

WSR 23-09-021
RULES OF COURT
STATE SUPREME COURT
[April 6, 2023]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO CR) NO. 25700-A-1501
28—PERSONS BEFORE WHOM)
DEPOSITIONS MAY BE TAKEN AND)
CR 30—DEPOSITIONS UPON ORAL)
EXAMINATION)

Byers and Anderson Litigation Services, having recommended the suggested amendments to CR 28—Persons Before Whom Depositions May Be Taken and CR 30—Depositions Upon Oral Examination, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2024.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2024. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of April, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Changes to

CIVIL RULE 28

A. Name of Proponent: Byers & Anderson, Inc. dba B&A Litigation Services (B&A)

B. Spokespersons:

Steven B. Crandall, JD, CLVS
Chief Executive Officer
2200 6th Avenue, Suite 425
Seattle, Washington 98121
253-627-6401
scrandall@balitigation.com

C. Purpose: Amending CR 28 (a), (c), (d), and (e) is necessary to preserve the integrity of the record and make it clear that any persons recording depositions would be considered "officers" under the rules and are subject to rule 28(c) Disqualification for Interest, rule 28(d) Equal Terms Required, and rule 28(e) Final Certification of the Transcript.

On October 27, 2022, the Supreme Court of Washington issued an Order Regarding Court Operations After October 31, 2022. Washington courts had been operating under a series of orders issued by the Court following Governor Inslee's proclamation of a state of emergency on February 29, 2020, due to the novel coronavirus disease (COVID-19) pandemic.

The Court ordered that the following provisions of the Court's current emergency orders remain in effect until further order of the court: *With Respect to Civil Matters:*

3. With respect to all civil matters, courts should encourage parties to stipulate in writing to reasonable modifications of existing case schedules and remote methods of service and to conduct discovery, pretrial hearings, and alternative dispute resolution by remote means whenever possible.

Presumption of Remote Depositions: With respect to discovery, depositions shall be performed remotely absent agreement of the parties or a finding of good cause by the Court to require the depositions be performed in person. Absent agreement of the parties, with respect to remote depositions where only the deponent and their counsel are in the same room, the technology used must include video/audio for both the deponent and their counsel. If the deposition is being recorded (see CR 30 (b) (8)), the recording need only be of the deponent witness and not of other participants to the deposition proceeding.

The routine use of remote depositions has created an opportunity for counsel to exploit ambiguities in the rules to argue that CR 30 (b) (8) (H) permits counsel, counsel's employees, or anyone to video record a deposition thereby avoiding the safeguards of CR 28 and jeopardizing the integrity of the record and confidence in the system.

The rules give the parties great latitude in selecting the person before whom a deposition may be taken.

CR 29 *Stipulation Regarding Discovery Procedure*, states:

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

The rules provide additional latitude in selecting the method used to record deposition testimony.

CR 30 (b) (4) *Nonstenographic Recording*, states:

The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

It has become standard practice in Washington Courts to employ audio/video recording systems in place of stenographic court reporters. In addition, the Department of Licensing has recognized that Voice Writers, who use specialized software and skills to make the record, may be certified as court reporters in the State of Washington. The methods and persons before whom a deposition may be taken have evolved as technology has changed. The rules have not kept up.

With respect to depositions the rules provide a special exception for recording of deposition testimony by video without court order or the need for stipulation by counsel.

CR 30 (b) (8) *Video recording of depositions*, states in part:

(A) Any party may video record the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be video recorded.

In *Perales v Town of Cicero, et al.*, US District Court, Northern District of Illinois, Case Number 11 C 2056, March 6, 2012 the Court held that:

... unless stipulated otherwise, each method of deposition recording must be accompanied by its own separate Rule 28(a) officer who can perform the duties laid out in Rule 30."

In *Alcorn v City of Chicago*, Case Number 17 C 5859 the Court addressed Plaintiff's proposal to use a Zoom recording:

The issue presented is one that is novel and a product of the national health crisis that we are currently facing. Since April 2020, attorneys have been conducting an extraordinary number of depositions remotely using videoconferencing technology. While technology has changed the dynamics of the practice of law, some things have remained the same. A court reporter is still a fixed and necessary presence at a deposition, and is charged under the Federal Rules of Civil Procedure with ensuring the integrity of the deposition. The question presented in this matter is whether a party can record a deposition, using the "Zoom" record function, where the court reporter has been retained only to stenographically record the deposition, and has declined to certify the video recording as an accurate record of the witness's testimony.

