

October 29, 2018

Via Email NVSCCLERK@NVCOURTS.NV.GOV

Chief Justice Michael Douglas

Nevada Supreme Court

201 South Carson Street

Carson City, Nv 89701-4702

FILED

OCT 29 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Re: ADKT 522 post public comment.

Attached: Discovery Commissioner Ayres

On behalf of Evolve Court Reporting and myself, please find the following comments, concerns and responses to the Nevada Court Reporting Boards submitted documents and Las Vegas Defense Lawyers submitted documents and verbal record on October 19, 2018, I am submitting the following for the Court to consider prior to making a final decision on ADKT 522.

A. An Order that Requires the Written Transcript to Be the Official Record Is Inconsistent with Tenets of Statutory Interpretation Because It Nullifies Portions of the Rule

One of the most basic canons of statutory interpretation requires courts to interpret rules to give meaning to every part of the rule and to avoid interpretations that render any part of a rule meaningless.

In 2005, the court amended N.R.C.P. 30 to bring it more in line with the federal rule and to allow for nonstenographic recording. Under the new rule, a party could choose one of three methods of recording a deposition: audio, audio/visual, or stenographic (in any combination).

The rule also provides, "any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means." The **may** in this rule is important. May means it's permissive. Optional. No party must transcribe a nonstenographically recorded deposition, but any party may. The official record of a nonstenographically recorded deposition is the audio or audiovisual recording. And that's all that's ever required until trial, where if a party offers

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nonstenographic deposition testimony as evidence, "the party shall also provide the court with a transcript of the portions so offered." The rule requires a transcript of the nonstenographic deposition. It does not require a stenographic transcript taken at the deposition.

At trial, the rules actually prefer the presentation of nonstenographic depositions: "deposition testimony offered other than for impeachment purposes **shall be presented in nonstenographic form**, if available, unless the court for good cause orders otherwise."

The rules also provide that if the party noticing the deposition designates one method of recording the deposition, any other party may choose to record the deposition by another method, at their own expense, upon five days' written notice.

Paragraphs (e) and (f) provide additional procedure consistent with the choice of the attorney noticing the deposition to choose the method of recording. Paragraph (e) allows the deponent to request to review the "transcript or **recording**" Paragraph (f) requires the officer to retain a copy of the deposition, which the rule identifies as "stenographic notes of any deposition taken stenographically or a **copy of the recording of any deposition taken by another method.**"

Thus, the plain meaning of the rule anticipates parties will be taking depositions either stenographically, by audio recording, or by audio and visual recording. If a party chooses one method of recording, any party who desires an additional method of recording may arrange for one at their own expense. Additionally, any party that wants the nonstenographic recording transcribed may arrange for one. If a party chooses nonstenographic means of recording, then the officer presiding over the deposition must keep a copy of the recording.

Under the rule, the official record of the deposition is the original recording—the only recording required under the rule—whether it be stenographic, audio, or audiovisual. A transcript of the nonstenographic recording only becomes necessary for ease of reference at trial, and even then, it's a transcript of the recording, not a live stenographic recording.

The position of the Nevada Court Reporters Board (NCCRB) and the Las Vegas Defense Lawyers (LVDL) requires a real-time, stenographic transcription of all depositions and declares that

the official record of the deposition is the stenographic record and only the stenographic record. The Court does allow parties to supplement the official stenographic record with an audio/video recording, but relegates this recording to an optional, inferior position.

The problem with the NCCRB and LVDL interpretation of N.R.C.P. 30 is that whereas the rule allows the parties to choose their preferred method of recording, the NCCRB and LVDL requires the parties to record their depositions by stenographic means. Such an interpretation renders meaningless the 2005 amendments to N.R.C.P. 30 and 32 that create alternatives to a stenographic recording.

Additionally, whereas the NCCRB and LVDL requires a stenographic recording but allows parties to supplement the transcript with a recording, the rule says the opposite: if a party chooses to record nonstenographically, the other parties may supplement that with either a stenographic recording or a transcription of the video.

