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April 30, 2024

Clerk of the Supreme Court
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Attn: Court Rules Committee

RE: Proposed Amendments to Civil Rules as promulgated by Order No. 25700-A-1549

Dear Sir:

I write out of a concern for unintended consequences that stem from equating remote testimony and in-person testimony.

Currently remote testimony is only permitted on a showing of "good cause in compelling circumstances . . . ." The proposed amendment to CR 43(a) would eliminate those required showings. The party calling the witness would get to decide whether the witness appears in person or testifies from a remote location. No showing of necessity would be required. CR 43(a)'s exception to the rule of attendance at trial, that was created to accommodate special circumstances, would be transformed into a tactical litigation tool. If one side sees an advantage in preventing the jury from having too close a look at a marginally honest witness there will now be a way to limit observation. As will be seen, the rule fails to provide a meaningful check against such sharp practice.

One can anticipate that a media or communication consultant will become a significant part of pre-trial preparation. By conducting what amounts to a screen test, the consultant could judge whether to keep the witness out of the courtroom by using a Zoom connection. If the witness' weakness in person is that he comes across with body language that could be interpreted as demonstrating dishonesty, that can be screened from the jury via the tactical application of the proposed rule. The even playing field of trial is thus tipped to the advantage of the proponent of the witness in a way not contemplated by the drafters. Without requiring a showing of necessity (compelling circumstances and good cause), the new rule becomes a gift to the side that has concerns about the truthfulness of their witness' testimony. The rule amendment will limit the effectiveness of traditional methods of confrontation.

The loss of the requirement of necessity (compelling circumstances) as a prerequisite to having remote testimony cedes control to the proponent potentially at the disadvantage of the adverse party. That was not the intention of the drafters of the amendment. The elimination of the language making clear that remote testimony is intended as a limited exception thus swallows the former rule and gives a lawyer complete license to stack the deck in his favor. Given the tactical gift provided by the proposal, it might soon be a breach of the standard of care for the proponent of the witness to not take advantage in this way.

The drafters of the amendment may have thought that CR 43(a)(1) provided a means for the opponent to rein in abuse. However, the standards set forth in the rule provide no meaningful protection. Here are the factors to be considered by the court should the opponent object to remote testimony:[1]

> In determining whether testimony should be allowed by remote means per CR 1, the court may consider [1] whether the witness is subject to a trial subpoena;[2] [2]whether there will be any prejudice to any party or the witness if testimony by remote means is permitted; [3]the witness' access to technology that allows the witness to be seen and heard; and [4]court's ability to facilitate remote testimony.

The last two requirements, 3 &4, are considerations of the mechanics of presenting the testimony and are not substantive. The only relevant limiting factor is number 2, whether there will be prejudice. In most cases the objecting party will either not know in advance or will be unable to demonstrate to the court the potential prejudice. By example consider the circumstance in the movie, Twelve Angry Men.[3] In that movie an elderly witness claimed to have seen the defendant run down the stairs in an apartment building after slaying his father. An elderly juror

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[1] The bracketed numbers have been added to ease reference to the factors.

[2] The first requirement about a subpoena does not inform the court's decision one way or the other. Should the court grant remote testimony to a witness testifying volitionally and without a subpoena? Does the availability of a subpoena increase the likelihood of allowing remote testimony because the adverse party can utilize a subpoena? The proposed rule does nothing to inform the answer to those questions.

[3] This example was used by the court in *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38, 42 fn. 9 (D. Mass. 1998)("The testimony of the witness would still be mediated via videoscreen. Studies have suggested that television and videoscreens necessarily present antiseptic, watered down versions of reality. Much of the interaction of the courtroom is missed.").

comments on this testimony during deliberations, noting that the witness had a limp and had moved very slowly and deliberately when called as a witness. The juror has a doubt that the witness could have arisen from bed and moved to the point of observation in time to see what he reported.

Such an in-person observation by a juror would not have been possible if the witness testified from his living room over a Zoom screen. The party calling such a witness under the proposed amendment would have a means to shield the witness by using remote a remote connection. If the adverse party wants to object to that procedure he would have to know of the physical limitation in advance of trial in order to make an objection. The opportunity to see the witness in person in advance of the trial is also being compromised by amendment of another rule, CR 30, the effect of which would be to bar an adverse attorney from attending at a remote deposition. If these two rule amendments are adopted, the jury may ultimately be denied the opportunity to make important observations that could change the outcome of the case.

