

April 30, 2024

To: The Honorable Washington Supreme Court
From: Civil and Human Rights Advocacy Clinic, Gonzaga University School of Law
Re: Comment on Proposed General Rule 41

The Civil and Human Rights Advocacy Clinic at Gonzaga University School of Law (the Clinic) respectfully submits this comment opposing proposed General Rule (GR) 41—Jury Selection Using Remote Technology. As currently drafted, this proposed rule raises constitutional concerns in criminal cases, may reinforce technology inequities, and may lead to increased costs and inefficiency. This comment will address the Clinic’s objections to GR 41 and recommend modifications should the Court adopt a remote jury selection rule.

Constitutional Perspectives

GR 41(b) provides that remote jury selection may be used “[i]n all cases,” without distinction between civil and criminal trials, and without the parties’ consent, including from criminal defendants. This proposal disregards the fact that criminal defendants possess constitutional jury trial rights to which parties in a civil matter are not entitled. More meaningful jury selection procedures are necessary to ensure these rights for criminal defendants.

The Sixth Amendment and the Washington Constitution guarantee a criminal defendant the right to both an impartial jury and a public trial. Effective and accessible *voir dire* is necessary to ensure these rights. As this Court recently observed:

Voir dire is a significant aspect of trial because it allows parties to secure their Sixth Amendment and article I, section 22 right to a fair and impartial jury through juror questioning. It serves to protect the defendant’s right to an impartial jury by exposing possible biases on the part of potential jurors and by selecting a jury capable of deciding and willing to decide the case solely on the evidence.¹

Remote proceedings restrict the ability of counsel to engage directly with jurors, foreseeably diminishing the ability of counsel to examine jurors effectively for bias. By contrast, in-person *voir dire* allows for a more meaningful examination of each prospective juror and provides counsel with the ability to make more informed, evidence-based decisions about how to exercise both for-cause and peremptory challenges.

¹ *State v. Zamora*, 512 P.3d 512, 520 (Wa. 2022); see also *State v. Momah*, 217 P.3d 321, 325 (Wa. 2009) (recognizing that the right to a public trial extends to *voir dire*, because “[t]he process of juror selection ... is itself a matter of importance, not simply to the adversaries but to the criminal justice system” [internal citations omitted]); see generally *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501(1984); *Ham v. South Carolina*, 409 U.S. 524 (1973).

Passion Into Practice.

For example, the American Bar Association (ABA) has outlined several tips for effective *voir dire*, emphasizing that jurors must remain attentive and participate in a manner that reveals the information necessary for counsel and the court to assess jurors' potential for bias.² This assessment can include nonverbal cues, such as "signs of anxiety and general positive or negative affect," and "visual cues [such] as body movement, body orientation, body posture, shrugs, eye contact and facial expressions."³ Counsel may use *voir dire* to examine group dynamics and leadership experience to anticipate how the jurors may interact with one another.⁴

Remote jury selection through Zoom or similar platforms does not afford the parties this same level of individualized insight, inviting an enhanced risk of bias at trial. Attorneys will have limited opportunity to observe individual juror reactions or group dynamics in a panel, with similarly restricted opportunity to engage these jurors in the manner recommended by the ABA. Counsel also will have greater difficulty during remote *voir dire* prompting jurors to interact with each other, a critical method for effective examination of bias.⁵

Moreover, this limitation to the *voir dire* process may incentivize bad practices and short cuts. By hindering the ability of an attorney to converse with every prospective juror in a meaningful way, GR 41 may increase the likelihood that attorneys will resort to generalizations, stereotypes, and even implicit biases when exercising peremptory challenges. Moreover, trial judges may not be able to employ GR 37 as effectively to police lawyer bias in jury selection, because judges also will lack the holistic information of in-person jury selection to assess counsels' challenges.⁶ Proposed GR 41 therefore risks not only harm to criminal defendants' jury trial rights, but also to jurors' right to equal protection of the law.

The jury trial "best practices" workgroup report published by the Washington Supreme Court identified this issue starkly—that civil and criminal cases are not equally amenable to remote jury proceedings.⁷ Proposed GR 41, however, does not differentiate between the types of trials or procedures when the court may incorporate remote *voir dire*. These differences are what led the workgroup to recommend that "no aspect of a remote criminal jury trial occur without the defendant's consent."⁸ GR 41 does not provide any language that indicates a criminal defendant's ability to consent to, or deny, remote jury selection proceedings.

² See *11 Must-Dos from a Voir Dire Master*, American Bar Association (March 2019), available at <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/> (last visited April 29, 2024).

³ *Id.*

⁴ *Cf. id.*

⁵ *Cf. id.*

⁶ *Cf. State v. Jefferson*, 429 P.3d 467 (Wa. 2018); *State v. Lahman*, 488 P.3d 881 (Wa. App. Div. Two 2021).

⁷ *Cf. Jury Trial Workgroup, Best Practices in Response to Frequently Asked Questions*, Washington Court (June 2021), available at <https://www.courts.wa.gov/newsinfo/content/Best Practices in Response to FAQ.PDF> (last visited April 29, 2024).

⁸ See *id.* at 7.

To address these constitutional concerns, this rule at a minimum should stipulate that remote jury selection in criminal cases is subject to the defendant's consent. Furthermore, at least in criminal cases, the rule should give the parties the right to examine each remote prospective juror individually before the parties exercise challenges.

