

Family Law Section

Family Law Section of the Washington State Bar Association



December 29, 2021

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Supreme Court Rules and Procedures Committee
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929,

Sent via email: supreme@courts.wa.gov.

SUBJECT: Comment on Proposed CR 39

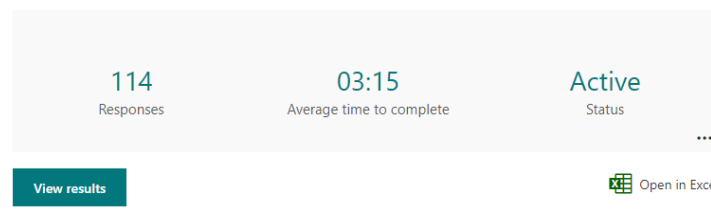
Dear Supreme Court Justices and Committee Members,

I am writing today to provide the input of the Family Law Executive Committee (FLEC) regarding CR 39, the current version of the proposed rule regarding videoconference trials.

A survey was sent to the Family Law Section membership to canvass their consensus and concerns regarding the proposed rule. The response to the survey was strong and included more comments than previously received in prior surveys.

Support for the proposed rule included 84 responses. Opposition to the rule totaled 30 votes.

Video Trials - Proposed Changes to CR 39



1. Do you support the proposed changes?

[More Details](#)

● Yes 84
● No 30



It was notable to the Committee that of the 114 responses, 81 or 71% expressed specific concerns, whether in support or opposition, many based on actual experience with videoconference trials implemented after the pandemic started. The survey was statewide and intended to gather as much commentary as possible.

Those who voted in opposition voiced the following categorized concerns, in descending order of frequency:

- 11 *Lower Quality Trial Experience*
- 7 *Judges should not have sole discretion. Parties must agree to experience video trial*
- 4 *Due Process Impacts*
- 6 *Credibility Impacts*
- 5 *Abuse of the Process (having children present witnesses-reading from notes, multi-tasking during trial)*

A representative comment from a colleague opposed:

Video is not adequate, in many cases, for the court to adjudge the credibility of the witness. It also does not allow for the examining counsel to see and react to visual clues particularly for cross examination. It also likely will prevent counsel from having direct access to the client when examinations are underway to obtain client input and feedback.

Those who voted in favor voiced the following benefits or concerns, in descending order of frequency:

- 17 *Efficiency/Convenience*
- 15 *Cost Savings*
- 12 *Pandemic Safety*
- 11 *Access to Justice in general or for the disabled*
- 3 *Going to court in Seattle presents a safety risk*
- 2 *Greener method of appearance*
- 2 *Concerns about abuse of process (again children listening to proceedings)*

A representative comment from a colleague in support:

Efficient, eliminates travel to and from the courthouse that is costly and typically involves boxes of notebooks, facilitates witness participation with less lost time from work due to waiting in the hallway, encourages counsel to speak one at a time instead of over each other, safer from Covid-19 and other health concerns, adaptive for those with disabilities

FLEC'S POSITION

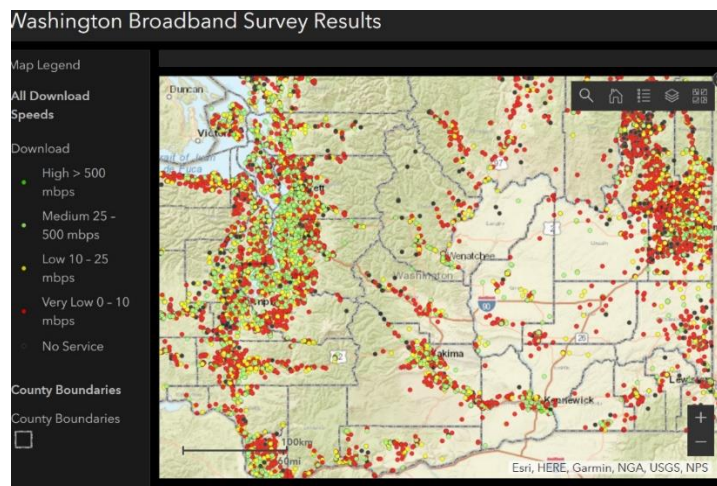
FLEC is supportive of the proposed rule, provided videoconference trials should not be imposed over the objection of a party absent well defined good cause. Such exceptions might include allegations of domestic violence or a disabling condition.

