

December 28, 2021

Justice Charles Johnson, Co-Chair
Justice Mary Yu, Co-Chair
Washington Supreme Court Rules Committee
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Washington Coalition for Open Government Comments to Proposed Changes to CR 39 and CrR 3.4, and Proposed New GR 41

Dear Justice Johnson and Justice Yu:

On behalf of the Washington Coalition for Open Government (“WCOG”), I write to express concerns with the proposed amendments to CR 39 (permitting civil trials by videoconference) and CrR 3.4 (permitting remote appearances by criminal defendants), as well as proposed new GR 41 (providing for jury selection via videoconference).

WCOG believes any court rule providing for remote or virtual judicial proceedings must recognize, and give practical meaning to, the constitutional requirement that “[j]ustice in all cases shall be administered openly.” Const. art. I, § 10. In particular, the rules must assure that the public’s right of access to virtual proceedings—including its ability to attend, review and record such proceedings—is protected in no less a manner than it is for in-person proceedings. As currently drafted, all three proposed rule changes fall short of this standard. They should not be adopted unless protections for public access are added.

The proposed revision to CR 39 is especially problematic. The proposal permits video bench or jury trials as long “all *participants* can simultaneously see, hear, and speak with each other.” Proposed CR 39(d)(2)(A), (B) (emphasis added). But the rule fails to mention the ability of the *public* to see and hear the trial. In fact, the rule does not mention public access at all. The proposed rule must be clarified to make clear that video trials cannot proceed unless the public is guaranteed the means to attend the proceedings, as required by *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982) and other constitutional authority.

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CR 39(d)'s silence on public attendance at video trials is particularly glaring in light of the other proposed rule changes on virtual proceedings, both of which *do* expressly recognize the need to accommodate public access. The pending proposed revision to CrR 3.4, allowing for remote appearances by defendants in criminal proceedings, requires that any such appearance "shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge." Proposed GR 41(e) provides that where jury selection is conducted via videoconference, the hearing must be "open to the public and ... the public shall be able to simultaneously see and hear all participants." This Court should not adopt CR 39(d) unless it is revised to add similar language guaranteeing the public's right of access to any videoconference trial.

Proposed CR 39(d) also should be revised to require courts to consider the public's interest in access in its assessment of whether to allow a remote trial in the first instance. Specifically:

- Proposed CR 39(d)(1) requires that trials are to be "conducted in open court and, *so far as convenient, in a regular courtroom.*" This provision should be revised to require the court to weigh the effect a virtual trial, or a trial held outside of a regular courtroom, would have on the public's right to access the proceeding.
- Proposed CR 39(d)(3) requires the court to hold a pretrial hearing to "address appropriate safeguards" for any trial by videoconference. This provision should be revised to require the trial court, at the pretrial hearing, to consider the means by which public access to the proceeding will be provided, and to permit any member of the public to be heard on that issue. *Cf. Ishikawa*, 97 Wn.2d at 38 (before any limitation on access to a proceeding is permitted, anyone present "must be given an opportunity to object").

Separately, each of proposed CR 39(d), CrR 3.4 and GR 41 fails to address another important aspect of public access to judicial proceedings: the ability of the news media to record judicial proceedings, which assures that members of the public have the ability to observe and understand judicial proceedings even if they cannot attend as they happen. The right to record judicial proceedings is set out in GR 16, which has governed news media photography since 1991. The rule enables the press to fulfill its role as surrogate for members of the public, most of whom cannot personally attend or watch judicial proceedings. *See Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980).

Under GR 16, "open access" to courtroom cameras "is presumed," and recording is presumptively allowed upon request. The rule provides courts the discretion to regulate courtroom cameras, primarily to assure that recording does not "distract participants ... or otherwise adversely affect the dignity and fairness of the proceedings." GR 16(a)(2); *see also* GR 16 Illustrative Guidelines. This justification does not apply to virtual proceedings, however,

because there is no risk of physical disruption from camera equipment or personnel. Moreover, when proceedings are publicly available online—whether through video conference, livestreaming, or other virtual platforms—courts lack both the practical ability and the authority to regulate recording of the proceedings by the news media or other non-parties.

Accordingly, this Court should revise the rule proposals to make clear that trial courts may not impose restrictions on the press or public's ability to record or disseminate proceedings that are publicly available online. Alternatively, the proposals should expressly provide that the press and other non-parties have a presumptive right to record virtual proceedings on request.

WCOG is a nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of government and matters of public interest. WCOG's mission is to foster open government, supervised by an informed citizenry, which is a cornerstone of democracy. It appreciates the opportunity to comment on the proposed rules.

Respectfully submitted,



Eric M. Stahl
Counsel for Washington Coalition for Open Government

From: [OFFICE RECEPTIONIST, CLERK](#)
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Subject: FW: Washington Coalition for Open Government Comments to Proposed Changes to CR 39 and CrR 3.4, and Proposed New GR 41
Date: Tuesday, December 28, 2021 9:02:12 AM
Attachments: [WCOG.comments.CR39.pdf](#)

From: Stahl, Eric [mailto:ericstahl@dwt.com]
Sent: Tuesday, December 28, 2021 9:00 AM
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Please see the attached comments from WCOG to the Rules Committee regarding the proposed changes to CR 39 and CrR 3.4, and proposed GR 41. The text of the attachment is copied below. Thank you for your consideration.

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of access to virtual proceedings—including its ability to attend, review and record such proceedings—is protected in no less a manner than it is for in-person proceedings. As currently drafted, all three proposed rule changes fall short of this standard. They should not be adopted unless protections for public access are added.

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Respectfully submitted,

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