



December 10, 2021

Sent via Email and U.S. Mail

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

Re: Comments from Washington State Association for Justice on Proposed Amendment to CR 39 and Proposed New GR 41

Dear Justices Johnson and Yu:

The Washington State Association for Justice (WSAJ) appreciates the opportunity to provide comments on the proposed amendment to CR 39 (Trial by Jury or by the Court) and proposed new GR 41 (Jury Selection by Videoconference). We support efforts by the Court to provide avenues for civil trials and proceedings to be conducted virtually. The COVID-19 pandemic has strained our courts and created a backlog of at least several years for civil cases alone. We welcome court rule changes aimed at getting cases before judges and having them adjudicated efficiently. Our primary focus is protecting Washington citizens' Constitutional right to a jury trial. To that end, we write to express our support for the proposed amendment to CR 39 with a couple of concerns, which are discussed below, and our categorical support for the proposed new GR 41.

I. Proposed Amendment to CR 39 – Trial by Jury or by the Court

- A. Including whether the parties have “significant” financial interests at stake as a factor when deciding which cases may proceed via videoconference could result in inconsistent rulings and keep cases that are prepared for trial from being resolved.

Section (d)(2)(A)(i) refers to nonfinancial interests at stake as a factor for courts' consideration when determining whether to order trial via videoconference. WSJA knows of and has concern regarding proposals to add significant “financial” interests at stake to this list of considerations.

Whether parties have “significant” financial interests at stake is a highly subjective determination. First, what constitutes “significant” financial interests varies greatly depending on the parties and their respective resources. A \$1 Million verdict could be incredibly significant to an individual making minimum wage and would be much less so to a large corporation. Moreover, although the parties can advance their case value pre-trial, the ultimate question of damages (financial value) is the province of the jury. Indeed, it is almost always the case that there is a wide chasm between a plaintiff's and a defendant's value of a case that is positioned for trial—cases where there is an agreed case value settle pre-trial.



Moreover, requiring or encouraging trial courts to consider the “financial” interests at stake in determining whether a trial via videoconference—in many cases the only type of trial available for the foreseeable future, given the ongoing pandemic and case backlogs—raises concerns under our state constitution’s article 1, section 10 requirement that courts administer justice in “all cases . . . without unnecessary delay.” Many objective, logistical considerations for whether a trial via videoconference, such as the presentation of evidence and witnesses, fall within both trial court’s well-respected, well-established authority to manage their courtrooms and, arguably, “necessary” delay. However, article 1, section 10 contains no exceptions for cases based on their perceived monetary value, and subjecting litigants to potentially indefinite delay in receiving a jury trial based on such a highly subjective perception arguably falls within the ambit of “unnecessary” delay.

WSAJ supports the proposed amendment to CR 39, but respectfully requests that whether the parties have significant financial interests at stake not be included in the final rule.

B. Authorizing the court to reject an agreement between the parties to conduct trial by videoconference adds delay and could contribute to the court backlog.

WSAJ also is aware of and has concerns about proposed amendments to CR 39 that would allow courts to disregard agreement by the parties to conduct proceedings virtually. Section (d)(2)(B)(i) of the current proposed amendment authorizes a jury trial by videoconference “[w]hen there is written agreement of the parties,” with the only qualifier being that the “agreement shall be filed with the court before the start of trial.” The proposed amendment says nothing about requiring approval by the court of an agreement between the parties to conduct trial by videoconference; however, it is our understanding that some commenters intend to request that the amendment include a requirement that the court approve or deny a request for trial by videoconference—even in instances where there is complete agreement between the parties to proceed virtually.

WSAJ is concerned that a provision requiring court approval will result in further delay on cases that are otherwise ready for trial. First, it is one more motion that requires review and determination by a trial judge. This inserts another roadblock where the parties must wait for the court to make its decision whether to approve or deny the parties’ agreement. If parties agree to conduct their trial by videoconference, and the courts are equipped with the tools to make that happen, there is no reason to add an additional hurdle, including the delay involved with waiting for the court to review the pleadings and issue an order.

