DEPARTMENT OF JUSTICE
Washington, DC 20530

August 26, 2016

The Honorable Scott Wilk
California State Assembly, 38th District
P.O. Box 942849, Room 4158
Sacramento, CA 94249-0038

Re: Proposed Regulation of Court Reporting in California

Dear Assemblyman Wilk:

We write in response to your letter of July 21, 2016, requesting views concerning the regulation of court-reporting services in California as you expect those issues to arise in the California legislative session. You have asked, specifically, for views on "third-party contracts," meaning contracts between local California court reporters and service provider firms on the one hand, and "third parties" (such as insurance companies) on the other hand, for more than one deposition at a time. Your letter noted the Division's past work in this area, issuing a business review letter regarding restrictions on multi-case contracts in 1995. In that letter, the Division cautioned the National Court Reporters Association (the "NCRA") to avoid threatening competition among court reporters by discouraging innovative contract terms.[1]

The Antitrust Division of the U.S. Department of Justice (the "Division") welcomes the opportunity to provide the following information for your consideration.

I. Background

Competition is the core organizing principle of America's economy,[2] and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services,

[1] Letter from Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Jeffrey P. Altman, Esq., McKenna & Cuneo (July 27, 1995).

[2] *See, e.g.,* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2014) ("Federal antitrust law is a central safeguard for the Nation's free market structures."); Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy has long been faith in the value of competition.").

and innovation.[3] The Division works to promote competition through enforcement of the antitrust laws, which prohibit certain transactions and business practices that harm competition and consumers, and through competition advocacy, whereby the Division advances outcomes that benefit competition and consumers via comments on legislation, discussions with regulators, and court filings, among other means.

The Division has analyzed state legislation or regulation directed at a wide variety of industries. A theme that emerges from this work is that sometimes regulation aimed at a laudable public policy goal (e.g., safety, health, prevention of fraud) instead can serve primarily to protect incumbents from competition, thereby harming consumers by raising prices, limiting options, and dampening innovation, among other effects. Thus, in the Division's view, regulation should be directed at real harms and drafted carefully to avoid unnecessarily limiting competition.

The Division has commented on the competitive impact of several proposals that would change the definition of the practice of law. In a recent letter, the Division, joined by the Federal Trade Commission, highlighted the importance of avoiding "overbroad scope-of-practice and unauthorized-practice-of-law policies that can restrict competition between licensed attorneys and non-attorney providers of legal services," while recognizing that there are some activities "for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney client relationship is present."[4] The Division also opposed "restrictions on the performance of legal related services that are not necessary to address legitimate and substantiated harms to consumers," and recommended that "any such restrictions be narrowly drawn to minimize their anticompetitive impact."[5]

A recent report by the Council of Economic Advisors (the "CEA") echoes these points. The report discusses occupation licensing, meaning regulation that requires an individual to obtain the permission of the government – a license – to perform certain

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[3] *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

[4] Letter from Robert Potter, Chief, Legal Policy Section, Antitrust Div. and Marina Lao, Dir. of Office of Policy Planning, Fed. Trade Comm'n, to the Honorable Bill Cook, North Carolina Senate 1-2 (June 10, 2016).

[5] *Id.* at 3. *See also* Letter from Thomas O. Barnett, Assistant Att's Gen, Antitrust Div., U.S. Department of Justice, & Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, to Judiciary Public Affairs Office 4 (Jan. 25, 2008) (opposing proposals that, "while appearing to be good faith efforts to protect consumers, have not been tailored enough to avoid unnecessary harm to competition," as well as others that "appear to be little more than overt attempts by lawyers to eliminate competition from alternative, lower-cost non-lawyer service providers.").

types of work.[6] The CEA explains that "[w]hen designed and implemented carefully, licensing can offer important health and safety protections to consumers," but that it also can "lead to higher prices for goods and services" by raising barriers to entry.[7] In fact, research shows effects on prices of between 3 and 16 percent, with no increase in the quality of goods or services.[8] Accordingly, the CEA recommends that states limit licensing requirements "to those that address legitimate public health and safety concerns" and engage in "comprehensive cost-benefit assessments of licensing laws to reduce the number of unnecessary or overly-restrictive licenses."[9]

II. Analysis

Your letter states that certain groups claim that third-party court reporter contracts "raise ethical issues." Specifically, they contend that "the financial benefit to a court reporter of a multi-case contract could skew that reporter's independent judgment and result in a transcript favoring the party paying for the service."

Preserving the integrity of the judicial process is important,[10] but, at the same time, regulation of court-reporting services – like the regulation of other services – can raise barriers to entry, restrict competition, and limit the options available to consumers. Accordingly, carefully weighing the potential competitive costs of any proposals to restrict the provision of court-reporting services against any demonstrated need to ensure integrity is an important step. For example, if presented with legislation that would limit or prohibit third-party contracts, legislators should consider carefully whether those contracts truly threaten the integrity of the judicial process and, if so, whether any proposed legislation is narrowly tailored to address that threat.

A. The Division's 1995 Business Review Letter

The Division considered restrictions on multi-case contracts in a business review letter,[11] and that letter provides a template for analyzing any bill that might be considered by the California legislature. The National Court Reporters Association (the "NCRA")[12]

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[6] Today, licensing requirements extend to a very broad set of occupations, for example, florists, auctioneers, scrap metal recyclers, and barbers in some states. More than one quarter of U.S. workers now require a license to do their jobs. COUNCIL OF ECONOMIC ADVISORS ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3, 6 (2015).

