



April 4, 2024

The Honorable Chief Justice Steven C. Gonzalez
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

The Washington State Association for Justice ("WSAJ") has over 2,400 attorney members who represent thousands of citizens in civil matters. WS AJ respectfully submits the following to the Washington Supreme Court regarding the proposed amendment to CR 1, CR 30, CRLJ 38, CR 39, and CR 43 regarding remote depositions, trials, and other proceedings.

RE: Proposed Amendment to CR 1

Over the past four years, Washington courts have been the vanguard of utilizing remote proceedings to preserve and expand access to the civil justice system. Washington courts have been and continue to be at the forefront of embracing technology to increase access to justice and reduce the cost of civil litigation. Remote proceedings have been and should continue to be an invaluable tool in Washington's civil justice system. *See generally* "Summary Report of Remote Proceedings prevalence and Practice in Washington Courts," Washington Courts' Board of Judicial Administration (October 2023).

WSAJ supports the Washington Supreme Court's continued efforts to permit and encourage the use of remote and hybrid proceedings in civil matters with appropriate safeguards. The proposed addition to CR 1 is a welcome addition that will help clarify the important role technology can play in superior courts throughout the state to secure the just, speedy, and inexpensive determination of every civil action.

RE: Proposed Amendments to CR 30

Over the past four years, the use of remote depositions has become a welcome fixture to civil practice. WS AJ members have found that remote depositions help reduce the cost of litigation—particularly in avoiding unnecessary travel related expenses for experts and medical doctors—while increasing access to justice. WS AJ believes that the continued use of remote depositions is consistent with CR 1 and should be encouraged with the appropriate procedural safeguards. To that end, WS AJ is generally in favor of amendments encouraging that goal. However, WS AJ has significant concerns with the suggested amendments to CR 30 and sincerely hopes that the Court revisit the proposed amendments to this rule to ensure that the amended rule comports with the existing and familiar standards of CR 26. WS AJ's primary concerns with the proposed amendment are detailed below:

1. Duplication of CR 30(b)(4)

The proposed draft inadvertently duplicates CR 30(b)(4) altering the number of CR 30(b)(6) to CR 30(b)(5).



2. Removal of the Current CR 30(b)(7)

The current CR 30(b)(7) provides:

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer the propounded questions.

The proposed rule deletes these two sentences. By removing the second sentence of the current CR 30(b)(7), the proposed rule could be interpreted to imply that when a deposition is taken remotely, it is “taken at the place where the deponent is to answer the propounded questions.” No such change was intended. This interpretation, while plausible in the absence of the language in the second sentence of CR 30(b)(7), is inconsistent with current civil practice and the Uniform Interstate Depositions and Discovery Act.

Disputes relating to out-of-state subpoenas for deposition testimony must be addressed by the foreign court that issued the subpoena in accordance with that jurisdiction’s procedural, evidentiary, and conflict of laws rules. For in-state depositions, CR 37 provides that an application for an order to a deponent not a party “shall be made to the court in the county where the deposition is being taken.”

WSAJ suggests that language from the current CR 30(b)(7), “[f]or the purposes of this rule and rules 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer the propounded questions” be modified preserved with any amendments to CR 30. WSAJ takes no position as to whether that language should be preserved in a standalone portion of the rule or incorporated another provision with CR 30.

3. The Proposed CR 30(b)(7) Should Not Be Adopted.

During its participation in the Civil Subcommittee of Board for Judicial Administration (BJA) Remote Proceedings Work Group, WSAJ’s representative proposed the following language for CR 30(b)(7):

(7) Any party may take a deposition in person or by remote means. Parties shall make a good faith effort to agree to the mode and manner of depositions before notice is served. The deposition shall proceed as noticed unless within three days of receiving the deposition notice a party or deponent files a motion objecting to the notice. In determining whether a deposition shall proceed as noted, the Court shall apply CR 1, CR 26(b)(1)(C), and CR 26(c).

WSAJ’s draft CR 30(b)(7), which applies equally to remote and in person depositions, is based on the existing standards of CR 26 with its 11 specific and recognized factors, including good cause, and the body of case law interpreting and applying those factors. This proposed rule could save the courts and parties time and money by eliminating motions challenging the format of the deposition without good cause. WSAJ’s proposed rule provides greater and unbiased guidance to parties and the courts while protecting all parties from frivolous challenges to an opponent’s choice of remote or in person depositions.



The Subcommittee did not adopt WSAJ's proposed CR 30(b)(7) and instead, put forth a proposal that jettisons the familiar standards of CR 26 in favor of four new, undefined factors that have no precedent and are more lenient than the CR 26 standards. The Subcommittee's proposed rule provides that, in addition to the four new, undefined factors, a court may consider "any prejudice" when determining whether a deposition should proceed in person or by remote means. As drafted, the Subcommittee's proposed CR 30(b)(7)(c) is expressly biased against remote depositions (the Court may consider "any prejudice . . . by *remote means*") without equal consideration for challenging in person depositions. The draft rule forces disclosure of attorney work product and strategy by requiring a party to argue about the "role of the witness" in any challenge to the format of the deposition. More problematically, by removing a good cause standard for challenges to the form of the deposition, the Court opens the floodgates to motions and appeals challenging the form of a deposition. This will unquestionably increase the cost of litigation and trial court workloads by incentivizing routine motions challenging remote depositions. WSAJ strongly opposes the language in draft CR 30(b)(7) and encourages this Court to adopt a rule that is based on the familiar and established standards of CR 26 which will eliminate frivolous challenges to the designated form of the deposition.