Stepping away from the Twelve Angry Men example, there is another major reason why opposing counsel may want a witness to be present at trial. After nearly 50 years trying cases and teaching law students and lawyers to do the same, I can attest to the fact that it is vastly more difficult to conduct a successful cross-examination over the phone or through a computer screen. Body language of the examining lawyer, the majesty of the courtroom, the presence of a judge and the group dynamic of having twelve jurors focused upon the witness, all influence the truth finding function of a trial. Cross examination skills take years to be acquired. They distinguish the effective lawyer from the novice. This rule parks the lawyers at a computer screen and insulates the witness. The loss of the application of in-person examination skills may create some perverse form of equity between the beginner lawyer and the experienced, but it does this by lowering the bar and compromising the potential justness of the outcome.

Another shortfall of having a witness testify remotely concerns the effective use of documents to impeach. It is far quicker and easier to use documents and diagrams if everyone is in the same room. In a courtroom, when a witness is confronted with a prior inconsistent statement, the document and the witness can be observed at the same moment by the jury. Compare that with the "share screen" function in Zoom, which replaces the view of the witness with a screen shot of the document. The witness' demeanor when confronted goes unseen or is at least minimized.

Returning to the factor of prejudice in the criteria for objecting to remote testimony, all of the above points comes down to the lawyer arguing that he will be more effective in his cross-examination if the witness is present in the courtroom. That is a significant factor of prejudice to the client if he or she is denied the opportunity to have his lawyer do his best to impeach a dishonest witness. But, there is no way to effectively make such an argument to the court under criteria number 2 of CR 43(a)(1). What weight would a court give to a lawyer saying

"I'm more effective if the witness is present?" Besides being immodest, it also proves too much. The same argument can be made about the cross-examination of any witness. It is easily dismissed by a judge seeking to get the trial moving. For experienced lawyers it is fundamentally true that using the tools of the courtroom only works effectively in the courtroom; not through television.

The court would have to discount such an argument to preserve the remote witness option. In that way, the most honest and important reason for prejudice to one's client from remote testimony becomes impossible to fully articulate, particularly in advance of the testimony itself. The standard of prejudice loses virtually any basis by which it can be proven or applied. And, there lies the collateral harm of the proposal. The burden of justifying the witness' presence or absence is shifted from the proponent of the witness' absence to establish necessity ('good cause" and "compelling circumstances") to the opponent, who has to argue, often in a vacuum, that he can do better if the witness is present. It is an argument that is doomed to failure. The amendment thus enshrines the tactical advantage at the expense of a more effective means for seeking the truth. Objections to remote testimony and to compel in-person testimony will be decided based upon whether the computer monitors and bandwidth are working and prejudice will be impossible to address.

It is submitted that the safe guards against tactical abuse of remote testimony under CR 43(a)(1) are illusory.

The talisman of "Access to Justice" leads to collateral consequences.[4] The intent may be noble, but the application compromises adversary proceedings, leading to a risk that "Access" provides a gateway to injustice. There will, of course, be

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[4] One can assume that tactics will be met by tactics on the other side. Don't be surprised if in the future you see the following counter measures:

> 1) subpoenaing all the witnesses on the other side's witness list to force them to attend in person to prevent remote testimony;
>
> 2) issuing notices of in-person depositions to prevent the opponent from excluding the issuing lawyer from attending in person;

Court rules should not be drafted to encourage marginally ethical actions by the parties to counter gamesmanship or to advance it.

circumstances that require a court to bend and allow remote testimony. Those should continue to be considered the exception rather than the rule. The standards of "compelling circumstances" and "good cause" have worked well to provide judicial flexibility and have put the burden of establishing necessity where it belongs; on the party seeking to take advantage of the exception.