[7] *Id.* at 3-4.

[8] *Id.* at 4.

[9] *Id.* at 5.

[10] *Cf.* Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors ...." (internal quotations omitted)).

[11] Persons concerned about the legality under the antitrust laws of proposed business conduct may ask the Department of Justice for a statement of its current enforcement intentions with respect to that conduct pursuant to the Department's Business Review Procedure.

[12] The NCRA is a professional association the represents the interests of verbatim shorthand reporters.

sought review of a proposal to amend its Code of Ethics to require a member, when making the official court record, to inform all parties to litigation if that member has a contractual relationship with one of the parties.[13] The NCRA stated that it was concerned that long-term contractual relationships "may undermine the actual or perceived impartiality of the court reporter," and believed that the amendment would advance "the public interest in impartial court reporting."[14]

The Division observed that, while ethical codes "serve many salutary purposes," they can "have the purpose or effect of restraining price or quality competition, limiting output, or discouraging innovation."[15] It stated that, to avoid those harms, the amendments to the Code of Ethics should observe the following guidelines:

- they "should not have the purpose or the effect of discouraging court reporters from entering into long term contracts, contracts with volume discounts or other fee discount provisions, or contracts with any other innovative terms, or otherwise discouraging competition among court reporters";

- they "should be accompanied by an affirmative statement to NCRA's membership that the changes are not intended, and NCRA does not intend generally, to prohibit or discourage long term contracts, volume discounts, fee discounts or other innovative contract terms, or otherwise discourage competition among court reporters";

- they should not require disclosure of contractual relationships to other court reporters (as opposed to the parties to the case and their representatives); and

- they should require disclosure only of "the minimum facts necessary to enable the parties to exercise their rights under the Federal Rules."[16]

The Division stated that, to the extent any amendment to the Code of Ethics follows these guidelines, and does not otherwise raise antitrust concerns, it would have no current intention to challenge the proposed conduct.[17] The Division observed that the NCRA "does not seek to discourage or prohibit long-term contractual arrangements or fee discount agreements for court reporting services."[18]

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[13] Letter from Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Jeffrey P. Altman, Esq., McKenna & Cuneo (July 27, 1995).

[14] *Id.* at 1-2.

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.* at 3.

[18] *Id.* at 2.

B. Factors to Consider Regarding the Regulation of Court-Reporting Services

Drawing on this letter and our previous competition advocacy work, the Division advises that the following factors be considered when reviewing any legislation that would restrict third-party contracting or otherwise specifically regulate court reporting or related services. First, legislators could consider whether, given any existing regulation, multi-case contracting (or any other practice) presents a significant risk to the integrity of the judicial process. For example, legislators could examine whether there is any evidence of harm in states that currently do not restrict or prohibit multi-case contracts.

Second, legislators could consider whether the existing regulatory scheme is sufficient to address any risk of harm. In this regard, we note specifically that the Professional Standards of Practice obligate court reporters, inter alia, to "[a]ct without bias toward, or prejudice against, any parties and/or their attorneys" and to avoid "a relationship that compromises the impartiality of the certified shorthand reporter."[19] A reporter who violates these standards is subject to discipline, including the suspension or revocation of his or her license.[20]

Third, legislators could assess the consumer cost of regulations that limit competition. For example, a company might realize significant savings under a third-party court reporting contract and pass some of those savings on to its customers. Similarly, a contract might provide a customer with other case-management tools, data-security tools, or other litigation-related services. Generally, consumers benefit when presented with a wider variety of goods and services. To make a fully informed decision, the legislature should consider the likelihood and magnitude of competitive harm (higher prices, lower quality products) that could result from additional regulation.

If legislators make a considered judgment after weighing the competitive costs that there is a need for additional regulation, legislators should determine whether the bill's provisions are narrowly tailored to curing the potential harm. Legislators should adopt the least competitively restrictive means of addressing any threat to the integrity or fairness of the judicial process (or of advancing any legitimate state interest) so as to minimize the costs to competition and the welfare of consumers. In particular, if legislators decide that third-party contracts undermine public confidence in the judicial system, they might consider steps short of an outright ban. For example, it appears that

[19] CAL. CODE REGS. tit. 16, § 2475(b) (2016).

[20] CAL. CODE REGS. tit. 16, § 2475(a) (2016).

recently passed legislation, rather than banning certain types of contracts, mandates disclosure in deposition notices.[21]

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We appreciate the opportunity to share our views. We hope our views are useful to you as you consider legislation regarding court-reporting services.

Robert Potter, Chief
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[21] *See* Cal. Civ. Proc. Code § 2025.220(a)(8)(A) (2016) (deposition notice must disclose "the existence of a contract, if any is known to the noticing party, between the noticing party or a third party who is financing all or part of the action and either of the following for any service beyond the noticed deposition: (i) The deposition officer. (ii) The entity providing the services of the deposition officer."); *id.* § 2025.220(a)(8)(B) (deposition notice must contain a disclosure if "the party noticing the deposition, or a third party financing all of part of the action, directed his or her attorney to use a particular officer or entity to provide services for the deposition").