1. The NCCRB and LVDL Concerns About the Integrity of an Audiovisual Recording Are Unfounded and Not Supported by the Plain Language of the Rule

The NCCRB and LVDL suggested that at least part of the reason behind its argument is that the Court is concerned about the integrity of the audiovisual recording, though the Court implicitly trusts a certified court reporter:

The presence of a certified court reporter helps to ensure that the record is clear, where the videographer may not realize until after the deposition is concluded that certain portions are not audible. A court reporter is better suited to identify and immediately request clarification from the parties at the deposition.

Because depositions are treated as court testimony, and can be admitted as such at trial, deposition testimony is to be subject to the same safeguards as live testimony, including a certified court reporter ensuring the record is clear.

First, the drafters of Rule 30 already took into account the integrity of nonstenographic means of recording and built safeguards into the rule. Second, the fact that audiovisual recording is more accurate than live human transcription is beyond question.

a. Rule 30 Already Has Safeguards to Protect the Integrity of Nonstenographically Recorded Depositions

The new paragraph (b) (4) under rule 30 adds requirements to those depositions that are "recorded other than stenographically," including the requirement that the officer state his or her name and address; date, time, and place of the deposition; and name of the deponent at the beginning of each recorded segment. This paragraph also requires that the recording techniques not distort the appearance or demeanor of the deponents.

The drafter's notes indicate that these provisions in paragraph (4) were added "to protect the utility and integrity of non-stenographic recordings." This tells us that the drafters already considered the question of the integrity of non-stenographic means of recording a deposition and felt that the safeguards they placed in paragraph (4) were sufficient to justify their allowance.

b. Audiovisual Recordings Are Much More Accurate than Human Transcriptions

It should go without saying that a video camera and microphone capture information far more accurately than a human transcriber, but let's look at the facts.

To get certified as a Realtime reporter by the National Court Reporter Association, the candidate must demonstrate the ability to take down testimony at 200 words per minute "with 96 percent accuracy." The National Verbatim Reporters Association requires 95% accuracy. The American Association of Electronic Reporters and Transcribers requires 98% accuracy. Put a different way—we know human court reporters err as much as 5%, and we give that degree of error our official stamp of approval.

The rules themselves recognize that to err is human. Where a party requests the opportunity to review the transcript (or recording), they have 30 days to review the transcript (or recording) to make "changes in form or substance."

This not only acts as an additional safeguard to the integrity of the process—whether taken stenographically or otherwise, because it allows the deponent and the deponent's attorney to be a check against accuracy—but it also recognizes the potential for transcription errors to creep into the transcript.

Transcription errors are not a concern with video recording because the video becomes the official record, and any transcript made after the fact is not. Where the transcript is used, often videographers will sync the transcript to the recording, so the transcript and video can be viewed at the same time, which creates an added layer of security in the capturing process.

Other concerns about video recording have been raised, like (1) people speaking over each other, which a court reporter transcribing is careful to stop, (2) issues about the quality of the audio and video, or (3) concerns that technical issues might result in a lost record.

It's worth noting, again, that these are all side issues that would only be important if the rules did not explicitly allow for these types of depositions. Regardless, they are also easy to address.

Regarding people speaking over one another, there is no reason to think that the Court Reporter is the only person interested in or capable of making sure people only speak one at a time. Even when a court reporter is present, the attorney creating the record has the keenest interest in making sure the record is clear, followed by the attorney whose client is testifying. The videographer, who is constantly monitoring the video and audio feeds, can and does also interject. It would be the sloppy lawyer indeed who relies on a court reporter or videographer to make sure the attorney is creating a clean record.

Regarding the quality of the audio and video, this is also not of great concern because the meticulous process involved in recording a deposition via video and audio ensures reliability of the deposition transcript to a degree much higher than the JAVS Digital Recording system, currently used in Nevada District Courts, due to the technological safeguards discussed in the previous section and to the vigorous training of the Notary Deposition Officers. This is significant because reliability of JAVS is arguably much more important as it creates a record of trials whose outcome determine whether someone is paid, fined, incarcerated, or in some cases, executed, whereas depositions, though important, are just one tool in the overall justice system.

