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July 22, 2013

Chief Justice Barbara Madsen
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Senator Adam Kline
223 John A. Cherberg Building
P.O. Box 40437
Olympia, WA 98504-0437

Re: CR 28 (c) and (d) – Concerns re: WCRA's Proposed Changes

Dear Chief Justice Madsen and Senator Kline:

You probably know me from my days as President of the Washington State Association for Justice (2009-2010 term), but in addition to my personal injury practice, I have been involved with court reporting issues for well over a decade now, initially as one of the attorneys involved in litigation relating to transcript formatting allegations, and later as a consumer of court reporting services speaking out against what I felt to be anti-competitive proposals (to, for example, raise the WPM requirements to pass the court reporting test to 225 while "grandfathering" in the current reporters, etc.) to the WAC's/Court Reporting Act put forth by the political arm of the Washington Court Reporters Association (WCRA).

In addition to being a Past-President of WSAJ (which, let me be clear, I am not speaking on behalf of here), I have also served on the WSTLA/WSAJ Board of Governors continuously since 1995-1996 and am a shareholder/owner of Carter & Fulton, P.S., an Everett law firm which emphasizes the handling of personal injury claims of all types. I thus am a frequent consumer of court reporting services, am familiar with billing practices in the industry, and given my past involvement in a number of court reporting issues, very aware of the very political and competitive environment in which court reporters operate. Finally, I am quite familiar with the requirements and contents of the WAC (308-14), RCW (18.145) and Civil Rules (CR 28) governing depositions and/or court reporters, as well as the legislation proposed by WCRA this past session (long session!).

This letter addresses the non-specific, proposed changes to CR 28 advocated by Senator Kline in his letter of May 16, 2013 to you, Chief Justice Madsen – changes being advocated by

the lobbying team of WCRA, as Senator Kline notes in his letter to the Court. Given the information I have come into possession about these issues, I urge you to use extreme caution before enacting any changes to the court rule advocated by WCRA.

Taken at face value, the changes proposed by WCRA's lobbying team/attorney seem innocuous enough, and in the public interest. They are couched as "consumer protection" issues and aimed at doing away with a perceived "competitive disadvantage", as noted by Senator Kline. However, after taking a closer look at these issues, and at the WAC changes WCRA is attempting to get passed by DOL contemporaneously with Senator Kline's proposed court rule change to CR 28, I feel compelled to write to you both to express my firm opposition to any changes to CR 28, at least without further addressing the concerns raised below. There is much, much more to this story than meets the eye and I want to ensure that you are all operating with full and fair information prior to considering acting upon Senator Kline's proposal.

First, let me be clear where I come from on these issues. I am an attorney and thus a consumer of court reporting services. I fully endorse and support efforts to make court reporters comply with all statutes and administrative and court rules applicable to them. This includes the "equal pricing for equal services in a given case" directives contained in both WAC 308-14-130 and CR 28. I, like I am sure both of you when you were in active practice, expect to be treated fairly by the court reporting industry, and expect the reporters I use to comply with all applicable regulations. As a businessman myself, and as someone who represents clients on a contingency fee basis, costs matter given that they ultimately come directly out of my client's pocket in successful cases, and I expect to be treated fairly by the professional service providers I use. In the past, when I have received transcripts out of compliance with the state's formatting guidelines, I have written letters to a number of large reporting firms pointing out the "bad" transcripts and explaining the rule to them. I have not reported them to DOL, but rather sought to educate, as there have long been ambiguities in the rules and a lack of awareness about such requirements within the industry. I thus fully support *true* consumer protection rules changes which are meant to help consumers be treated more fairly. Unfortunately, I do not believe the WCRA-sponsored changes to represent true consumer-oriented rulemaking.

In truth, WCRA's effort to "reform" the WAC and/or CR 28, or pass legislation which does so more broadly, is part of a broader, nationwide campaign which was created and sponsored by the National Court Reporters Association (NCRA) to deter competition with the solo and small firm reporters by the larger, national court reporting firms and to keep rates high for the freelance reporters. Simply put, these proposed changes appear to represent anti-competitive "protectionism" at its worst, with the NCRA having crafted a very specific and detailed "map" as to how to accomplish these aims on a state-by-state basis. As proof of this, I have attached voluminous information to this letter (see, **Exhibits A** and **B** hereto) which makes clear that these proposed changes are in fact part of a larger, organized campaign by the NCRA and their related state organization, WCRA (akin to AAJ and WSAJ in our world) to stifle competition from larger, out-of-state reporting firms. These efforts have already spawned one anti-trust lawsuit (Arizona), and requests for federal investigations in two other states (Arkansas and Nevada). Washington, unfortunately, appears to be the proponent's next "target state" for such regulatory/court rule changes and/or legislation aimed at implementing the NCRA-WCRA

anti-competitive scheme. I apologize for the length of my attachments - 127 pages of material - but it is my hope that you will take the time to carefully peruse it, as it is very enlightening as to what is really going on here.

