IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Derrick Schaeffer,	)	
	)	
Plaintiff,	)	No. 19-cv-7711
	)	
-vs-	)	*(Judge Dow)*
	)	
City of Chicago, et al.	)	*(Magistrate Judge Gilbert)*
	)	
Defendants.	)	

RESPONSE TO MOTION FOR PROTECTIVE ORDER

Defendants have filed a cursory motion seeking to bar plaintiff from using Zoom to create audiovisual recordings of depositions in addition to the stenographic record made by a court reporter who is competent to administer the oath to the deponent. Defendants ignore Federal Rule of Civil Procedure Rule 30(b)(3)(B), which was amended in 1993 to authorize "unilateral selection of nonstenographic means for recording depositions." 8A FED. PRAC. & PROC. CIV. § 2115. Under the rule, since 1993, "any party has had a right to use nonstenographic recording by giving prior notice to the deponent and the other parties." *Id.*

The Court should deny defendants' motion, first, because defendants failed to confer as required by Local Rule 37.2. In addition, the motion seeks to rely on a single case, *Alcorn v. City of Chicago*, 336 F.R.D. 440 (N.D. Ill. 2020), which did not consider Rule 30(b)(3)(B). *See below* at 8-9. Defendants

misread *Alcorn* to bar all audiovisual recording unless made by a "certified videographer." The Court should reject this position, especially because "certified videographer" is a term that is not defined in the Federal Rules of Civil Procedure.

I. Defendants' Failed to Comply with Local Rule 37.2

Defendants have not complied with Local Rule 37.2 and disregard this Court's direction, available on its webpage through the hyperlink to "Discovery Motions" that "[a]ny discovery motion must state with specificity when and how the movant complied with Local Rule 37.2."

The meet and confer required by Local Rule 37.2 could have resolved defendants' misguided complaint that "'[p]laintiff did not explicitly request or state that any of those depositions be video recorded." (ECF No. 95 at 1.) Plaintiff's notice of deposition, attached to defendants' motion as Exhibit A, contains this explicit statement:

> Notice is hereby given that plaintiff will commence depositions, to be recorded by audiovisual means using Zoom and by stenographic means, in accordance with the following schedule:

(ECF No. 95-1.) In any event, a "meet and confer" would have allowed plaintiff to resolve this objection by providing defendants with an amended notice of deposition stating more clearly (perhaps by using bold, italics, and a larger font) that the depositions would ***"be recorded by audiovisual means using Zoom."*** (ECF No. 95-1.)

A "meet and confer" could also have resolved defendants' misguided complaint that the notice of deposition fails to state that the video recording would not be certified. (ECF No. 95 at 2.) Although the Federal Rules of Civil Procedure do not contain such a requirement, plaintiff would have avoided litigation of this peripheral issue and amended the notice to include the explicit statement that only the stenographic record would be certified pursuant to Rule 30(f)(1).

Plaintiff would have similarly agreed to resolve defendants' third objection (ECF No. 95 at 2) by stating on the record that, in addition to being stenographically recorded, the deposition was being video recorded through Zoom. Defendants are unable to provide any authority for their claim that such a statement on the record is required. Nevertheless, plaintiff has no objection to making such a statement on the record to avoid further litigation.

Finally, a meet and confer would also have allowed the parties to discuss the provision of Rule 30(b)(5)(B) that the "attorneys' appearance or demeanor must not be distorted through recording techniques." This provision firmly rebuts defendants' claim, also advanced without any citation of authority, that the "[r]ecording must be fixed on the deponent during the entirety of the deposition." (ECF No. 95 at 2, 4.)

The Court should therefore strike defendants' motion. In the alternative, plaintiff explains below that the Court should deny defendants' motion for protective order.

