

# THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED )  
AMENDMENTS TO CR 28—PERSONS BEFORE )  
WHOM DEPOSITIONS MAY BE TAKEN AND CR )  
30—DEPOSITIONS UPON ORAL EXAMINATION )  
\_\_\_\_\_ )

## ORDER

NO. 25700-A-1501

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 attached hereto 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

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ORDER

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CR 28—PERSONS BEFORE  
WHOM DEPOSITIONS MAY BE TAKEN AND CR 30—DEPOSITIONS UPON ORAL  
EXAMINATION

addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or [supreme@courts.wa.gov](mailto: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

  
González, C.J.

# GR 9 COVER SHEET

Suggested Changes to  
CIVIL RULE 28

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

B. **Spokespersons:**

Steven B. Crandall, JD, CLVS  
Chief Executive Officer  
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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.

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

3 *CR 29 Stipulation Regarding Discovery Procedure*, states:

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

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

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

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

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

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

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

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

26 In *Perales v Town of Cicero, et al.*, US District Court, Norther 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

1 the dynamics of the practice of law, some things have remained the same. A court reporter is  
2 still a fixed and necessary presence at a deposition, and is charged under the Federal Rules of  
3 Civil Procedure with ensuring the integrity of the deposition. The question presented in this  
4 matter is whether a party can record a deposition, using the "Zoom" record function, where  
5 the court reporter has been retained only to stenographically record the deposition, and has  
6 declined to certify the video recording as an accurate record of the witness's testimony.

7 The Court went on to note that:

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

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

17 These CR 28 safeguards include:

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

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

22 and

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

24 Any arrangement concerning court reporting services or fees in a case shall be offered to all  
25 parties on equal terms. This rule applies to any arrangement or agreement between the person  
26 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

1 June of 2016. At that time alternative methods and stipulated persons before whom depositions  
2 were taken was a rare occurrence. That is no longer the case.

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

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

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

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

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

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

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

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

24 F. **Supporting Materials:**

25 Declaration of Steven B. Crandall in support of suggested changes to CR 28(b) and CR  
26 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~~ officer 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



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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.



1 **GR 9 COVER SHEET**

2 Suggested Changes to  
3 CIVIL RULE 30

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

5 B. **Spokespersons:**

6 Steven B. Crandall, JD, CLVS  
7 Chief Executive Officer  
8 B&A Litigation Services  
9 2200 6<sup>th</sup> Avenue, Suite 425  
10 Seattle, Washington 98121  
253-627-6401  
scrandall@balitigation.com

11 C. **Purpose:** Amending CR 30(b)(8)(H) is necessary to eliminate an ambiguity that counsel  
12 are exploiting to record video depositions themselves without the assistance of an impartial  
13 professional legal videographer. Use of an impartial professional legal videographer ensures,  
14 *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.

15 It is also consistent with CR 30 (b)(4) that the testimony at a deposition may be recorded by  
16 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*.

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

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

21 Counsel have misinterpreted CR 30(b)(8) to mean that they have an unrestricted right to video  
22 record a deposition without any rules or limitations other than the requirements set forth in  
23 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.

24 By recording the deposition themselves or by using their own employees, counsel are  
25 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,

1 an employee of one of the parties, a relative of one of the parties, or someone else with a  
2 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.

3 CR 28(c) states:

4 *Disqualification for Interest.* No deposition shall be taken before a person who is a relative  
5 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.

6 Counsel interpret CR 28(c) narrowly to mean an "officer" as defined previously in the rule in  
7 order to reach the conclusion that this rule does not apply to the video operator identified in CR  
8 30. Such an interpretation ignores the unambiguous use of the term "person." CR 28 uses the  
9 language a "person" before whom a deposition may not be taken. Had the court wished to  
10 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.

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

12 CR 30(b)(4) states:

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

15 CR 30(b)(4) recognizes that the testimony at a deposition may be recorded by other than  
16 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).

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

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

21 Absent agreement of the parties or court order, if all or any part of the video recording will  
22 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  
23 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,  
24 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  
25 them and for editing of the video recording. 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

1 recording be made, or that the person playing the recording at trial suppress the objectionable  
2 portions of the recording. In no event, however, shall the original video recording be affected  
3 by any editing process.

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

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

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

25 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

1 remote depositions and the ease of self-recording, the issue of counsel recording their own  
2 depositions rarely arose. The specialized equipment and knowledge made such a practice  
unthinkable.

3 Professional legal videographers are trained to conduct depositions under CR 30 and recording  
4 of physical and mental examination of persons under CR 35. As such they consider themselves  
5 to be officers of the court with a duty to create an impartial video record. They adhere to a  
6 number of standards and best practices. In no case do they simply hit “record,” whether  
7 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.

8 In *Brizuela v City of Seattle*, the Superior Court of the State of Washington for King County,  
9 Case No. 14-2-05875-6SEA, plaintiff sought to use an uncertified videographer with limited  
10 experience in conducting CR 35 examinations. The defense filed a motion to compel that any  
11 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.”

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

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

15 F. **Supporting Materials:**

16 Declaration of Steven B. Crandall in support of suggested changes to CR 28(b) and CR  
17 30(b)(8)(H).  
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1 **CR 30**  
2 **DEPOSITIONS UPON ORAL EXAMINATION**

3 **SUGGESTED CHANGE TO CIVIL RULE 30**

4 (a) [Unchanged.]

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

7 (1)–(7) [Unchanged.]

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

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

23 (8)(I) [Unchanged.]

24 (c)-(h) [Unchanged.]