The Court went on to note that:

Rather, it is a certified videographer who has the appropriate training to serve as the Rule 28 officer, and ensure that a video deposition is properly recorded with established procedures to go on or off the record, limit noise and interruptions, address technical glitches, and frame the camera view on the witness. And it is the videographer who will complete the necessary certification under the Federal Rules to affirm the accuracy of the video recording of the deposition, not the stenographic reporter.

By modifying CR 28(a) to include a person recording a deposition under CR 30 in the definition of officer, the Court would remove an ambiguity in the rules which counsel are exploiting to avoid the application of CR 28 safeguards thereby ensuring the integrity of the process.

These CR 28 safeguards include:

CR 28(c) *Disqualification for Interest*, states:

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

and

CR 28(d) *Equal Terms Required*, states:

Any arrangement concerning court reporting services or fees in a case shall be offered to all parties on equal terms. This rule applies to any arrangement or agreement between the person before whom a deposition is taken or a court reporting firm, consortium or other organization providing a court reporter, and any party or any person arranging or paying for court reporting services in the case, including any attorney, law firm, person or entity with a financial interest in the outcome of the litigation, or person or entity paying for court reporting services in the case.

By replacing the word "person" with "officer" the court eliminates the ambiguity that allows counsel to misinterpret the rules and makes it clear that the duties of an officer apply.

CR 28(e) provides an additional safeguard by requiring that the transcript produced shall not be certified until after the final version has been reviewed and that the transcript should not be modified after the certification. I submitted this rule change request adding section (e) back in June of 2016. At that time alternative methods and stipulated persons before whom depositions were taken was a rare occurrence. That is no longer the case.

CR 28(e) *Final Certification of the Transcript*, states:

The court reporter reporting a deposition shall not certify the deposition transcript until after he or she has reviewed the final version of the formatted transcript. A court reporting firm, consortium, or other organization transmitting a court reporter's certified transcript shall not alter the format, layout, or content of the transcript after it has been certified.

As currently written this safeguard applies only to transcripts produced by court reporters who are certified pursuant to RCW 18.145.010.

CR 29 allows stipulation by counsel as to other persons before whom a deposition may be taken. When such a person is not a certified court reporter pursuant to RCW 18.145.010, the court's interest in the accuracy of the transcript makes certification of the transcript more essential not less.

No matter who produces a transcript or what method is used to record the testimony of a witness, whether it be a stenographic reporter, a voice writer, a court installed system, audio or video recording, or some other method stipulated to by the parties, the court retains an interest in maintaining the integrity of the record, disqualifying persons with an interest in the outcome, providing equal terms to all parties, and certifying the accuracy of the transcript.

Such a change is also consistent with the use of the term "officer" in rules 30, 31, and 32.

D. **Hearing:** B&A does not believe a public hearing is needed.

E. **Expedited Consideration:** B&A believes that the Court's Order Regarding Court Operations After October 31, 2022 has created exceptional circumstances which justify expedited consideration.

F. **Supporting Materials:**

Declaration of Steven B. Crandall in support of suggested changes to CR 28(b) and CR 30 (b) (8) (H).

Alcorn v. City of Chicago, Case No. 17 C 5859

Perales v Town of Cicero, Case No. 11 C 2056

CR 28

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

SUGGESTED CHANGE TO CIVIL RULE 28

(-) (1) - (6) [Unchanged.]

(a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before (i) an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, (ii) a certified court reporter, or (iii) a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in rules 28, 30, 31, and 32 includes a certified court reporter, a person appointed by the court, ~~or~~

designated by the parties under rule 29-, or recording a deposition under rule 30.

(b) [Unchanged.]

(c) **Disqualification for Interest.** No deposition shall be taken before a ~~person~~ an officer who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) **Equal Terms Required.** Any arrangement concerning court reporting services or fees in a case shall be offered to all parties on equal terms. This rule applies to any arrangement or agreement between the ~~person~~ officer before whom a deposition is taken or a court reporting firm, consortium or other organization providing a court reporter, and any party or any person arranging or paying for court reporting services in the case, including any attorney, law firm, person or entity with a financial interest in the outcome of the litigation, or person or entity paying for court reporting services in the case.

(e) **Final Certification of the Transcript.** The ~~court reporter of-~~ ficer reporting a deposition shall not certify the deposition transcript until after ~~he or she has~~ they have reviewed the final version of the formatted transcript. A court reporting firm, consortium, or other organization transmitting a ~~court reporter's~~ an officer's certified transcript shall not alter the format, layout, or content of the transcript after it has been certified.

