Tracy, Mary

From: Hinchcliffe, Shannon
Sent: Friday, May 08, 2015 9:43 AM
To: Tracy, Mary
Subject: FW: RAP 9,2 New Rule (d)
Attachments: GR 9 COVER SHEET.pdf; Clark County Letters.pdf; WCRA Legal Counsel's Letter to Clark County.docx; Clark County Court Admin Response.pdf

From: Phyllis Lykken [mailto:pclykken@gmail.com]
Sent: Thursday, April 30, 2015 10:39 PM
To: AOC DL - Rules Comments
Subject: RAP 9,2 New Rule (d)

I am writing to urge the Court to adopt the new proposed rule (d). There may be some confusion, because there are actually two new rules submitted that have both been designated as new rules assigned with the (d) designation: One by WCRA and one by the CMC. I support both additions and believe strongly the language submitted by both organizations is important.

As for WCRA's proposed language, I think this is very important based on what has been outlined under the language in our GR9 cover letter. Attached for reference simply due to the confusion that could be caused by both proposed new rules.

As for CMC's proposed language, the last sentence contains two words that were inadvertently added when the rule was submitted and those words "or different" should be deleted.

With regard to the reference made to Clark County in WCRA's cover letter. I have first-hand experience in that my company was asked to transcribe proceedings recorded within the Superior Court of Clark County that none of the persons on their list of approved transcribers would (or could) transcribe. That left the defendant with no choice but to go outside the list and seek assistance in having court proceedings transcribed. I have attached letters related to the incident from the complaining attorney and also from Clark County's Court Administrator. This is the person who determines who will be allowed to be on their list of approved transcribers. At this point no certified court reporters are on their list of approved transcribers. I was granted permission and approval to transcribe these proceedings for one time only and was told I would not be added to the list of approved transcribers. I believe this flies in the face of the Court Reporting Practice Act, as is outlined in the attached letter from WCRA's legal counsel to Clark County, and believe the legislature never intended this law to be regarded or disregarded on a county-by-county basis. Please also review the response of Clark County's Court Administrator, which I have attached.

Thank you for your considerations herein.

Respectfully,

Phyllis Craver Lykken, RPR, CCR
WCRA Legislative Chair

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**:

- Steve Crandall, Esq.
  WCRA Past President
  2200 Sixth Avenue, Suite 425
  Seattle, Washington 98136
  206.938.0348
  steve@promotionarts.com

- Phyllis Craver Lykken, CCR
  WCRA Past President
  Legislative Chair
  NCRA Regional Representative, Western Region
  917 Triple Crown Way, Suite 200
  Yakima, Washington 98908
  509.457.3377
  phyllis@centralcourtreporting.com

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 advocatory 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 advocatory 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.

LAW OFFICE OF STACY KINZER

705 Second Ave., Ste. 1300
Seattle, WA 98104-1797
(206) 224-8777

March 25, 2015

Central Court Reporting
ATTN: Phyllis Likken
1700 Seventh Avenue
Suite 2100
Seattle, WA 98101

Re: *State v. Harkey* COA No. 47061-6-II
Clark County Superior Court No. 04-1-00532-9

Dear Ms. Likken:

Thank you for your assistance on the phone today, regarding the transcription of a hearing from VHS videotape today. I am enclosing the Statement of Arrangements that I filed, for your information. As we discussed, I will wait for you to let me know which court reporter to send the videotape to for transcription.

I hope this is a good opportunity for your firm to enter the Clark County "approved list" of court reporters. You can imagine my frustration with the Court Administrator telling me that the one person on the approved list that could handle VHS was known to be "erratic." I believe it is well past time that they expanded their list.

Very truly yours,

Stacy Kinzer

Encl.

SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
PO BOX 5000
VANCOUVER, WA 98666-5000
E-MAIL: Jeff.Amram@clark.wa.gov

WASHINGTON
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JEFFREY D. AMRAM
SUPERIOR COURT ADMINISTRATOR

TELEPHONE (360)397-2150
FAX (360)759-6708

March 27, 2015

Phyllis Lykken
Central Court Reporting and Video
1700 7th Ave.
Suite 2100
Seattle, WA 98101

Dear Ms. Lykken:

The purpose of this letter is to authorize you to transcribe the requested portions of the matter 'State vs. Nicholas Harkey' (04-1-00532-9) from the video tape provided by this Court for that purpose. All transcription format requirements of the State of Washington or Rules of the Washington Courts are to be followed in preparation of the transcript in this matter.

This authorization is for the preparation of transcript in the above matter only and does not constitute your permanent addition to the Court's list of approved transcribers.