Second, including a requirement that the court approve an agreement to proceed by videoconference could keep cases that are well-suited for virtual proceedings from moving forward in a timely fashion—further contributing to the backlog. Virtual proceedings are an excellent way to keep case schedules on track and to keep cases from languishing on the civil docket. This is particularly true where all parties agree to have their case proceed in this manner. WSAJ recognizes the importance of the trial judge’s authority to manage court procedure. For example, we appreciate why the court retains authority to deny parties’ joint request for a trial continuance—the purpose being that it is the court’s duty to keep cases on track and to ensure that they are resolved expeditiously. On the other hand, there are instances where the court does not have the authority to overrule party agreement. For



example, parties are highly encouraged to resolve their cases by settlement short of trial. This is why parties issue pre-litigation settlement letters and engage in pre-trial mediations. With very few exceptions, trial courts do not have the authority to review and approve (or reject) a settlement agreement (not including settlements involving minors and class action lawsuits).

Third, allowing judges to reject parties' agreement to proceed via videoconference could encourage forum shopping. If parties learn of a particular judge's personal preference or opposition to videoconference proceedings it could lead to litigants seeking to avoid certain judges on that basis alone.

WSAJ believes that videoconferencing is a great tool to keep civil cases moving forward and supports an amendment to CR 39 that allows party agreement to videoconference proceedings to be determinative.

II. Proposed New GR 41 – Jury Selection by Videoconference

WSAJ supports proposed new GR 41, which addresses the procedure for conducting jury selection by videoconference. Virtual jury selection has promoted judicial efficiency and ensured that a broader group of potential jurors have the opportunity to fulfill their civic duty of jury service. In the past, some potential jurors have been unable to participate due to lack of resources or other obstacles, such as lack of childcare or transportation. Virtual jury selection has enabled many of these individuals to participate from their homes and avoid some of these barriers. WSAJ strongly supports promoting broadening the jury pool through use of jury selection by videoconference.

Thank you for all the time and consideration that you have given to address Washington's strained courts. We share your desire to promote virtual proceedings and encourage judicial efficiency. It is often said that justice delayed is justice denied—this principle is particularly true today as we work to clear the civil case backlog across Washington. We believe that court rule changes that create pathways for parties to have their cases heard and resolved serves the interest of justice. We support the proposed new GR 41 and the proposed amendment to CR 39—with two areas of concern, as discussed above. We are available for further comment should you have any questions on our position.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gregory E. Price".

Gregory E. Price
WSAJ President

A handwritten signature in black ink, appearing to read "Celia M. Rivera".

Celia M. Rivera
WSAJ Immediate Past President



A handwritten signature in black ink, appearing to read "Nathan P. Roberts".

Nathan P. Roberts
WSAJ President-Elect

A handwritten signature in black ink, appearing to read "Christopher E. Love".

Christopher Love
WSAJ Court Rules, Chair

A handwritten signature in blue ink, appearing to read "Colleen Durkin Peterson".

Colleen Durkin Peterson
WSAJ Legislative, Vice President

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Linford, Tera](#)
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Date: Friday, December 10, 2021 10:17:07 AM
Attachments: [WSAJ Ltr. to WA SC Court Rules Committee - Re CR 39 and GR 41.pdf](#)

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Sent: Friday, December 10, 2021 9:44 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Larry Shannon <larry@washingtonjustice.org>; Sara Crumb <sara@washingtonjustice.org>
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Chief Justice González and Justices Johnson and Yu:

Thank you for this opportunity to be heard regarding the proposed amendment to CR 39 and proposed new GR 41. Please find attached the Washington State Association for Justice's comments on these rules. A hard copy will follow. Please let us know if you have any questions.

Best,

Kelli Carson

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