GR 9 COVER SHEET

Suggested Changes to

CIVIL RULE 30

A. **Name of Proponent:** Byers & Anderson, Inc. dba B&A Litigation Services (B&A)

B. **Spokespersons:**

Steven B. Crandall, JD, CLVS
Chief Executive Officer
B&A Litigation Services
2200 6th Avenue, Suite 425
Seattle, Washington 98121
253-627-6401
scrandall@balitigation.com

C. **Purpose:** Amending CR 30 (b) (8) (H) is necessary to eliminate an ambiguity that counsel are exploiting to record video depositions themselves without the assistance of an impartial professional legal videographer. Use of an impartial professional legal videographer ensures, *inter alia*, impartiality, accuracy, trustworthiness and professionalism during the examination, the privacy and safe keeping of a deponent's information, and the impartiality of the video record.

It is also consistent with CR 30 (b) (4) that the testimony at a deposition may be recorded by other than stenographic means, the safeguards of CR 28(c) *Disqualification for Interest*, the equal terms of CR 28(d) *Equal Terms Required*, and the transcript certification requirements of CR 28(e) *Final Certification of the Transcript*.

CR 30 (b) (8) *Video recording of depositions*, states in part:

Any party may video record the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be video recorded.

Counsel have misinterpreted CR 30 (b) (8) to mean that they have an unrestricted right to video record a deposition without any rules or limitations other than the requirements set forth in subsection

(b) (8). This interpretation is contrary to the rules and case law. Counsel read CR 30 (b) (8) to mean "independent of" rather than "in addition to" to the other rules and regulations related to the taking of depositions.

By recording the deposition themselves or by using their own employees, counsel are interpreting the rules to allow that anyone can record the video deposition and that the disqualification for interest prohibitions in CR 28(b) apply only to the stenographic officer. Such an interpretation would allow recording by the attorney themselves, an employee of the law firm, an employee of one of the parties, a relative of one of the parties, or someone else with a financial interest in the outcome of the litigation. Such a position is against public policy, the court's interest in the impartiality of the record, and the integrity of the judicial process.

CR 28(c) states:

Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Counsel interpret CR 28(c) narrowly to mean an "officer" as defined previously in the rule in order to reach the conclusion that this rule does not apply to the video operator identified in CR 30. Such an interpretation ignores the unambiguous use of the term "person." CR 28 uses the language a "person" before whom a deposition may not be taken. Had the court wished to restrict this rule to only officers as defined in CR 28(a) they could have used the language, "No deposition shall be taken before an officer who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action." [Emphasis added.] They did not.

Counsel, further ignores the context within which rule 30(b) (8) was written.

CR 30 (b) (4) states:

The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means.

CR 30 (b) (4) recognizes that the testimony at a deposition may be recorded by other than stenographic means while CR 30 (b) (8) (H) makes a special exception for video recorded depositions so that stipulation or court order is not necessary for this particular method. It does not give counsel leave to ignore the requirements of CR 28 or the context of CR 30 (b) (4).

Given the apparent ease of recording virtual depositions, one can easily imagine a scenario in which one, two, or more counsel each record the deposition and seek to introduce their video as representative of the video record at trial.

CR 30 (b) (8) (G) states:

Absent agreement of the parties or court order, if all or any part of the video recording will be offered at trial, the party offering it must order the stenographic record to be fully transcribed at that party's expense. A party intending to offer a video recording of a deposition in evidence shall notify all parties in writing of that intent and the parts of the deposition to be offered within sufficient time for a stenographic transcript to be prepared, and for objections to be made and ruled on before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the video record-

ing. The court shall permit further designations of testimony and objections as fairness may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the video recording be made, or that the person playing the recording at trial suppress the objectionable portions of the recording. In no event, however, shall the original video recording be affected by any editing process.

It has become standard practice to synchronize the deposition video to the court reporter's transcript in order to create designations for use in trial and to eliminate objections from the video playback. The court reporter cannot ensure the accuracy of the video produced by counsel. In this case, you have a transcript, produced by an independent impartial officer who has a duty to produce an unbiased record being synchronized to a video being produced by one of the party's counsel who have a duty to zealously represent the interest of their client. When the synchronized video is played back in court it is often done without showing the written transcript and the video effectively stands in for the official record. Any jury could reasonably assume that the video they are seeing is an accurate record of the deponent's testimony.

