the court may have the same issues. Too often, anyone who has participated in a video hearing or meeting can recall a frozen screen or garbled audio. While this is fine for a meeting, it is not acceptable for court. Without assuring equal access to jurors with technological resources, virtual voir dire or trials should not be mandated.

It should also be recognized that not all litigants have the same comfort with technology. While clients with resources may not have trouble hiring lawyers with modern computers, multiple screens, and spreadsheet software, indigent clients cannot be assured their attorneys have the resources to conduct a virtual voir dire or trial competently. Before either rule is implemented, more study should be done on their impact on poor communities without high-speed internet access and how that will create an additional barrier between poor and wealthy communities.

Effective Trials

Remote voir dire and trials can impact a person's right to a fair trial and effective assistance of counsel. Courts conducting virtual trials with open access must ensure that those excluded from hearing testimony, such as additional witnesses, are not present. The rules lacks safeguards to assure an accurate record for appeal, particularly where it cannot ensure that prospective jurors cannot fully hear and participate in the proceedings.

A lawyer's comfort with technology can also be a barrier to a fair trial. Lawyers who are uncomfortable with technology will not be as competent as those who are. Where assigned counsel represents a person, courts should ensure the competency gap is not widened.

Technological literacy can also impact participation by potential jurors. Like anyone else, potential jurors who do not have the technological capacity or tools to engage in online voir dire or trial effectively may be unfairly excluded if trials are moved online.

Potential Juror Distraction

In a courtroom, jurors must pay attention to the proceedings. Where they do not, the judge can quickly remedy the problem. At home, jurors have many distractions, from work and family obligations, to pets running across their laps, to deciding what they want to eat from their refrigerator. Likewise, it is easy to minimize a virtual meeting screen and simply surf the internet without anyone knowing whether that juror is actively engaging with the hearing. Neither of these proposals addresses how to remedy this problem with virtual proceedings. Without some measures on how to deal with distracted jurors and venire panels, courts should not mandate these rules. In short, a defendant has the right to be able to see that jurors are paying attention. There is simply no way for that to be guaranteed with virtual voir dire and trials.

Procedural Integrity and Privacy Concerns

Virtual trials and voir dire create procedural-integrity concerns that do not exist when court is conducted in person. Links to proceedings can be shared with people, and those people are able to record and circulate the proceedings. These problems compromise the privacy of the litigants and the jury pool, who should not have their faces and statements recorded and disseminated without court approval. Before this rule is adopted, provisions should be put into place to protect privacy concerns of those who will appear or participate in the video trials and voir dire and to ensure the integrity of the proceedings.

Workload Issues

In many counties, virtual court voir dire has lengthened the time it takes to try a case. The current Indigent Defense Standards do not account for this increased time. Indigent Defense Standards cap the number of cases per lawyer and not the amount of time worked on each case, so where the time per case increases, this Court may be required to modify the Indigent Defense Standards to account for this change in procedure.

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Attachments: [image001.png](#)
[2021.11.9.CPD Comments GR 41 and CR 39.pdf](#)

From: Bonnie Sterken [mailto:bonnies@wsba.org]
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Cc: Travis D. Stearns <Travis@washapp.org>; Diana Singleton <dianas@wsba.org>; Terra Nevitt <terran@wsba.org>; BHMTollefson@outlook.com; Jason Schwarz <Jason.Schwarz@co.snohomish.wa.us>
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Good afternoon,

Attached, please find comments from the WSBA Council on Public Defense regarding the proposed new GR 41 and amendments to CR 39.

Take care,



Bonnie Middleton Sterken | Equity and Justice Specialist

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Pronouns: She/Her

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