Also, a predicate for videoconference trials should be that parties and representatives have adequate access to necessary technology to ensure full and efficient participation. The Seattle Times recently reported on the status and gaps of broadband access in Washington State.

<https://www.seattletimes.com/seattle-news/when-the-world-turned-digital-hundreds-of-thousands-of-washingtonians-were-shut-out-will-massive-government-funding-solve-the-problem>

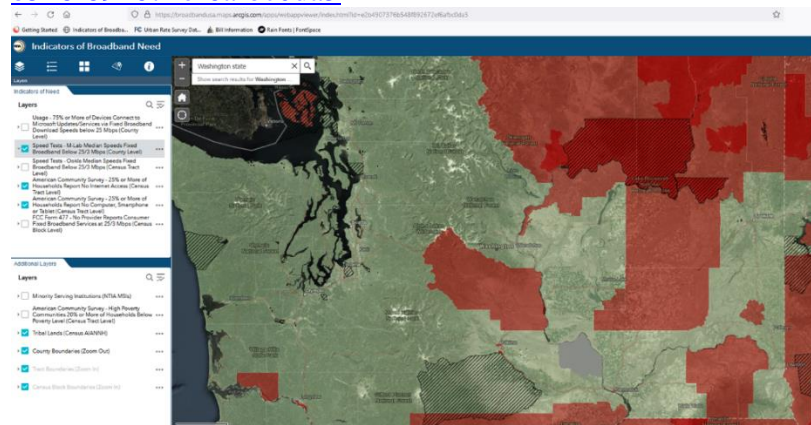
A survey conducted by the Broadband Office of the Washington Department of Commerce illustrates the variance of internet access across the state.

<https://www.arcgis.com/apps/opsdashboard/index.html#/4bcf7c77ecac475eb467e9df0028d05b>



Another important graphic is the National Telecommunications and Information Admin (NTIA) INDICATOR OF BROADBAND NEED MAP. Specifically, the *layers that demonstrate households without internet access OR where the households are cited as having no computer, smartphone, or tablet with which to access the*

internet: <https://broadbandusa.maps.arcgis.com/apps/webappviewer/index.html?id=e2b4907376b548f892672ef6afbc0da5>



A related and helpful resource is the August 2021 Stanford study: **Virtual Justice**. <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf> Chapter 7: Access to Technology (pages 75-84) delineates the issue. The following are a few pertinent excerpts:

(page 75): "... policymakers should be careful to question their assumptions about access to technology."

(page 76): "Most often, interviewees' concerns fell into one of four categories: access to phones (including smartphones, cell service, and minutes/plans), access to computers, access to the internet, and access to quiet or private spaces in which to log onto virtual court."

(page 78): "Interviewees often explained that access-to-technology problems are unevenly distributed across society. Seven interviewees described these problems as generational, and 21 described access gaps according to financial resources or across socioeconomic and demographic lines."

(page 84:): "But access to justice has a comprehension component, too. Are defendants able to understand remote court as well as in-person court?"

Multiple survey respondents, regardless of how they voted, expressed concerns about witnesses using notes, third persons being present during videoconference proceedings, including children of the parties, and witness coaching or tampering outside the presence of the court's full view, in actual trials.

If judges are able, over time, to develop sufficient skill to deal with these issues in a videoconference setting, as they have when family law trials are held in person, these legitimate concerns raised by multiple colleagues who have participated in videoconference trials may dissipate. However, until such experience is acquired and manifested videoconference trials should be by agreement, with a list of exceptions, rather than instituted as entirely subject to judicial discretion.

To summarize, CR39d(2)(a) in its current form, allows for a family law trial to be by videoconference to be ordered over the objection of counsel or a party, on the court's initiative. FLEC supports the use of this provision during the pandemic but not as a regular or mandated procedure once the pandemic has resolved. There are many locations throughout the state where residents cannot reliably participate in videoconference and audio proceedings of sufficient quality to ensure due process. Concerns exist regarding witness coaching and children being exposed to their parents' proceedings by a party. These concerns should be monitored and addressed as the rule is implemented to assure that the same type of conduct that is not allowed in open courtrooms, is allowed to take place in videoconference trials. FLEC believes that this rule will ultimately contribute to greater access to justice but not if the same protections cannot be afforded to videoconference participants. For some participants, there appear to be initial

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systemic inequities (lack of broadband access/education) that will adversely impact some geographic and societal groups and communities.

Very Truly Yours,

Jacqueline L. Jeske

Chairperson

Family Law Executive Committee