This is a list of only some of the safeguards Evolve utilizes during an audio deposition:

1. Nine (9) different levels of redundancy for recorded depositions, which assures that all data collected in a video and audio recorded deposition is secure and reliable.
2. Each recorded deposition is time stamped as it is recorded.
3. Rough notes are taken during the recording and entered into the timestamp for past testimony search. This makes "read back" easy to accommodate as the record of the deposition merely needs to be rewound to listen to the previous questions or answers. And unlike in a court-reported deposition, it is not a human-written rough-draft being read back. It is the actual witness or attorney speaking in his or her own voice. This process requires that the Notary Deposition Officer to merely rewind the record and play back the attorney's voice asking his/her question.
4. Upon the completion of the oral deposition, the original digitally recorded files are locked and securely coded to prevent any manipulation of the original record.
5. Per NRCP the "Officer" certifies that all non-stenographic depositions have adhered to the process detailed above. A Court reporter certifies that the transcript is an accurate representation of their respective stenographic notes, not to the accuracy of the deposition itself.

In addition to the above safeguards, Evolve's Notary Deposition Officers are trained by The American Guild of Court Videographers ("AGCV"). The AGCV is a nationally recognized association since 1993, which trains Certified Deposition Video Specialists on how to conduct a professional video recorded deposition. According to the AGCV's Code of Ethics, their membership is trained "to maintain a file of every deposition taken indefinitely or when authorized in writing to destroy same by the client." Each member "must also provide redundant back up of all audio, video, and photographic files of commissioned acquisitions or case data the Member have been ordered to maintain custody of."

The above procedures and protections ensure the accuracy and reliability of audio and video deposition recordings and proves that they are of the same, if not higher, quality than the

JAVS's recording and preservation of the court's record of proceedings.

c. This Exact Issue Was Dealt with by Another Court in 1985

At least one other set of courts outside Nevada has grappled with this issue.

In West Virginia in 1985 (back when a video recorded deposition required permission of the West Virginia court), a party asked the court to allow him to take a deposition by video with no court reporter present to make a stenographic transcript, but with a notary there to administer the oath. The court denied the motion.

The plaintiff objected to the decision, "primarily because it required him to provide a stenographic transcript in addition to the videotape." In his objection, he argued that the primary purpose of the rule allowing alternative means to take a deposition "is to allow the parties to minimize costs in situations where the savings do not undermine the accuracy or trustworthiness of the record produced."

The lower court had required a court reporter to be present to provide live stenographic transcription to afford "an additional check on the accuracy of any videotaped evidence later offered at trial." That court, like this one, seemed to have a certain level of distrust for depositions recorded by nonstenographic means.

The appellate court reversed the lower court and offered a different rationale: "The drafters of the federal rule, and this Court in adopting the West Virginia Rule, contemplated videotaping or other means of transcription as an alternative, rather than an additional, means for recording a deposition."

The court, of its own initiative, also provided a cost-savings rationale to its decision:

We take judicial notice, however, of the fact that the circuit courts in this State that have replaced court reporters with tape recorders have experienced a significant reduction in both payroll expense (equipment operator vs. stenographer) and transcription costs. This indicates that similar savings might be achieved through videotaping.

Even without such savings, the videotaped deposition offers many benefits. A jury can hear testimony of unavailable witnesses and observe their demeanor, the tedium of reading depositions into the record at trial can be avoided, and parties can demonstrate immovable evidence such as large machinery. Portions of the testimony to which objections are made and sustained can be edited out of the tape prior to its presentation to a jury. Given these benefits, we believe it would be improper to focus exclusively on the cost-savings rationale, although we hope that application of Rule 30(b)(4) will have the added effect of diminishing expenses.