II. The Federal Rules Permit Counsel to Make a Video Recording of a Deposition to Supplement Stenographic Recording

The Federal Rules permit "counsel to videotape a deposition where an authorized officer would also be stenographically recording the deposition." *Maranville v. Utah Valley Univ.*, No. 2:11CV958, 2012 WL 1493888, at *2 (D. Utah Apr. 27, 2012); *see also EEOC v. Draper Dev., LLC, No. 115CV00877GLSTWD*, 2016 WL 11605137, at *2 (N.D.N.Y. May 9, 2016) (collecting cases); *Pioneer Drive, LLC v. Nissan Diesel America, Inc.*, 262 F.R.D. 552 (D. Mont. 2009).

The method of recording depositions is addressed in Federal Rules of Civil Procedure 30(b)(3):

> (3) Method of Recording.
>
> (A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
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> (B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

Rule 30 addresses the accuracy of the recording in Rule 30(b)(5)(B):

> (B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

Plaintiff complied with Rule 30(b)(3) when he included in his notice of deposition the statement that depositions would "be recorded by audiovisual means using Zoom and by stenographic means." (ECF No. 95-1.) This language complies with Rule 30(b)(3)(B)(2). *Conforto v. Mabus*, No. 12CV1316-W BLM, 2014 WL 3896079, at *5 (S.D. Cal. Aug. 8, 2014) (notice was sufficient when it stated that "deposition would be taken before a certified shorthand reporter and notary public and may be videotaped"); *Rawcar Grp., LLC v. Grace Med., Inc.*, No. 13CV1105-H (BLM), 2013 WL 12076572, at *8 (S.D. Cal. Dec. 16, 2013) (notice was sufficient when it stated that "deposition would be recorded stenographically and may be videotaped"); *Maranville v. Utah Valley Univ.*, No. 2:11CV958, 2012 WL 1493888, at *1-*2 (D. Utah Apr. 27, 2012) (notice was sufficient when it stated that "depositions would be taken 'before a shorthand reporter and notary public' in accordance with the Federal Rules of Civil Procedure and that they would 'also be videotaped and/or audiotaped by Plaintiff['s] counsel, as allowed by Rule 30(b)(3).'").

Defendants argue that despite the language in plaintiff's notice stating that the depositions would "be recorded by audiovisual means using Zoom," they were not "on notice that the depositions would be video recorded via Zoom." (ECF No. 95 at 2.) The Court should reject this nonsensical suggestion.

Defendants next argue the plaintiff may not record the depositions on Zoom because doing so would create an impermissible "uncertified video recording of the deposition." (ECF No. 95 at 3.) This argument is contrary to the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure require that a deposition be taken before "an officer authorized to administer oaths either by federal law or by the law in the place of examination," FED. R. CIV. P. 28(a)(1)(A), or before "a person appointed by the court where the action is pending to administer oaths and take testimony." FED. R. CIV. P. 30(a)(1)(B).

The depositions in this case were taken before a court reporter authorized to administer oaths. Plaintiff attaches the reporter's certification for the deposition of defendant Perez as Exhibit 1. Defendants do not challenge the competence of the court reporter to administer the oath. Defendants refer to the need to "ensure that a neutral individual administers the oath" (ECF No. at 95 at 3), but this need was satisfied by the court reporter's oath.

One of several district courts to consider and reject defendants' argument explained:

> The Federal Rules of Civil Procedure allow, at the very least, counsel to videotape a deposition in concert with a stenographer recording it. Over the past thirty years courts have increasingly recognized videotaping as an inexpensive and preferable alternative to stenographically recording depositions. *See Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 n. 6 (5th Cir. 1985) (listing cases that discuss the preferability of videotaped depositions). This trend was recognized and codified in the 1993 amendments to the Federal Rules of Civil Procedure, which provided that "[u]nless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means." FED. R. CIV. P. 30(b)(3)(a). The result of this change is that "parties [are] authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel." Advisory Committee's Note on FED. R. CIV. P. 30.
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> In authorizing a deposing party to record a deposition by nonstenographic means, the Rules were also amended to address concerns over accuracy. The Rules now provide that a deposition cannot be recorded in such a way that the appearance and demeanor of the deponent or attorneys are distorted. FED. R. CIV. P. 30(b)(5)(B). At the same time, if the deposed party or counsel has concerns over the recording technique, the deposed party or counsel may choose an additional method of recording the deposition. FED. R. CIV. P. 30(b)(3). These changes, viewed in concert, permit a party to record a deposition without the assistance of an independent videographer.