In *Alcorn v City of Chicago*, No. 17-cv-5859, F.R.D. 440 (N.D. Ill. 2020), the court addressed Plaintiff's proposal to use a Zoom recording created without the use of an independent professional legal videographer. The court noted that:

Plaintiff's proposal in this case is untenable. If permitted, Plaintiff would obtain a certified transcript of the recording but an uncertified video recording of the deposition. Yet, Plaintiff seeks to use both the transcript and the recording as equals at her discretion. As a result, the process outlined in the Federal Rules of Civil Procedure to ensure the integrity of the deposition would be bypassed. The court reporter would not be managing the appearance or demeanor of anyone on the screen, any edits to the recording, or the sealing and maintaining of the recording. There would be no certification that the Zoom video recording accurately captures the testimony of the deponent. Plaintiff's proposal essentially seeks an end-run around the procedures outlined in Rule 30.

CR 30 (b) (8) (D) states:

Unless otherwise stipulated to by the parties, the expense of video recording shall be borne by the noting party and shall not be taxed as costs. Any party, at that party's expense, may obtain a copy of the video recording.

CR 28(d) *Equal Terms Required* states in part:

Any arrangement concerning court reporting services or fees in a case shall be offered to all parties on equal terms.

By allowing one party to control the video recording of the deposition the court would set up a situation in which counsel would have to purchase the recording from opposing counsel. There would be no limitation on what the recording party could charge. Such a situation would be at odds with the equal terms requirement of CR 28(d) and could result in significant litigation cost shifting.

Legal videography has been a service offered by court reporting agencies since its introduction in the 1980s. As such it must be offered to all parties on equal terms. Until the introduction of remote depositions and the ease of self-recording, the issue of counsel recording their own depositions rarely arose. The specialized equipment and knowledge made such a practice unthinkable.

Professional legal videographers are trained to conduct depositions under CR 30 and recording of physical and mental examination of persons under CR 35. As such they consider themselves to be officers of the court with a duty to create an impartial video record. They adhere to a number of standards and best practices. In no case do they simply hit "record," whether conducting a deposition in person or remotely. They use specialized software, equipment, and knowledge to produce deposition recordings. Utilizing the services of professional legal videographers not only guarantees the quality and integrity of the recording, it also ensures the impartiality of the person making the recording.

In *Brizuela v City of Seattle*, the Superior Court of the State of Washington for King County, Case No. 14-2-05875-6SEA, plaintiff sought to use an uncertified videographer with limited experience in conducting CR 35 examinations. The defense filed a motion to compel that any videotaping be performed by a certified, professional videographer. The Honorable Theresa B. Doyle ordered that "if the plaintiff wishes to videotape either examination...he will employ a licensed professional videographer."

D. **Hearing:** B&A does not believe a public hearing is needed.

E. **Expedited Consideration:** B&A believes that the Court's Order Regarding Court Operations After October 31, 2022 has created exceptional circumstances which justify expedited consideration.

F. **Supporting Materials:**

Declaration of Steven B. Crandall in support of suggested changes to CR 28(b) and CR 30 (b) (8) (H).

CR 30

DEPOSITIONS UPON ORAL EXAMINATION
SUGGESTED CHANGE TO CIVIL RULE 30

(a) [Unchanged.]

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Video Recording.

(1) - (7) [Unchanged.]

(8) (A) - (G) [Unchanged.]

(H) After the deposition has been taken, the operator of the video recording equipment shall submit with the video recording a certificate that the recording is a correct and complete record of the testimony by the deponent. Pursuant to rule 28(c) the operator shall further certify that they have no financial interest in this matter, nor are they an attorney for, nor are they a relative or employee of, any party or attorney in this action. If the video recording is stored exclusively on a computer or service (including cloud storage) and not on an easily removable and portable storage device, the certificate shall so state and indicate measures taken to preserve it. Unless otherwise agreed by the parties on the record, the operator shall retain custody or control of the original video recording. The custodian shall store it under conditions that will protect it against loss, destruction, or tampering, and shall preserve as far as practicable the quality of the recording and the technical integrity of the testimony and images it contains. The custodian of the original video recording shall retain custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the recording be preserved for a longer period.

(8) (I) [Unchanged.]

(c) - (h) [Unchanged.]

Reviser's note: The typographical error in the above material occurred in the copy filed by the state supreme court and appears in the Register pursuant to the requirements of RCW 34.08.040.