

April 16, 2024

Ms. Erin L. Lennon
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

Re: Comments on Select Proposals in the Supreme Court of Washington's Order No. 25700-A-1549 Rules Package

Dear Ms. Lennon,

This letter is submitted on behalf of the King County Bar Association Judiciary and Litigation Committee ("Committee") as a comment on portions of the proposed rules described in the Supreme Court's November 2023 Order No. 25700-A-1549. The Committee's primary purpose is to evaluate and propose possible changes in judicial administration and conduct studies and projects designed to enhance Bench-Bar relationships. The Committee regularly reviews and comments on proposals to change the Superior Court Local Rules, the state Civil Rules and General Rules. The Committee is comprised of King County lawyers and judges with experience and active practices that span all topics of civil litigation and criminal law.

The Committee has participated in the BJA Covid Recovery Task Force Report Proceedings Workgroup. For over a year, members of our Committee regularly attended BJA Covid Recovery Task Force meetings and assisted in crafting the rules that are now presented for comment.

Following publication of Order No. 25700-A-1549, our Committee established a Subcommittee to further evaluate the draft rules and suggest proposed comments on the rules package. The Subcommittee met several times in the winter and engaged in vigorous discussions about many of the draft rules. In the end, the Subcommittee identified a series of draft rules it believed the Committee should weigh in on via written comment. The Subcommittee discussed several other proposed rule amendments (e.g., GR 11.3, GR 41, CR 43(a)(1)) but was either unable to come to a consensus on providing any specific proposal to the Committee or determined that a comment from the Committee was unnecessary.

The Subcommittee's proposals were then considered by the Committee and voted on. While the Committee's membership did not uniformly agree with each proposal of the Subcommittee, the Comments represent the majority position of the Committee membership.

Our Committee now submits the following comments on select proposals within Order No. 25700-A-1549. The comments offered below are provided solely on behalf of the Committee and not on behalf of the King County Bar Association.

Proposed CRLJ 38(i)

The Committee believes that the standard for conducting remote trials in the proposed CRLJ 38(i) should match the standard articulated in the proposed CR 39(d). Specifically, CRLJ 38(i) seems to allow a trial by remote means over another party's objection, so long as ordered by the court, and further does not include the protections described in CR 39(d) for ensuring all matters remain open to the public and accessible to its participants.

Proposed CR 1

Our Committee was concerned that the language in CR 1 would improperly place a preference for remote proceedings and proposes adding the following clarifying language:

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. *To this end, proceedings held by remote means are permitted to the extent permitted by these rules or local rules.*

Proposed CR 30

The Committee identified a few matters in the proposed amendments to CR 30 that warranted comment.

First, the draft proposal includes two CR 30(b)(4) subsections which throw off the numbering of familiar provisions within the existing rule (i.e., CR 30(b)(6) depositions are now CR 30(b)(5) depositions). The Committee recommends that this minor numbering issue be corrected to avoid any confusion.

Second, the draft rule appears to have inadvertently removed the current CR 30(b)(7) ("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 Committee is in favor of revising and expanding upon the current CR30 (b)(7) to match the position articulated in the BJA Covid Recovery Task Force Report Proceedings Workgroup's letter of March 2024 which proposed the following revisions to CR 30(b)(7):

For the purposes of this rule and rules 37(a)(1), 37(b)(1), and 45(d), a deposition taken by remote means is taken at the place where the deponent is to answer the propounded questions. Any party may take a deposition in person or by remote means. Parties are strongly encouraged to agree to the mode and manner of deposition, in person or remote, before notice is served. The deposition shall proceed as noticed unless within three days of receipt of notice an objecting party or the deponent files a motion objecting to the notice. In determining whether a deposition shall proceed in person or by remote means, the court may consider the following non-exclusive factors and any other factor the court deems appropriate: (a) the role of the witness in the case, (b) the complexity of the case, (c) whether there will be prejudice to any party or the witness if testimony by remote means is permitted, (d) whether the witness is subject to the court's subpoena power and, thus, whether a party will at any point have the opportunity to question the witness in person, and (e) whether the noted mode of deposition serves the purposes of CR 1.

Third, several of our Committee members expressed concern about the following language in the proposed CR 30(b)(7) "[t]he deposition shall proceed as noticed unless within three days of receipt of

notice an objecting party or the deponent files a motion objecting to the notice.” Of particular concern was the brief (i.e., three day) timeline for filing a motion objecting to the notice. Several Committee members expressed concern about the foreseeable challenges in conducting a CR 26(i) conference—a necessary precondition for filing a motion—and drafting a motion on such a truncated timeline. The Committee recommends amending the proposal to set the filing deadline for any motion objecting to the mode or manner of the deposition from the noting date of the deposition. Additionally, the Committee recommends adding language to clarify that any motion objecting to the mode or manner of the deposition is subject to CR 26(i) and CR 37. The Committee’s proposed revision follows:

Any party may take a deposition in person or by remote means. Parties are strongly encouraged to agree to the mode and manner of deposition, in person or remote, before notice is served. The deposition shall proceed as noticed unless, no later than two days prior to the scheduled deposition, a party or deponent files a motion objecting to the mode or manner of deposition set forth in the notice. The provisions of CR 26(i) and CR 37 apply to this section. In determining whether a deposition shall proceed in person or by remote means, the Court may consider the following nonexclusive factors and any other factor the court deems appropriate: (a) the role of the witness in the case; (b) the complexity of the case; (c) whether there will be prejudice to any party or the witness if testimony by remote means is permitted (d) whether the witness is subject to the Court’s subpoena power and, thus, whether a party will at any point have the opportunity to question the witness in person; and (e) whether the noted mode of deposition serves the purposes of CR 1.

Proposed CR 39(d)

The Committee supports the proposed addition to CR 39(d) to permit trial by remote means and believes that the use of remote trials, in whole or part, has the potential to increase access to justice and decrease the cost of civil litigation.

Proposed CR 43(d)(1)(C)

The Committee proposes adding the following inclusive language to the draft rule:

CR 43(d)(1)(C) - the witness shall stand while the oath is administered unless the witness is physically unable to stand or testifying by remote means.

The Committee applauds the efforts of the BJA Covid Recovery Task Force Report Proceedings Workgroup and this Court in crafting this comprehensive set of rules to permit and encourage the use of remote and hybrid proceedings in civil cases with appropriate safeguards. The past few years have demonstrated to practitioners throughout the state that remote technologies have a place in the civil justice system and have the potential to increase access to justice and reduce the cost of civil litigation. The Committee believes that its proposed edits will help courts and practitioners in the interpretation and application of the draft rules if they are adopted.

Sincerely,

s/ Colin B. Mieling

s/ Katie J. Comstock

Colin Mieling

Katie J. Comstock

Co-Chairs, KCBA Judiciary & Litigation Committee

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: Comments on Order No. 25700-A-1549 Rules Package
Date: Tuesday, April 16, 2024 3:56:34 PM
Attachments: [KCBA Judiciary Litigation Committee Comments.pdf](#)

From: Mieling, Colin <mieling@sgb-law.com>
Sent: Tuesday, April 16, 2024 3:12 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Katie Comstock <katie@levy-law.com>
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Good afternoon,

Please find attached the King County Bar Association Judiciary and Litigation Committee's Comments on Select Proposals in the Supreme Court of Washington's Order No. 25700-A-1549 Rules Package. If you have any issues with the attachment, please let me know.

Best,

Colin Mieling



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