The court's final decision set the parameters of a judge's discretion regarding depositions: where a deposition is recorded by video, the judge cannot require the party taking the deposition to pay for a stenographic transcript. The judge may, however, "impose safeguards to assure the accuracy and trustworthiness of the record produced. If a party other than the one offering the motion considers such safeguards inadequate, he may retain a court reporter at his own expense."

That is exactly what we are asking the court to take notice of here. The rules allow a nonstenographically recorded deposition. In some cases, they prefer it. If the defendants are not satisfied that the means we will be using will ensure an accurate recording, they can utilize the procedures in the rule and provide an alternative means of capturing the deposition testimony, but it must be at their expense.

It should not be lost on this Court that one of the principal aims of the civil justice system is "to secure the just, speedy, and inexpensive determination of every action." This is the very first rule of civil procedure, and there is a reason it is placed first.

In the final analysis, with a video recorded deposition, the accuracy of the recording literally speaks for itself.

D. Same as court proceedings

30 days for errata - if conducted other than stenographic, then they listen to the record.

In her courtroom, unless you ask for a transcript, they don't provide one. The official record is the video. If they provide a transcript, they don't send it out to a court reporter. They

either do it themselves or send it out to a transcription service.

Just has to certify that it is true and accurate.

E. Notaries Can Preside Over Depositions

Notaries have a place of high esteem in our state's laws. Abandoned safety deposit boxes cannot be opened unless a notary public is present. Affidavits must be taken before a justice, judge or court clerk, justice of the peace, or notary. Documents that have been acknowledged by a notary public are presumed to be authentic at trial. A notary can authorize the submission of a petition to place a candidate on the ballot. A notary acknowledgement is also enough to designate someone to dispose of their human remains after death. The only people authorized by statute prove a conveyance affecting real property in Nevada are judges or court clerks with a seal, justices of the peace, and notary publics. Where a trial is postponed, and a deposition is requested, that deposition may be taken "before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate ..."

Significantly, notaries may officiate over a marriage just as an ordained minister or other marriage officiant.

For a judgment debtor's examination, similar in almost all respects to a deposition, "the oath or affirmation of the judgment debtor must be administered by a notary public" and either "transcribed by a court reporter or recorded electronically."

The Nevada Rules of Civil Procedure were modeled after the federal rules, so looking to how the federal rules are interpreted gives us a guide to how our state's rules should be interpreted. The local rules for the Nevada District Court specifically contemplate a notary to be the official presiding at the deposition. Specifically, LR 54-4 makes allowances for taxable deposition costs, including "reasonable costs of a deposition reporter and the notary or other official presiding at the deposition ..."

Prior to 2007, court reporters had to be notaries with limited powers of a notary. That requirement was written out of NRS 240 in 2007, at the same time the court reporting statute, NRS 656, was amended. NRS 656.315 now reads, "A certified court reporter

may administer oaths and affirmations without being appointed as a notary public pursuant to chapter 240 of NRS."

A notary public's authority to administer oaths has always been beyond question and has always been superior to a court reporter's ability to do the same.

The NCCRB submitted that a link from the SOS website showing that only court reporters take deposition shows that notaries are not able to take a deposition. After communication with the SOS and their counsel, they agreed that the information on the page was erroneous and they promptly removed it from their site. In Addition, it is our contention that in the freelance arena, that the only persons able to take a deposition is a licensed attorney. Further NRCP states that a deposition is taken before an officer able to administer the oath. Taking of an oath has never been removed from NRS 240.004 "Notorial Act" or restricted under NRS 240.075 "Prohibited acts" by legislation. This statute has been revisited by legislation several times throughout the years.

F. The Nevada Rules of Civil Procedure Revision Committee Had an Opportunity to Make Court Reporters the Exclusive Recorders of Depositions but Turned it Down

The Nevada Certified Court Reporter's Board, in anticipation of the proposed changes, made some proposals of their own. The Court Reporter's Board wanted to change the existing language to allow only court reporters to preside over depositions.