The proposed amendment leave open questions of enforcement and jurisdiction. Witnesses must take an oath which puts them in jeopardy of punishment via contempt or a perjury prosecution. If the remote witness is in Washington state the only question for enforcement is the venue of the hearing against the witness. No issue of jurisdiction is raised and venue is easily determined. However, if the witness is out of state or out of the country what legal effect does the administration of an oath by a Thurston County judge have? Is it actionable perjury to lie on an interstate Zoom call? If the Thurston County judge needs to hold the out of state witness in contempt, how could such a citation be enforced? These are not random issues. In circumstances of perjury in depositions the legislatures of most states have found a mechanism to provide a court of competent jurisdiction to deter the crime. They enacted the Uniform Interstate Depositions and Discovery Act, RCW 5.51.010, *et seq.* In that context a Washington lawyer must apply to the home state of the witness for process that would permit remote deposition testimony to be taken. The deposition is then conducted under the law of the state in which the witness is testifying and the coercive powers of that state apply. That Act applies only to depositions. There is no similar uniform act that would apply to remote trial testimony given in another state. The proposed amendments make no provision for addressing the problems of administering a binding oath or holding a prevaricating witness accountable. Without such mechanisms they intrude on the notion of jurisdictional limitations.

There is another major change in the proposed civil rules. The amendment to the deposition rule takes away the opportunity for opposing counsel to be present at a remote deposition. Under the proposed modification to CR 30(h)(7)(b), if an opponent notes a remote deposition of a witness, any witness, the opposing lawyer is prohibited from attending the remote deposition in person. There is little justification for such an exclusion of a party and their lawyer. Under current standards, exclusion of a lawyer for the adverse party has to meet the test for a protective order under CR 26(c)(5). That burden for a protective order is on the one seeking the order. Here, under the proposed amendments, the "protective order" equivalent of exclusion from attending at a remote deposition is automatic. A lawyer barred from attending would have to seek extraordinary relief from the court with no standard for determination of such a request being set forth. Once again, the new proposals create opportunities to game the process and make unintended tactical use of the new rules; to, in effect, weaponize them.

The two remote testimony provisions (trial and deposition) suffer from inconsistent draftsmanship and differing standards. Compare the standards by which a court is to determine

remote testimony with the standards for whether an objection to a remote deposition should be permitted.

Trial CR 43(a)(1)	**Deposition** CR 30(b)(7)
In determining whether testimony should be allowed by remote means per CR 1, the court may consider [1] whether the witness is subject to a trial subpoena;[5] [2]whether there will be any prejudice to any party or the witness if testimony by remote means is permitted; [3]the witness' access to technology that allows the witness to be seen and heard; and [4]court's ability to facilitate remote testimony.	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.

CR 43(a)(1) does not factor in the significance of the role of the witness in the case, nor does it consider the complexity of the case. The deposition provision, CR 30(b)(7), points to the future opportunity to question the witness in person, ignoring the potential loss of that opportunity under CR 43(a). It is as if each of the two provisions were drafted without regard for the other. In their haste to implement remote litigation, the BJA has proposed standards that are not harmonious.

A glaring omission in the trial rule is that it lacks provisions safeguarding the process from undue influence during testimony. It says nothing about coaching the remote trial witness. The deposition rule goes to lengths to prevent such misconduct. Compare CR 43(a) with the BJA's draft proposal in CR 30(h)(7) (d) &(e):

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5 The first requirement about a subpoena does not inform the court's decision one way or the other. Should the court grant remote testimony to a witness testifying volitionally and without a subpoena? Does the availability of a subpoena increase the likelihood of allowing remote testimony because the adverse party can utilize a subpoena? The proposed rule does nothing to inform the answer to those questions.

(d) During the deposition, unless specifically requested to do so by the examining attorney, the deponent shall not refer to any notes, or any electronic or other means used for communication, such as email and messaging.

(e) No one shall attempt to influence the deponent's response to an examiner's question in any manner, including visually, verbally, and in writing such as notes, text message, email, and electronic chat functions.

The proposed amendments proceed from the premise that live and remote testimony are of equal value and that we should encourage the remote as a matter of access. It is interesting that no supporting testimony has been provided to this court to prove this assumption. BJA relies on only anecdotal support. But, there is ample evidence to the contrary.[6] Some of that evidence

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[6]

Watching someone on a screen does not have the same impact as seeing the individual in-person. "Virtual hearings inevitably skew the perceptions and behavior of the involved parties by either removing or over-emphasizing non-verbal cues, failing to properly simulate normal eye contact, or exaggerating features." A recent report by the Surveillance Technology Oversight Project recently noted that these problems "can obstruct the fact-finding process and prevent accurate assessments [of] credibility and demeanor." The few studies conducted of use of videoconferencing in courts show that these issues can have significant impacts on outcome.