Technology Concerns

The Clinic embraces the fact that remote jury selection may offer the potential for greater access to jury service for people who cannot easily or equitably access the courthouse. Jury selection that depends on remote technology, however, will necessitate that every prospective juror be able to participate effectively in a remote video call. At the minimum, this participation requires an up-to-date computer or smartphone, a stable internet connection, a quiet and appropriate place in which to participate, and a minimum level of technology competence. This requirement could undermine, rather than enhance, jury pool inclusivity.

As of Summer 2023, roughly 230,000 households within Washington State still cannot access the broadband services necessary to use remote video technology.⁹ At a minimum, this deficit would automatically exclude, or immensely burden, more than 8% of households within the state from the remote jury selection process at the very outset of the rule's implementation. Additionally, an individual who can access the internet must have a stable enough connection to participate in the entire *voir dire* proceeding free of glitches, lapses, or other technological malfunctions. As Clinic members can attest from their own educational experience, the COVID-19 pandemic revealed vast disparities in technology access for remote activities.¹⁰ Without greater resources to ensure equal access, a remote technology requirement for jury selection may heavily burden participation by different communities and individuals, jeopardizing the fair and equal application of the judicial process across the entire state.

Washington courts have already showcased their hesitancy to introduce remote technology into jury selection, commonly citing technological inequalities. In a 2023 poll of 123 Washington courts, 80% of responding judges and administrators indicated that remote jury selection is "not feasible or desired."¹¹ Internet connection issues for remote parties was reported as the biggest challenge facing courts that have adopted various forms of remote proceedings. Washington courts thus do not view themselves as currently capable of supporting remote jury selection, and a majority oppose the practice altogether.

⁹ See Gov. Jay Inslee, *Making "Internet for All" Possible in Washington*, Medium (June 27, 2023), available at <https://medium.com/wagovernor/making-internet-for-all-possible-in-washington-3160670364bd> (last visited April 29, 2024).

¹⁰ Cf. generally, *Coronavirus Has Devastated the College Experience*, Chronicle of Higher Education (2020), available at <https://sponsored.chronicle.com/coronavirus-has-devastated-the-college-experience/index.html> (last visited April 28, 2024).

¹¹ Washington Remote Proceedings Workgroup, at p. 6, Washington Courts (Oct. 2023), available at https://www.courts.wa.gov/programs_orgs/pos_bja/RemoteTF/BJA_Mtg_Oct_2023.pdf (last visited April 28, 2024).

Further, the proposed rule directs that a court will not exclude a juror from jury selection “due to lack of resources or access and shall arrange for alternative methods, including but not limited to in-person *voir dire*.” The proposed rule’s goal may be to enhance jury diversity, but by mandating participation in remote jury selection for those lacking appropriate technology, the rule could disproportionately burden those individuals. This rule overlooks the reality that those without access to the latest technology may also face challenges in accessing transportation, childcare, eldercare, or the ability to take time off work to attend jury selection in person. This rule thus inadvertently may favor individuals with resources over those who are disadvantaged.

Court Costs & Efficiency

Proponents of remote jury selection assert its cost-effectiveness, under a theory that remote proceedings allow for more efficient jury selection, cutting both time and resources. The evidence from several jurisdictions that have experimented with remote *voir dire*, however, does not suggest that the duration of jury selection is meaningfully shortened with the use of remote technology for the narrow purpose of *voir dire*.¹²

Additionally, cost-saving assessments do not account for hidden costs that may be necessary to run remote jury selection effectively. For example, the remote proceedings workgroup that polled Washington courts on the feasibility of all remote proceedings identified several barriers that will necessitate added expenses.¹² These expenses include:

- Added support and technical staff—previous Washington workgroups have recommended at least two technical staff be present at every remote proceeding, in addition to the court staff already present
- Improved equipment and courtroom space for this necessary equipment
- Internet services for both the court and participants—internet connection issues on the part of the court itself was reported by 38% of respondents.

These costs are not considered within GR 41 and could offset, if not exceed, any efficiencies derived from remote jury selection. These hidden costs also include other necessary considerations, such as the burden remote proceedings will place on appellate courts and the possible cost of diminished judicial legitimacy if defendants’ jury trials rights are eroded for efficiency. These costs could lead to an ironic result in which the jurisdictions that most need efficient jury selection, and can least afford to waste resources, will be the ones incapable of taking advantage of remote proceedings, reinforcing disparities amongst the counties.

¹² Natalie Hanson, *Benefits, Disparities of Keeping Remote Court Hearings Weighed in California Senate*, Courthouse News Service (March 7, 2023), available at <https://www.courthousenews.com/benefits-disparities-of-keeping-remote-court-hearings-weighed-in-california-senate/> (last visited April 29, 2204).

Conclusion

In conclusion, the Clinic respectfully opposes GR 41 because, in its current form, it enables judges unilaterally to impose remote jury selection across the State. The Clinic thus urges that GR 41 not be allowed to go into effect without revisions. These revisions could include:

- Conditioning this procedure in criminal cases on a defendant's consent
- Ensuring the parties an opportunity to examine each remote juror individually
- Condition adoption of this rule on legislation to support greater technology access across the State, both for prospective jurors and for local judicial systems

Respectfully submitted:

Gonzaga Law Civil and Human Rights Clinic

This comment reflects the views of the members of the 2024 Gonzaga Civil and Human Rights Clinic and does not necessarily represent the views of Gonzaga University or Gonzaga University School of Law

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Dear Clerk of the WA Supreme Court,

Attached please find a comment on proposed GR 41 from Gonzaga Law School's Civil and Human Rights Clinic.

Thank you very much, and please let me know if I should share any additional information.

Sincerely,

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