Specifically, they proposed the following changes to N.R.C.P. 30(b)(2) (with the proposed language to be stricken labeled with strike-out text and the proposed language to be added in italics):

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. ~~Unless the court orders otherwise, it may be recorded by sound, sound and visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.~~ Unless otherwise ordered by the court or by written stipulation of the parties as provided in Rule 29, the deposition shall be recorded by a certified court reporter or a certified voice writer with or without video

technology, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for the transcription to be made from the recording of a deposition by the certified court reporter or certified voice writer.

They proposed the following changes to N.R.C.P. 30(b)(3):

With 5 days' notice to the deponent and other parties, any party may designate ~~another method to record the deponent's testimony in addition to the method specified by the person taking the deposition.~~ to add video technology to record the deponent's testimony in addition to being recorded by a certified court reporter or certified voice writer. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

In other words, the Court Reporter's Board proposed changes to the rule that would bring it in line with: the deposition must be taken by stenographic means, which will be the official record, and if any party wants video, they can add it at their own expense.

These proposed changes illustrate the understanding by the court reporter's board that the way the rule is currently written does not require a stenographic recording.

The NRCP review committee's response illustrates that (1) they also understand that a deposition does not need to be stenographically, and (2) that they do not want to give the Court Reporter's Board a monopoly on depositions. Indeed, in the official minutes of the committee to revise the NRCP, they "declined to recommend the proposed edits" by the Court Reporters Board. Among their stated reasons was that they recognized, as the West Virginia court did, that such a change would "adversely impact access to justice."

The Court Reporters Board's efforts to change the rules of civil procedure came on the heels of an amendment to the court reporter's statute, NRS 656, where they tried to get the legislature to make the same change. It sounds counterintuitive, but the Court Reporters Board petitioned the legislature to lower the bar of entry for court reporters to address a shortage in court reporters, but at the same time wanted exclusivity when it came to depositions.

To address the shortage, Nevada Senator Scott Hammond sponsored Senate Bill 406 where it was proposed that the requirements for being a certified court reporter be relaxed.

The senate bill also had the following proposed addition to NRS 656.320:

Only a natural person who is a certified court reporter ... may, notwithstanding any other provision of law or court rule to the contrary, perform the duties of an officer before whom depositions may be taken in any court in this State.

It was this provision that received the loudest objection in official statements opposing the bill.

In the final version of the bill, the entire section requiring court reporters to preside over depositions was deleted.

Thus, both the legislature and the rules committee had an opportunity to grant court reporters a monopoly on depositions, and both declined to do so.

G. The Court Reporter's Proposed Changes to the Rules, Limits Access to Justice

Depositions with a videographer (audiovisual) are cheaper than depositions performed by a court reporter. A court reporter's fee is certainly a product of their demand, and court reporters are in high demand because there is such a shortage. The lower fee's associated with Court Reporters in Court are regulated by NRS 3.370. These rules are not being followed by freelance court reporting, where rates exceeding \$6.00 per page for transcripts are easily found. It seems disingenuous that the Nevada Court Reporting Board has not attempted to limit Digital Recording of Court hearings but are now concerned with limiting audiovisual recordings for their Monopoly on the freelance market.

Attached is a real invoice for a deposition taken in Nevada where a court reporter created a stenographic recording and video was taken as well. The deposition was 114 pages long. The total price of the court reporting was \$665 (\$5.83 per page), and the total price for the video was \$1,596.95 (\$14.00 per page). Total cost: \$19.84 per page.

Evolve provides video as an original record, then prepares an original transcript and certified copy, and synchronizes the video to the transcript—and for all that, it only charges for

\$2.95 per page. So that same 114-page deposition, done without a court reporter, would have been \$465.86 instead of \$2,261.95.

Access to justice, as the West Virginia court recognized, is a measure of how much it costs to participate in litigation.

Due to the drastic shortages of Certified Court Reporters for both Court hearings / Freelance Depositions and in a state with many rural areas that lack court reporters, there is no better way to take a deposition than through audiovisual means. Additionally, in family law, where lawyers and pro se litigants (which are prevalent in family law cases) often don't need transcripts for their depositions, this provides a less expensive way to do discovery. Finally, Evolve provides pro bono depositions to legal aid—something court reporters don't do—which they can only continue to do if the rule allowing nonstenographic depositions is allowed.

