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Hand Delivered

Anne K. Bingaman, Esq.
Assistant Attorney General
Antitrust Division
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Washington, D.C. 20530

Dear Ms. Bingaman:

Pursuant to the Department of Justice's business review procedure, 28 C.F.R. § 50.6, I am writing on behalf of the National Court Reporters Association ("NCRA") to request a business review letter regarding a proposed Contracting Policy that would relate to contracts between court reporters and parties to a litigation. As described in detail below, the proposed Contracting Policy is intended to preserve the independence and impartiality of the reporter who makes the official court record.

I. Background and Purposes of NCRA

NCRA is a 33,000-member, non-profit professional membership association that represents and promotes the interests of verbatim shorthand reporters. One of NCRA's purposes is to foster the practice of lawful and proper professional ethics by court reporters, as well as their compliance with applicable federal, state and local laws dealing with the verbatim shorthand reporting profession. In accordance with such federal, state and local laws, NCRA's Code of Professional Ethics stresses that those reporters who are making the official court record are officers of the court and must exhibit independence and impartiality, both in fact and appearance, in order to maintain the integrity of the profession.

The foundation of professional and ethical court reporting practice is the independence and impartiality of the court reporter. The court reporter's independence and impartiality are, in fact, among the cornerstones of the American civil and criminal justice systems. Parties to an action and the

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general public expect and demand that an impartial and independent court reporter, who has no bias or stake, financial or otherwise, in the outcome of an action, record depositions and court proceedings.

In this regard, NCRA members must always be mindful of Rule 28(c) of the Federal Rules of Civil Procedure, which states:

Disqualification for Interest: No 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.

As discussed in greater detail in the enclosed legal memorandum,^{1/} Rule 28(c) and the cases interpreting it emphasize that court reporters making the official court record must be independent and unbiased in order to ensure the trustworthiness and accuracy of the record. Most, if not all, state civil procedure codes contain rules similar to Rule 28(c), as well.

NCRA is concerned that the proliferation of contracting arrangements between court reporters and certain parties to the litigation or their representatives threatens compliance with Rule 28(c) and, thus, undermines the independence and impartiality of the court reporter. Companies who frequently use court reporting services are increasingly asking court reporters to enter long-term "requirements" type contracts. All attorneys representing that company are then directed to use only the court reporter(s) under contract. Other court reporters are establishing long-term contracting relationships with management consulting firms who are providing a variety of litigation support services to only one party to the proceeding.

In these contexts, the court reporter may perform critical litigation support services in addition to "standard" court reporting services for only one of the parties and thereby become a member of one party's advocacy or litigation support team. The court reporter may also deliver transcripts (or portions thereof) to the party or its representative with whom he or she has a contracting relationship before transcripts (or portions thereof) are delivered to other parties to the action.^{2/} Importantly, these special litigation support services and such advance delivery may not be made available to or even disclosed to the other parties to the lawsuit.

^{1/} This legal memorandum is virtually identical to the one that was considered by NCRA's Board of Directors at the time they considered the proposed Contracting Policy that is the subject of this request for business review.

^{2/} This practice, in addition to suggesting impropriety and a lack of impartiality, threatens confidentiality and the security of the reported information. Transcripts can be easily edited and/or reprinted. Contemporaneous distribution of transcripts to all parties in an action helps to ensure the confidentiality and security of the information reported.

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These kinds of arrangements could cause real or perceived bias in the reporting of a deposition or a proceeding. The agency relationship established by such a contracting relationship may violate the terms, or at least the intent, of Rule 28(c), because the contract establishes a substantial and long-term financial relationship between the reporter and one of the parties to the action. This relationship could cause a reporter to be "financially interested in the action" and thus impair the reporter's independence. Moreover, if the contracting arrangement converts a neutral deposition official into a member of a party's litigation or advocacy support team, the neutrality of the official and the trustworthiness of the record not only is questionable, but also may be impaired. The offering of specialized litigation support services to one party, but not the others, could certainly be viewed as a compromise of the reporter's obligation of impartiality and independence. Submission of transcripts (or portions thereof) to one party or its representative with whom the reporter has a contracting relationship before they are submitted to all other parties to the action clearly shows bias in favor of the contracting party. Thus, these features of contracting arrangements may serve to promote the interests of one party to an action at the expense of the other parties, and, at the very least, may call into question a reporter's independence and impartiality, which, in and of itself, must be avoided.