In 1999, Cook County, Illinois (Chicago) began holding most bail hearings in felony cases using a closed-circuit television procedure. The defendant remained at the detention center for the bail hearing. A study of the impact of this procedural change was conducted by a research team from Northwestern University led by Shari Seidman Diamond. The study concluded that "defendants were significantly disadvantaged by the videoconferenced bail proceedings." Specifically, "[t]he average bond amount for the offenses that shifted to televised hearings increased by an average of 51%."

An observational study of teleconferenced immigration hearings conducted in 2004-2005 found such hearings "a poor substitute for in-person hearings." The study found that the use of videoconferences reduced the ability or opportunity of immigrants to speak or ask questions and lessened their ability to communicate with their attorneys. The conferences were also plagued by technical difficulties, with almost half of observed cases experiencing one or more problems. The study called for a "moratorium on videoconferencing in removal cases until it can be improved." A different study of the use of teleconferencing in immigration proceedings

was supplied in the undersigned's August 3, 2023 letter to the Chief Justice, opposing the BJA proposals. I ask that that letter also be considered now. The use of remote testimony may be particularly harmful to the most disadvantaged amongst us.

> Access is not made equal by simply providing the technology and instructions. Even when an individual is able to obtain access to internet to participate in virtual proceedings, the conditions of their home or surroundings may unwittingly create prejudice or bias. Legal aid providers and public defenders have expressed concern that . . . they cannot go to their homes and ensure that the space is clear and quiet, and that the client has appropriate lighting, etc. before the start of a video proceeding. A cluttered or dirty home, a noisy or crowded space, or even a particular poster or book could leave an impression that harms a litigant.

ABA report, see footnote 6.

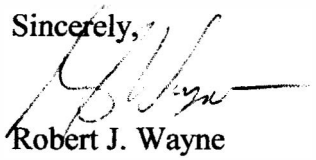
> determined that remote hearings impacted outcome, lessening the likelihood asylum would be granted.

Report of the American Bar Association attached to ABA Resolution 117 (August 3, 2020),

It is notable that both the ABA[7] and NITA[8] have opposed a permanent change allowing remote testimony. While the pandemic provided a temporary justification for remote testimony, we need to be cautious in accepting the wholesale changes promoted by the BJA.

I respectfully submit that the proposals for remote depositions and the use of remote witnesses at trial be rejected by this Court. Ample means for taking remote depositions under the Uniform act already exist. The current standard for remote trial witnesses which calls for good cause and compelling circumstances has worked in the courts of this state and nationwide under the similar standards in federal courts. Washington should not change a rule that is working and for which there is ample case law guidance in place.

Sincerely,



Robert J. Wayne

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7 The ABA urged that any authorization for remote proceedings "continue for as short a time as possible and in no event longer than the duration of the declaration of emergency issued in the jurisdiction." ABA Resolution 117 (August 3, 2020).

8 The compelling need for in-person proceedings where credibility can be assessed is so profound that the law prefers in-person trial testimony over recorded or transcribed deposition testimony, because "live testimony" permits the judge or jury to use their senses to judge the credibility of witnesses and to observe their responsiveness, demeanor, and how they react to unscripted questions to which they must answer in real time. Live testimony allows a litigant to confront witnesses in the manner intended by the founders of our Constitution. The dynamic interchange that occurs in trial between witnesses, the attorneys, judge and jurors is critical to ensuring that the factfinders' search for truth is undertaken on the most informed basis possible. Denying a factfinder these crucial tools deprives a litigant of a fair process in either a criminal or a civil case. It is therefore critical that our judicial system not default to remote or virtual proceedings, where such essential tools are severely compromised or eliminated altogether.

NITA's Statement on the Importance of In-Person advocacy in Courts.

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment to proposed rule Docket NO. 25700-A-1549
Date: Tuesday, April 30, 2024 4:07:33 PM
Attachments: scanned Clerk of Court Remote Testimony as submitted.pdf

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-----Original Message-----
From: Robert Wayne <bwayne@trialsnw.com>
Sent: Tuesday, April 30, 2024 4:05 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to proposed rule Docket NO. 25700-A-1549

Dear Clerk,

Attached is my comment to the proposed rule. This exceeds 1500 words, so I am mailing the original to you.

Robert Wayne