Conclusion:

Based on the arguments above, we ask that this Court accept the proposed changes to NRCP 30-32 without any changes.

Sincerely,

Peter Hellman

CONVERSATIONS ON DISCOVERY

By Wesley M. Ayres, Discovery Commissioner

Recently, I was approached with a question concerning the reporting of video-recorded depositions, which are permitted by NRCPC 30(b)(2). Specifically, the question was whether a deposition can be recorded by a videographer without the involvement of a certified court reporter. The starting point in this analysis is NRCPC 28(a):

Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before 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 Rule 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

Thus, a deposition may be taken before someone authorized to administer oaths, someone appointed by the court, or someone designated by the parties.

The individual generally authorized to administer an oath or affirmation in Nevada is a notary public. See NRS 240.004 (2017) (definition of "notarial act" includes administering oaths and affirmations), 240.1635 (identifying individuals who may perform notarial acts, which includes notary public). Indeed, prior to July 1, 2007, even a certified court reporter could not administer an oath or affirmation unless he or she was *also* appointed as a notary

public (or a notary public with limited powers). Since that time, however, any certified court reporter has been authorized to do so without being appointed as a notary public. See *id.* 656.315. Of course, Nevada statutes authorize many other individuals to administer oaths and affirmations in limited circumstances, but they have no connection to the taking and recording of depositions. See, e.g., *id.* 250.080 ("county assessor and the county assessor's deputies are authorized to administer all oaths and affirmations contemplated by law in the discharge of their duties as assessors").

NRCPC 28(a) does not address the manner in which deposition testimony is recorded. But the "practice of court reporting" is defined in our statutes:

"Practice of court reporting" means reporting, in this State, by the use of voice writing or any system of manual or mechanical shorthand writing:

- (a) Grand jury proceedings;
- (b) Court proceedings, with the exception of proceedings before a federal court;
- (c) Pretrial examinations, depositions, motions and related proceedings of like character; or
- (d) Proceedings of any agency if the final decision of the agency with reference thereto is subject to judicial review.

Id. 656.030(10). No individual is permitted to engage in the practice of court reporting unless he or she is certified by the Certified Court Reporters' Board of Nevada. See 656.145. So only

certified court reporters are generally permitted to take depositions by the use of voice writing or any system of manual or mechanical shorthand writing.

Significantly, nothing in NRS Chapter 656 mentions the video-recording of a deposition, and Nevada statutes do not otherwise purport to address videographers or whether they may video-record depositions. Presumably, anyone could video-record a deposition if a certified court reporter administers the oath or affirmation and remains present during the examination. However, a notary public is generally authorized to administer oaths and affirmations, and video-recording a deposition does not involve the use of voice writing or any system of manual or mechanical shorthand writing. Accordingly, no rule or statute precludes a videographer who is also a notary public from video-recording a deposition—without the involvement of a certified court reporter—so long as that person administers the oath or affirmation and remains present during the examination.

As noted above, NRCPC 28(a) allows a deposition to be taken before any person appointed by the court. The rule expressly provides that any such person "has power to administer oaths and take testimony." This language was taken from the analogous federal rule, and the drafters of that rule explained its purpose:

[This language] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony . . . In addition, the

amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped.

Fed. R. Civ. P. 28(a) advisory committee's note to 1946 amendment. Thus, even someone who is not a certified court reporter or a notary public could video-record a deposition if he or she was appointed by the court to do so. NRC P 28(a) similarly provides that the parties may stipulate in writing that a particular person will serve as the officer before whom the deposition is taken. This provision contemplates that expense might be avoided by using office stenographers instead of certified court reporters (although practical problems caution against this approach, except perhaps for short depositions). See 8A Charles A. Wright et al., *Federal Practice and Procedure* § 2084, at 420 & n.4 (3d ed. 2010).

