

Tracy, Mary

From: Hinchcliffe, Shannon
Sent: Friday, May 08, 2015 9:43 AM
To: Tracy, Mary
Subject: FW: Proposed Rule 80(d)
Attachments: GR 9 COVER SHEET.pdf

From: Phyllis Lykken [mailto:pclykken@gmail.com]
Sent: Thursday, April 30, 2015 9:58 PM
To: AOC DL - Rules Comments
Subject: Proposed Rule 80(d)

I am writing to urge the that the Court adopt the Proposed new rule added to CR 80, new paragraph (d) filed in WCRA's GR9 pursuant to the reasons outlined within the Cover Sheet.

Thank you for your considerations herein,

Phyllis Craver Lykken, RPR, CCR

GR 9 COVER SHEET

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

A. **Name of Proponent:** Washington Court Reporters Association

B. **Spokespersons:**

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C. **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.

- D. Hearing:** WCRA requests a hearing.
- E. Expedited Consideration:** WCRA requests expedited consideration.

F. Supporting Materials:

- **Exhibit A** — A letter from the Arizona Trial Lawyers Association to the Administrative Office of the Courts in opposition to striking anticontracting language from Arizona's court rules. The letter outlines Magna Legal Services LLC's lawsuit against the State of Arizona Board of Certified Court Reporters and relays ATLA's views on contracting. Magna is a member of the Alliance of Deposition Firms. (*See Exhibit F*)
- **Exhibit B** — Exhibit B is a copy of the letter sent to attorneys representing Farmers Insurance Company (FIC). FIC also hired a lobbyist to oppose WCRA legislation in 2013. FIC developed an exclusive arrangement to contract with Veritext Corp. to cover all of their depositions across the entire country. Veritext is a member of the Alliance of Deposition Firms. (*See Exhibit F*)
- **Exhibit C** — This is an October 2013 from the Trial Lawyers Association of British Columbia to the Minister of Justice and Attorney General opposing an effort at third party contracting initiated by the Insurance Company of British Columbia.
- **Exhibit D** — This exhibit is a letter from attorney Michael Fisher to the Department of Licensing regarding the allegedly unequal terms charged by Esquire Deposition Solutions LLC, a member of the Alliance of Deposition Firms. (*See Exhibit F*)
- **Exhibit E** — This is a letter from attorney Steven Jager to the Department of Licensing regarding unequal terms.
- **Exhibit F** — This exhibit is the PDC registration for the lobbyist hired to represent the Alliance of Deposition Firms in opposing WCRA's third-party contracting legislation. The Alliance of Deposition Firms consists of Veritext Corporation, Magna Legal Services, Esquire Deposition Solutions, LegalLink, Inc., and U.S. Legal Support, Inc.
- **Exhibit G** — State legislation/rules or Board Actions Limiting Preferential Agreements Between Interested Party Litigants and Court Reporters. In June of 2000 there were 20 states with third-party contracting regulations. There are now 27 states.
- **Exhibit H** — This is the National Court Reporters Association's policy on Third-Party Contracting, which mirrors the Washington Court Reporters Association policy.

- **Exhibit I** — This exhibit is a letter from Senator Adam Kline outlining why House and Senate bills were introduced to combat third-party contracting. Both bills passed unanimously but failed to come to vote after opposition from (i) the Alliance of Deposition Firms, (ii) a lobbyist for Farmers Insurance, and (iii) lobbyists for other insurance companies.