II. Proposed Contracting Policy

While NCRA does not seek to prohibit a long-term contractual arrangement between a court reporter and one party to an action (or the management consulting firm that may be providing special litigation support services for that party), NCRA does believe that certain safeguards must be instituted.^{3/} As a result, NCRA has drafted a proposed Contracting Policy which, in essence, applies NCRA's Code of Professional Ethics to the specific problem of contracts between reporters and parties to the litigation. The proposed Contracting Policy, which applies only to reporters who are making the official court record, includes the following principles:

1. A court reporter shall always disclose to all parties present the existence of any direct or indirect contracting relationship with any attorney or party to the proceeding. This disclosure shall include the identity of all principals and agents involved in the contracting group. It shall also include a description of all services being performed, as well as the disclosure of the fact if any special fee or credit arrangements are being provided to any attorney or party by such court reporter, his or her employer, or any principal or agent of the contracting group. It is the court reporter's obligation to inquire about and discover this information before accepting any assignment and to make such disclosure to all parties.

^{3/} Some states, such as Hawaii, have attempted to address the problem by strictly prohibiting direct contracting arrangements between court reporters and parties to an action, or by enacting laws or regulations which control certain aspects of those arrangements. Other states, such as Georgia, are in the process of enacting such legislation and rules.

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2. A court reporter shall always offer to provide comparable services to all parties in a case. Different parties to an action shall always be treated equally.
3. A court reporter shall not, in act or appearance, indicate that the court reporter is participating as part of an advocacy support team for any one of the parties.
4. A court reporter shall always comply with federal, state and local laws and rules that govern the conduct of court reporters (such as those that deal with certification, confidentiality, custody of transcripts, and contracting).

A copy of the Contracting Policy Statement adopted by NCRA's Board of Directors, which includes these principles, is enclosed.^{4/} These principles are based upon various provisions of NCRA's Code of Professional Ethics. Those provisions direct members to be fair and impartial, to be aware of conflicts of interest, to guard against the fact or appearance of impropriety, to preserve confidentiality, and to maintain the integrity of the reporting profession. NCRA's Code of Professional Ethics, Provisions 1, 2, 3, 4, and 9. A copy of NCRA's Code of Professional Ethics and two advisory opinions dealing with certain aspects of contracting arrangements are also enclosed.

As discussed more fully in the enclosed legal memorandum, Rule 28(c), when read together with the disqualification and waiver provisions of Rules 29 and 32(d)(2), argues in favor of a policy of full disclosure in advance to all parties to an action of any circumstance that could compromise the Rule 28(c) objectives of ensuring the neutrality of the proceeding and the trustworthiness of the record produced. A party (or the party's counsel) cannot efficiently and effectively object to the taking of a deposition unless there is full and fair disclosure in advance of any circumstances and relationships that could affect the neutrality of the proceedings or the trustworthiness of the record. Thus, in the contracting context, the Rules, when read together, require the disclosure to all parties of the particulars

^{4/} NCRA is currently using these principles as the focal point of a national campaign to seek corresponding changes to statutes, regulations and rules at the federal, state and local levels. Depending on the outcome of this business review request, NCRA may choose to implement and enforce the Contracting Policy on its own by, for example, incorporating the Contracting Policy's principles into NCRA's Code of Professional Ethics. If a member is then found to have violated the Code, the member could be expelled or suspended from NCRA, or censured or reprimanded. It is highly unlikely that such enforcement of the Contracting Policy could have any anticompetitive effect in a properly defined antitrust market, however, because membership in NCRA is not a prerequisite for the provision of court reporting services. Accordingly, enforcement of the Contracting Policy would have neither the purpose nor the effect of reducing competition. In fact, the disclosure requirement that is central to the Contracting Policy is pro-competitive, since it should result in a free exchange of information regarding services offered and prices charged, thereby promoting greater competition in these areas.

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of any contracting relationship or arrangement that could compromise the neutrality of the proceedings and the trustworthiness of the record produced. For this reason, NCRA's proposed Contracting Policy focuses on full disclosure as well as the requirement for court reporters to offer to provide comparable services and to treat all parties equally.

It should be noted that NCRA was careful to draft its proposed Contracting Policy in a way that would not impinge upon the pricing decisions of its members. The proposed Contracting Policy is intended merely to prevent court reporters from discriminating between parties to the same action in terms of the types of services offered. The Contracting Policy is designed to preclude reporters from providing preferential treatment to one party based on the close relationship achieved through a contractual relationship by requiring full disclosure and the opportunity for all parties to obtain the same services.

III. Conclusion

For all of the above reasons, NCRA believes that it must act immediately to preserve court reporter impartiality and independence in light of the introduction of certain new features of contracting arrangements between court reporters and parties to an action or their representatives. NCRA believes that its proposed Contracting Policy serves this legitimate goal without unduly restricting competition between court reporters. NCRA asks the Department of Justice to review its proposed Contracting Policy and to permit NCRA to enact and then enforce its provisions. Due to the critical role that court reporters play in the American civil and criminal justice systems, it is respectfully requested that you provide expedited review of this business review request.

Please contact me if you need additional information or have any questions concerning the proposed Policy.

Sincerely,



Jeffrey P. Altman

cc: Brian E. Cartier, Executive Director
National Court Reporters Association