The fact that a deposition may be video-recorded does not mean that a party may surprise the deponent or other parties by first disclosing its intention to do so at the deposition. The party that wants to video-record the deposition must give proper notice of that intention, either in the original deposition notice (generally giving all other parties at least fifteen days' notice), or in a subsequent notice (generally giving all other parties at least five days' notice) that video-recording will be used as an additional method of recording the deposition. See NRC P 30(b)(1), (3). Any video-recording must also comply with the requirements of NRC P 30(b)(4), which provides that certain information must be stated on the record, and prohibits distortion of the appearance or demeanor of deponents or attorneys.

In some cases, a party's attorney may seek to personally record a deposition. In that regard, NRC P 28(c) provides that "[n]o deposition shall be taken before a person 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." Accordingly, the attorney could not serve as the "officer" before whom the deposition is to be taken. If the attorney is merely seeking to make a recording for his or her own use in the case, with the understanding that it cannot be used as evidence, no statute or rule precludes the recording (although the court still retains discretion to refuse to allow it under NRC P 26(c)). See *Schoolcraft v. City of N.Y.*, 296 F.R.D. 231, 240 (S.D.N.Y. 2013) ("[a]lthough the Plaintiff may take video recordings in depositions for his own purposes, those recordings taken by counsel will not be admissible"). However, a split of authority exists over whether a video-recorded deposition may be used in court proceedings if a party's attorney operated the video recorder during a deposition. Compare *C.G. v. Winslow Twp. Bd. of Educ.*, Civil No. 13-6278 (RBK/KMW), 2015 WL 3794578, at *3 (D.N.J. June 17, 2015) (affirming magistrate judge's conclusion that federal "Rule 30(b)(5)(A)-(B) precluded Plaintiffs' counsel from doing the recording himself," since counsel did not qualify as an "officer" for purposes of Rules 28 and 29), with *Ott v. Stipe Law Firm*, 169 F.R.D. 380, 381-82 (E.D. Okla. 1996) ("[w]hile counsel's operation of the video camera is not the preferred method of conducting a video deposition, the court agrees with those courts that have concluded that neither Rule 28(a) nor Rule 28(c) specifically prohibit a party's attorney from operating the video camera during the course of a video deposition otherwise conducted in compliance with Rule 30").

Of course, if a party believes that the officer before whom the deposition is to be taken is disqualified, that party must object "before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence." See NRC P 32(d)(1) (objection based on disqualification of the officer is waived if untimely). Similarly, if a party believes that the person operating the video-recorder is not permitted to do so, the objection must be timely made at the deposition. See *id.* 32(d)(3)(B) ("[e]rrors and irregularities occurring

at the oral examination in the manner of taking the deposition . . . and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition"). In that regard, courts will expect parties to act with reasonable diligence. In one case, a party sought to preclude any use of a deposition after he learned that the deposition was taken before a stenographer who worked for opposing counsel. Although that individual ordinarily would have been disqualified under federal Rule 28, the court declined to grant the request. The court observed that movant's counsel had previously agreed that depositions could be taken by, inter alia, the stenographer in question, and it reasoned that "if the defendant's attorney saw fit to enter into a stipulation without first satisfying himself as to the possible disqualification of any of the named persons . . . , he must be taken to have waived the objection." See *Laverett v. Cont'l Briar Pipe Co.*, 25 F. Supp. 790, 791 (E.D.N.Y. 1938)

Attorneys should bear in mind that if they expect to present a video-recorded deposition at trial, they must designate the witness and provide a transcript of the pertinent portions of the deposition testimony as part of their pretrial disclosures. See NRC P 16.1(a)(3)(B). Likewise, an attorney offering video-recorded deposition testimony generally must also provide the court with a transcript of the portions so offered. See *id.* 32(c). No rule or statute purports to restrict the kinds of individuals who may prepare the transcript of a video-recorded deposition.

Wes Ayres is the Discovery Commissioner for the Second Judicial District Court. His columns are online and searchable at wcbarr.org.

