

Court Rules and Procedures Committee

Meeting
SUPPLEMENTAL AGENDA

June 18, 2018
9:30 a.m. – 12:00 p.m.

Conference Call: 1-866-577-9294, Code: 55419#

Subcommittee Report

1. Subcommittee X
 - Subcommittee Chair Rike Connelly **(2-10)**

Adjourn

Next meeting is scheduled for July 9, 2018



To: Court Rules and Procedures Committee
From: Ulrike (Rike) Connelly, Subcommittee X, Rules Committee
Date: June 14, 2018
Re: Proposal to amend Civil Rule 30

Purpose. This proposal recommends updating the language of Civil Rule 30(b)(8), which addresses depositions being recorded by videotape. The proposed revisions aim to accomplish two changes:

- (1) Remove all references to “video tapes” or “video taping,” and replace them with the more generic term “video record” or “video recording;” and
- (2) Address circumstances in which the original may be stored in the cloud or on a remote server (as opposed to storing on a fixed medium, such as a video tape) and require information about such storage to be included in the certificate provided by videographers.

The committee believes these changes are not substantive in imposing new requirements, but necessary to update the rule to reflect how litigants are using video recordings.

Supporting Information. Subcommittee X received a request to amend Civil Rule 30 to acknowledge the evolution of technological means used to record deposition proceedings. The proposal came from Seattle attorney Aaron Rocke.¹ It held two separate meetings to discuss the rule, and Mr. Rocke participated in the first. Members of the subcommittee also reached out to videographer firms in Seattle to get their input, with one firm (Prolumina) willing to discuss the rule. While the first of the changes elicited support, there was resistance about adding a new certification requirement, as it would change the existing format of the certifications.

The proposed revisions were circulated widely to the WSBA’s list of stakeholders, including: representatives from the Supreme Court, the three Courts of Appeal, the Superior Court Judges Association, and the District & Municipal Court Judges Association; specialty bars (the WA Defense Trial Lawyers, WA Association for Justice, NW Justice Project, WA Association of Criminal Defense Lawyers, WA Appellate Lawyers Associations, International Association of Defense Counsel, WA Association of Prosecuting Attorneys, WA State Association of Municipal Attorneys, Public Defenders Association, ACLU of Washington, Columbia Legal, and section leaders for the WSBA’s sections); and local and minority bar associations.

The District and Municipal Court Judges Association commented to express its non-opposition to the rule. No other written comments were received.

The subcommittee focused on the second of the proposed changes, which adds a sentence to subsection 8(H):

¹ The committee proposed minor revisions to Mr. Rocke’s original proposal, with which he agreed.

(H) After the deposition has been taken, the operator of the ~~videotape recording~~ equipment shall ~~attach to~~ submit with the ~~videotape recording~~ a certificate that the recording is a correct and complete record of the testimony by the deponent. 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 of the original ~~videotape recording~~. The custodian shall store it under conditions that will protect it against loss, ~~or~~ destruction, or tampering, and shall preserve as far as practicable the quality of the ~~tape~~ video recording and the technical integrity of the testimony and images it contains. The custodian of the original ~~videotape 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 ~~tape recording~~ be preserved for a longer period.

The subcommittee discussed whether this imposed additional requirements on videographers, and there was a concern about whether this would be onerous. The conclusion was that this was not adding a substantive requirement because the Rule already requires the original media to be stored under “conditions that will protect it against loss or destruction or tampering.” The change does make it explicit that these new ways of storing media should be called out, and parties put on notice about the steps being taken—and then parties can work with the videographer about the adequacy of those steps. But new language would be required to be added to the current certifications provided by videographers.

The subcommittee also considered whether it would be beneficial to include more guidance as to protective measures to be taken, such as encryption or prohibiting access to such storage locations. The committee ultimately decided that more was not necessary.

Hearing. The committee does not believe a public hearing is required.

Expedited Consideration? No. The committee does not believe expedited review is necessary.

DRAFT REVISIONS

CR 30

DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

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

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the deponent or the particular class or group to which the deponent belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subsection (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) 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. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under section (c), any changes made by the witness, the witness's signature identifying the deposition as the witness's own or the statement of the officer that is required if the witness does not sign, as provided in section (e), and the certification of the officer required by section (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 34 shall apply to the request, including the time established by rule 34(b) for the party to respond to the request.

(6) A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which the deponent will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to the matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer the propounded questions.

(8) ~~Videotaping~~ [Video Recording](#) of Depositions.