Pioneer Drive, LLC v. Nissan Diesel Am., Inc., 262 F.R.D. 552, 555 (D. Mont. 2009) (footnote omitted). The Court should follow *Pioneer Drive* because video recording of a deposition by counsel is expressly authorized by Rule 30(b)(3)(B), set out above.

In *Pioneer Drive*, and other authorities cited above, recording was done by an attorney on the attorney's video recording device. Any concerns about the accuracy of such a recording have no relevance to the recording here that is carried out independently of the attorney by the Zoom application itself.

Defendants ask the Court to follow the analysis of *Alcorn v. City of Chicago*, 336 F.R.D. 440 (N.D. Ill. 2020). (ECF No. 95 at 3-4.) But *Alcorn* reached its conclusion without considering the text of Rule 30(b)(3)(B). The Supreme Court recently rejected this type of freewheeling analysis, reminding the lower federal courts that they should follow the language of statutes (and rules), and that judges should not "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

Defendants' specific request is two-fold:

1. The recording must be made "by a certified videographer," and
2. The recording must be fixed on the deponent during the entirety of the deposition.

(ECF No. 95 at 4.) The Court should reject these requests.

First, the Rules neither require nor define a "certified videographer."[1] Second, the Rules acknowledge that participants other than the deponent may

[1] *Alcorn* stated that "it is a certified videographer who has the appropriate training to serve as the Rule 28 officer." *Alcorn v. City of Chicago*, 336 F.R.D. 440, 443 (N.D. Ill. 2020).

be recorded, requiring in Rule 30(b)(5)(B) that "the appearance and demeanor of the deponent or attorneys are distorted." Participants who do not want to be recorded may also choose, as undersigned counsel recalls some did, to turn off their video.[2]

Accordingly, the Court should allow plaintiff to follow the 1993 amendment to Rule 30(b)(3)(B) and exercise his right to nonstenographic recording, 8A FED. AND PRAC. & PROC. CIV. § 2115, and video-record the depositions on Zoom.

III. The Court Lacks Jurisdiction to Resolve the Hypothetical Question of Whether the Zoom Recording Could Be Used at Trial

This Court has previously observed that ruling on the evidence that may be presented at trial "is a matter reserved for the trial judge." *Berkheimer v. Hewlett-Packard Co.*, No. 12 C 9023, 2016 WL 3030170, at *5 (N.D. Ill. May 25, 2016). This rule is especially applicable in this case where there is not presently a live controversy between the parties about whether a video of a deposition recorded on Zoom can be used at trial or at summary judgment.

Federal law does not define the "appropriate training." Nor does Federal law recognize the profession of "certified videographer."

[2] *Alcorn* assumed that an attorney who turns off their video camera would "lose eye-contact with the witness." *Alcorn v. City of Chicago*, 336 F.R.D. at 444. This concern does not withstand scrutiny—witnesses should not be looking for visual cues from counsel.

The question of admissibility is neither ripe nor within this Court's authority to decide.

Alcorn reached a different conclusion, ordering: "Plaintiff may only record the upcoming remote depositions using the Zoom record function with a stipulation that she will not use the video recording as evidence in the case." *Alcorn v. City of Chicago*, 336 F.R.D. 440, 445 (N.D. Ill. 2020). Notably, *Alcorn* did not adopt defendants' no-recording-allowed position. Moreover, the ruling of *Alcorn* is inconsistent with the general rule that the admissibility of evidence at trial "is a matter reserved for the trial judge." *Berkheimer v. Hewlett-Packard Co.*, No. 12 C 9023, 2016 WL 3030170, at *5 (N.D. Ill. May 25, 2016). In the event the Court follows any of the reasoning of *Alcorn*, it should not adopt this portion of the ruling.

IV. Conclusion

For all these reasons, the Court should strike defendants' motion for protective order. In the alternative, the Court should deny the motion.

Respectfully submitted,

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