4. Conclusion Regarding Proposed Amendments to CR 30

WSAJ applauds the Washington Supreme Court's continued efforts to permit and encourage the use of remote depositions. However, the proposed changes to CR 30 need to be revisited and scrutinized to ensure that they comply with the standards articulated in CR 1 and CR 26. The proposed CR 30(b)(7) is a dangerous departure from those standards and disincentivizes the use of remote depositions to secure the just, speedy, and inexpensive determination of any matter. The proposed CR 30(b)(7) should not be adopted as drafted. WSAJ submits that its proposed version is preferable but welcomes the opportunity to collaborate with any stakeholders to address the identified deficiencies in the current proposed CR 30(b)(7) to ensure that any finalized rule does not undermine the goals of encouraging the use of remote technologies and maintaining access to justice.

RE: Proposed Amendment to CRLJ 38

We sincerely appreciate the Washington Supreme Court's herculean efforts since the outbreak of COVID-19 to preserve parties access to the civil justice system. Washington courts' embrace of remote and hybrid proceedings over the past few years at all levels have demonstrated how technology can be utilized to ensure that civil matters are handled in a just, speedy, and inexpensive manner. The utilization of remote proceedings, while not without hiccups, has unquestionably enhanced courts' ability to effectively manage civil cases on their docket and improved access to justice for Washingtonians. Remote proceedings have been and continue to be an invaluable tool in Washington's civil justice system. *See generally* "Summary Report of Remote Proceedings Prevalence and Practice in Washington Courts," Washington Courts' Board of Judicial Administration (October 2023).

WSAJ supports the Washington Supreme Court's continued efforts to support the use of remote and hybrid proceedings in civil matters with appropriate safeguards. The proposed CRLJ 38(i) provides that "[a] bench or jury trial may be conducted in whole, or in part, by remote technology upon agreement of the parties or order of the Court." While the WSAJ is generally in favor of clarifying CRLJ 38 to permit the use of remote trials, the organization is concerned that the draft of CRLJ 38(i) could allow for a remote trial to occur over the objection of



one or more of the parties. This appears to be a significant departure from the standard articulated in the proposed CR 39(d). WSAJ believes that the standards under which a remote civil trial can occur should be consistent through courts, regardless of their level or size.

As detailed below, WSAJ supports the use of remote trials in civil matters where the parties agree that a remote trial is appropriate.

WSAJ respectfully requests the Supreme Court modify proposed CRLJ 38(i) to incorporate the standards articulated in the proposed CR 39(d)(1)-(2) to clarify the standards under which a civil trial by remote means can occur.

RE: Proposed Amendment to CR 39

Shortly after the outbreak of COVID-19, Washington courts rapidly began conducting a variety of court proceedings with video conferencing technology. With Order No. 25700-B-631, this Court permitted and encouraged courts to adopt procedures to ensure that justice was administered in a fair and timely manner. As part of that Order, this Court encouraged the use of remote technology in civil cases to ensure the open and timely administration of justice in Washington.

Since that time, superior courts throughout this state have conducted innumerable civil matters in both remote and hybrid settings. In 2022, every Washington superior court surveyed reported conducting hybrid hearings in 2022, and 95% planned to continue the practice. *See generally* "Summary Report of Remote Proceedings Prevalence and Practice in Washington Courts," Washington Courts' Board of Judicial Administration (October 2023). Remote and hybrid proceedings have become a fixture in Washington's civil justice system.

Many WSAJ members have participated in civil trials by remote means since 2020 and have had positive experiences. WSAJ supports the Washington Supreme Court's continued efforts to permit and encourage the use of remote and hybrid proceedings in civil matters with appropriate safeguards. The proposed addition to CR 39(d) articulates a clear standard for the circumstances when a civil trial can proceed by remote means while simultaneously protecting the interests of all parties, increasing access to justice, and reducing the costs of civil litigation.

Accordingly, WSAJ respectfully requests that the Court adopt the proposed language to CR 39(d).

RE: Proposed Amendment to CR 43

Over the past four years, the use of remote testimony at hearings and trial in superior court has become a welcome fixture to civil practice. In 2022, every Washington superior court surveyed reported conducting hybrid hearings in 2022, and 95% planned to continue the practice. *See generally* "Summary Report of Remote Proceedings Prevalence and Practice in Washington Courts," Washington Courts' Board of Judicial Administration (October 2023). Remote and hybrid proceedings have become a fixture in Washington's civil justice system.



Remote testimony, once a rare exception, is now a regular practice within superior courts. WSAJ members have found that the use of remote testimony helps reduce the cost of litigation—particularly in avoiding unnecessary travel related expenses for experts and medical doctors—while increasing access to justice by facilitating the testimony of lay witness who would otherwise be unable to testify in person.

WSAJ supports the proposed amendment to CR 43(a)(1) which was unanimously approved by the BJA Remote Proceedings Work Group. The proposed rule comports with the standards articulated in the proposed CR 1 and clarifies what a court must consider to determine whether remote testimony should be permitted. WSAJ believes the removal of the “good cause in compelling circumstances” language in the current CR 43(a)(1) is critically important to this. The current language of CR 43(a)(1) has been interpreted by some courts both pre-and-post pandemic to limit or otherwise preclude the use of remote testimony. WSAJ believes the proposed language to CR 43(a)(1) will avoid this issue and provide greater consistency to when and how remote testimony will be utilized.

Accordingly, WSAJ respectfully requests that the Court adopt the proposed language to CR 43(a)(1).

Sincerely,

Two handwritten signatures in blue ink. The first signature, on the left, is "Colleen Durkin Peterson" and the second signature, on the right, is "Christopher E. Love".

Colleen Durkin Peterson
WSAJ President

Christopher E. Love
Chair, WSAJ Court Rules Committee