(A) Any party may video ~~record~~ [tape](#) 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 recorded on [videotape](#) [video](#). Failure to so state shall preclude the use of [videotape](#) [video recording](#) equipment at the deposition, absent agreement of the parties or court order.

(B) No party may videotapevideo record a deposition within 120 days of the later of the date of filing or service of the lawsuit, absent agreement of the parties or court order.

(C) On motion of a party made prior to the deposition, the court shall order that a videotapevideo recorded deposition be postponed or begun subject to being continued, on such terms as are just, if the court finds that the deposition is to be taken before the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

(D) 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 videotapevideo recording.

(E) A stenographic record of the deposition shall be made simultaneously with the videotapevideo recording at the expense of the noting party.

(F) The area to be used for videotaping-video recording testimony shall be suitable in size, have adequate lighting and be reasonably quiet. The physical arrangements shall be fair to all parties. The deposition shall begin by a statement on the record of: (a) the operator's name, address and telephone number, (b) the name and address of the operator's employer, (c) the date, time and place of the deposition, (d) the caption of the case, (e) the name of the deponent, and (f) the name of the party giving notice of the deposition. The officer before whom the deposition is taken shall be identified and swear the deponent on camera. At the conclusion of the deposition, it shall be stated on the record that the deposition is concluded. When more than one storage device is used to record the video recording-tape, the operator shall announce on camera the end of each separate storage device upon which the video recording is preserved, such as each tape or disk (if any), and the beginning of the next tapeone.

(G) Absent agreement of the parties or court order, if all or any part of the videotapevideo 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 videotapedvideo 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 tapevideo 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 videotapevideo recording be made, or that the person playing the tape-video at trial suppress the objectionable portions of the tapevideo recording. In no event, however, shall the original videotapevideo recording be affected by any editing process.

(H) After the deposition has been taken, the operator of the videotapevideo recording equipment shall ~~attach to~~ submit with the videotapevideo recording a certificate that the recording is a correct and complete record of the testimony by the deponent. 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 ~~videotape~~video recording. The custodian shall store it under conditions that will protect it against loss, ~~or destruction,~~ or tampering, and shall preserve as far as practicable the quality of the ~~tape recording~~ and the technical integrity of the testimony and images it contains. The custodian of the original ~~videotape~~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 ~~tape recording~~ be preserved for a longer period.

(I) The use of ~~videotape~~video recorded depositions shall be subject to rule 32.

(c) Examination and Cross Examination; Record of Examination; Oath; Objections. Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A judge of the superior court, or a special master if one is appointed pursuant to rule 53.3, may make telephone rulings on objections made during depositions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any

changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though signed unless on a motion to suppress under rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Service by Officer; Exhibits; Copies; Notice.

(1) The officer shall certify on the deposition transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. The officer shall then secure the transcript in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly serve it on the person who ordered the transcript, unless the court orders otherwise. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition transcript and filed with the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition transcript to any party or the deponent.

(3) The officer serving or filing the deposition transcript shall give prompt notice of such action to all parties and file such notice with the clerk of the court.

(g) Failure To Attend or To Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by such party and such other party's attorney in attending, including reasonable attorney fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because such party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable

expenses incurred by such other party and such other party's attorney in attending, including reasonable attorney fees.

(h) Conduct of Depositions. The following shall govern deposition practice:

(1) Conduct of Examining Counsel. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(2) Objections. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.

(3) Instructions Not to Answer. Instructions to the deponent not to answer questions are improper, except when based upon privilege or pursuant to rule 30(d). When a privilege is claimed the deponent shall nevertheless answer questions related to the existence, extent, or waiver of the privilege, such as the date of communication, identity of the declarant, and in whose presence the statement was made.

(4) Responsiveness. Witnesses shall be instructed to answer all questions directly and without evasion to the extent of their testimonial knowledge, unless properly instructed by counsel not to answer.

(5) Private Consultation. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.

(6) Courtroom Standard. All counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

From: [Benway, Jennifer](#)
To: [WSBA CourtRules](#)
Cc: ["Sherry Lindner "](#)
Subject: Comment on proposal to amend CR 30
Date: Wednesday, May 23, 2018 4:35:11 PM

This comment is provided on behalf of DMCJA Court Rules Committee Chair Judge Frank Dacca:

Hello,

Thank you for providing the DMCJA Court Rules Committee the opportunity to review the proposal to amend CR 30, which it did on May 9. The Committee has no opposition to this proposal.

Please let me know if I can be of any further assistance.

Thank you!

Jennifer (J) Amanda Benway

Legal Services Senior Analyst

Administrative Office of the Courts

360-357-2126