

Page 2

IN THE MATTER OF SUGGESTED AMENDMENTS TO CR 28 — PERSONS BEFORE
WHOM DEPOSITIONS MAY BE TAKEN, CR 80 — COURT REPORTERS AND RAP 9.2 —
VERBATIM REPORT OF PROCEEDING

(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, 2015. 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 3rd day of January, 2015.

For the Court



CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Changes to CIVIL RULE 28, CIVIL RULE 80, and RULE OF APPELLATE PROCEDURE 9.2

Purpose:

1. Suggested Change to Civil Rule 28

The purpose of amending CR 28 as proposed is to maintain the neutrality and impartiality of the certified court reporter, to ensure that deposition transcripts are prepared by disinterested persons, and to ensure that deposition transcripts are offered to all parties on equal terms.

Unlike attorneys, court reporters are intended to be neutral officers of the court in our judicial system. At its core, their job is to create an accurate record of testimony given during depositions and court or administrative proceedings. But court reporting is also a business. And like all businesses, competitors are constantly looking for a leg up. In recent years some reporting agencies — particularly national firms — have resorted to what is called “third party contracting” to achieve that advantage.

Third party contracting refers to the situation in which a court reporting firm enters into multi-case contracts that provide preferred pricing and create advocacy relationships. The contracts are typically with insurance companies, large corporations and law firms and they provide discounted service in exchange for the former’s promise to use the court reporting firm. National firms are very aggressive in marketing these multi-case contracts. One national reporting firm, the subject of a lawsuit in Arizona, has apparently offered 20% to 30% discounts off its regular rates for contracted parties. These agreements create a long-term contractual relationship between the reporting agency and party or counsel. Both WCRA and the National Court Reporters Association (NCRA) strongly oppose the practice, but it continues to grow.

When reporting agencies, subject to these contracts, are asked to report a Washington deposition, they hire a Washington certified court reporter as an independent contractor to report the deposition. However, the reporter is often required to relinquish control of the original final deposition to the “contracted” reporting firm, which then formats and/or edits the transcript and delivers the final product. This common scenario allows the advocacy court reporting agency to take control of the billing, distribution, and archiving of the official record. It also shifts control of the record from licensed and regulated officers of the court to partial interests, leaving the

public vulnerable to what are now becoming, unfortunately, common abuses within the court reporting industry. An entity whose interests are so closely tied to and interdependent with one party to the litigation should not be in control of the official record.

WCRA believes this very common scenario effectively eviscerates the Court's mandates for fair dealing and equitable treatment, reduces and/or restricts the court reporter's accountability to the public and the courts, jeopardizes the security and confidentiality of the official record, and removes any meaningful avenue of redress, undermining the purpose of CR 28 in two critical ways.

A court reporting agency that has a long-term contract with one of the parties is not a disinterested person under CR 28(c). Second, there is no mechanism for ensuring that all parties are actually receiving the deposition transcript on equal terms as the current CR 28(d) envisions. Instead, whether parties are treated equally is left to the discretion of the court reporting agency that invoices each party. As a practical matter, lawyers rarely inquire whether the reporting firm they used for a deposition is actually offering the transcript to the other side on equal terms. Even more troubling, the court reporting agency may not be regulated by the Department of Licensing and may or may not be aware of Rule 28(c) and (d). But it has a significant financial interest in not offering the same discounted terms to all parties.

2. Suggested Change to Civil Rule 80

The purpose of adding a new paragraph to Rule 80 is to allow a party to choose a court reporter at its expense in the event the superior court elects to use only an electronic recording device.

WCRA recommends that Civil Rule 80 be changed to allow parties to engage certified court reporters where a superior court has elected to use only an electronic recording. WCRA appreciates that electronic recordings can be a less expensive method of recording oral proceedings in the first instance. However, electronic recordings have several significant drawbacks. First, the recording system can fail, which in the worst case may require a new trial, a hugely expensive risk for litigants. Second, even if the system functions properly, an appellant will often have to pay more for a verbatim report of proceedings based on an electronic recording than one derived from stenographic notes. The reason is that a court reporter (or transcriptionist) must spend significantly more time transcribing recorded testimony than live testimony. Third, in multiday trials, litigants often want same day transcripts in order to prepare for subsequent days. If a proceeding is only recorded electronically, that recording must be obtained and then transcribed by the court reporter after the trial day has ended,

doubling the time required for a party to receive a transcript. Thus, while electronic recordings may reduce court costs they can significantly increase costs for litigants.

Therefore, if a party is willing to bear the cost of engaging a court reporter, Rule 80 should not prevent that party from doing so.

3. Suggested Change to Rule of Appellate Procedure 9.2

This proposed addition is needed because some courts may interpret the addition of transcriptionists in RAP 9.2 as giving them discretion to prevent certified court reporters from preparing verbatim reports of proceedings. That would be a mistake and fundamentally inconsistent with the Court Reporting Practice Act (CRPA). However, at least one superior court — Clark County — is already preventing certified court reporters from preparing verbatim reports of proceedings from electronically recorded trials. If the practice in Clark County is allowed to spread, it will turn the CRPA on its head by preventing the individuals specifically licensed by the State to create verbatim records from actually doing so.

1 (e) Control of the Transcript. The court reporter reporting a deposition shall not relinquish
2 control of the deposition transcript in a manner that would prevent the court reporter from
3 reviewing the production, distribution, charges and invoicing for the transcript before the
4 transcript is certified and delivered to the custodial attorney.

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SUGGESTED CHANGE TO CIVIL RULE 80

(d) Supplemental Stenographic Record. If the superior court elects to record a proceeding solely by means of an electronic recording device, any party may, at its own expense, engage a certified court reporter to record the proceeding stenographically. Where a proceeding has been recorded both electronically and by a certified court reporter, either form of record, or both, may be used to create the verbatim report of proceedings for appellate review under RAP 9.2.

SUGGESTED CHANGE TO RULE OF APPELLATE PROCEDURE 9.2

(g) Persons Authorized to Prepare the Verbatim Report of Proceedings. When a proceeding has been recorded stenographically by a court reporter, the verbatim report of proceedings must be prepared by the official reporter for the trial court or a Washington certified court reporter. When a proceeding has been recorded by electronic device, the verbatim report of proceedings must be prepared by the official reporter for the trial court, a Washington certified court reporter, or a transcriptionist approved by the trial court.

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