Please contact me if you have any questions.

Sincerely,

Jeffrey Amram
Clark County Superior Court Administrator

Cc: Stacy Kinzer

SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
PO BOX 5000
VANCOUVER, WA 98666-5000
E-MAIL: Jeff.Amram@clark.wa.gov

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SUPERIOR COURT ADMINISTRATOR

TELEPHONE (360)397-2150
FAX (360)397-6078

March 24, 2014

Bradford J. Axel
Stokes Lawrence, P.S.
1420 Fifth Ave.
Suite 3000
Seattle, WA 98101-2393

Re: Appellate Court Transcripts

Dear Attorney Axel:

Thank you very much for your letter dated March 20, 2014 regarding the preparation of transcripts in Courts using electronic audio or video recording. Our Court uses video recording and authorizes six transcribers to prepare transcript in appeals in compliance with RAP 9.2(a), "Courtroom procedures published by the Administrative Office of the Courts" and CR 80. Transcription of matters other than appeals to the Appellate Courts of Washington is unrestricted.

Sincerely,

Jeffrey Amram
Superior Court Administrator

Bradford J. Axel
(206) 892-2102
bradford.axel@stokeslaw.com

March 19, 2014

Via Federal Express

Jeffrey Amram
Clark County Superior Court Administrator
1200 Franklin Street
Vancouver, Washington 98660
(360) 397-2150

Re: Appellate Court Transcripts

Dear Administrator Amram:

Our firm represents the Washington Court Reporters Association (WCRA). WCRA understands that Clark County Superior Court (Court) has created a list of six "approved" providers authorized to prepare verbatim reports of proceedings under RAP 9.2. Specifically, the Court's website contains a page entitled "Transcripts,"[1] which lists six individuals or firms who have been approved by the Court for transcribing verbatim reports of proceedings from a trial video/audiotape. There is no explanation on the website — or elsewhere — of how these six became approved providers. Moreover, it is our understanding that the list is "closed," meaning that no additional persons will be added. Of the six approved providers, two are based in Oregon, one in Douglas County, and one in King County. None appears to be a certified court reporter (CCR) under the Washington Court Reporting Practice Act (CRPA).[2]

WRCA objects to the Court's list for several reasons.

First, the Court's policy prevents those most qualified to prepare verbatim reports of proceedings — certified court reporters — from actually providing that service. Only CCRs are licensed to provide court reporting services within the state. And one of the principal purposes of the CRPA is to create an accurate record for appellate review. Washington CCRs are therefore subject to strict certification standards. Moreover, the Department of Licensing has promulgated numerous regulations governing: (i) licensure and testing requirements; (ii) standards of professionalism; and most recently (iii) continuing

[1] http://www.co.clark.wa.us/courts/superior/transcripts.
[2] RCW 18.145.005 *et seq.*

education requirements.[3] The Court's policy, which effectively prohibits CCRs from creating verbatim reports of Clark County proceedings, conflicts with the CRPA, replacing licensed and regulated CCRs with unlicensed transcriptionists.

Second, by capping the supply of approved providers at six, the Court — by administrative fiat — is artificially increasing the cost of verbatim reports to litigants. Fundamental economic principals dictate that a decrease in supply leads to an increase in price. While excluding hundreds of licensed CCRs from the pool of approved providers may benefit the six transcriptionists that found their way onto the list, it unquestionably harms litigants; their choice of provider is restricted and the cost of service goes up.

Third, it is bad policy to have different approved providers in different counties. The creation of a verbatim report under RAP 9.2[4] is the same regardless of the county from which the case arises. One need look no further than the ever thickening volume of Local Superior Court Rules (currently over 1800 pages) to see that county-by-county requirements for court reporters or transcriptionists would needlessly increase the cost of court reporting services and litigation within Washington. With each new county-specific requirement, the pool of available court reporters would decrease and the cost of practicing the profession would increase. Again, as RCW 18.145 makes clear, the legislature did not intend for the *de facto* county-by-county regulation of the court reporting profession and there is no good reason why the profession should be regulated at the county level.

WCRA respectfully requests that the Court change its list of approved providers to include all Washington CCRs. By making that one change, the Court will: (i) ensure that its policy is in line with the Court Reporting Practices Act, (ii) increase the supply of qualified providers to litigants in Clark County, and (iii) help reduce the needless and costly escalation of county-specific procedural requirements.

Sincerely,

STOKES LAWRENCE, P.S.

Bradford J. Axel

cc: WCRA

[3] *See* WAC 308-14-010 *et seq.*
[4] RAP 9.2 plainly envisions that court reporters will prepare verbatim reports.