Unfortunately, it also appears that these proposed changes are consistent with past attempts by WCRA leadership to enact provisions which protect them from or limit competition from larger and/or out-of-state reporters/national court reporting firms – and, as noted above, wholly consistent with the larger overall plan hatched by the National Court Reporters Association (NCRA) to enact such protectionist rules nationwide. In the past decade, for example, at a time when many reporters from California and other states were re-locating to Washington due to our stronger economy, WCRA proposed that DOL raise the qualification standards for court reporters up to 225 words per minute, under the guise of "too many unqualified court reporters moving into Washington" - yet they included a "grandfather clause" in the newly proposed rule to exclude themselves from having to demonstrate the same competency they wished to impose upon others. This standard, of course, could have been met by only a few. As here, relevant to "speed", there had also not been a single documented complaint to DOL about the competency of a court reporter not being fast enough to take down testimony – again, a "solution in search of a problem". I testified against this proposal in Olympia, and suggested that if competency was truly the issue, *every* court reporter, current or new, should have to meet this very stringent, newly-proposed standard. When DOL proposed removing the "grandfather" clause from WCRA's proposal to increase the qualification speed, the proposal was, of course, immediately dropped by WCRA. That is but one glaring example of the type of protectionist rulemaking WCRA has attempted in the past.

The current issue is similar – a "solution in search of a problem". Proponents argue, without proof, that firms are entering into agreements with insurers and other frequent consumers of court reporting services, and that some lawyers are being charged more than others for the same service in a given case. I myself must admit that I have from time to time heard lawyers wonder out loud if certain insurers operating via in-house counsel (Liberty Mutual, Allstate, etc.) may be getting more favorable terms than is plaintiff's counsel, but, in truth, I am not bound to use these reporters when I note a deposition, or have every right to inquire about the rate structure in advance if I do consider using them. In fact, I typically use the reporting outfit I always use when I note depositions in a case, although at times, when, say, the plaintiff and defendant are to be deposed on the same day, we may use the same reporter. NEVER have I been asked or pressured – much less required - to use the same reporting outfit the defense uses in a given case, and when I do, I have also never uncovered evidence that I am being charged more than defense counsel for the same item (original or copy of the transcript). Further, given my knowledge of these rules, I have inquired to ensure that this is the case with the firm I typically use, and it is.

As with the qualification speed issue, relevant to this latest pricing issue, DOL indicates that they have never received a complaint on this issue – not a one. Further, I am told that DOL has also never sanctioned a single reporter for violating the "equal terms for equal services in a given case" rule(s). If unequal pricing is, in fact, a widespread issue, there is little evidence of such a problem existing. Given this, if the Court does anything relevant to CR 28, it should be to

simply require that in any instance where a reporter/firm is working for both sides in a given case, the reporter or firm, if asked, be required to execute an Affidavit of Equal Terms, certifying that all parties are receiving equal terms for equal services (same rate for the original, same rate for copies, etc.). If there is a question, a complaint can be lodged with DOL, and they have subpoena power to confirm compliance per RCW 18.145.

However, before I move further into the meat of the issue, I do think that it is important for you to understand what WCRA is, and what it is not. While the name of WCRA seems to denote that the Association represents the majority of the court reporters in the State of Washington, in truth, a small but vocal minority of court reporters belong to WCRA. The last information I had indicated that WCRA had 200 or less members (many, non-reporters or non-active) when there are about 900 active reporters in the state. I am told that when Phyllis Lykken, the current WCRA President, was asked at the recent June 6, 2013 DOL public hearing how many actively practicing CCR members WCRA had, she said she could not answer the question, and did not know. Whatever the numbers, what is clear is that many more reporters in this State have chosen not to belong to WCRA than have chosen to belong. Further, the WCRA Board has long been controlled by solo or small firm court reporters rather than the Board being balanced between firms of all sizes. Thus, this Association should not be confused with an organization like WSAJ, which has as members a majority of the attorneys in the State whose practices emphasize personal injury cases, and can generally (but not always!) speak with a fairly unified "voice" for its members. They thus represent a small minority of the CCR's in Washington, with their membership being concentrated in the solo/small firm areas, also.

After carefully reviewing the latest WCRA proposals, I must conclude that the political arm of WCRA has once again proposed both legislation (now dead for this year), WAC changes – specifically changes to WAC 308-14-130 (1), (7) and (9) – and changes to CR 28 which under the guise of "consumer protection" are really aimed at doing away with competition from the larger, more technologically advanced court reporting outfits. The "hook" for these proposals is, as noted above, the argument that insurers and other frequent consumers of court reporting services are entering into agreements with larger court reporting firms to handle all of their work in a given area, usually at a reduced price due to the volume of work received, and that the reporters and the firms they are working for are not complying with CR 28 and WAC 308-14-130(1) which ALREADY require that all parties in a given case receive equal terms from the involved reporter(s) (same price for originals, copies, exhibits, appearance fee, etc.) for the same service(s).

There is, per the WAC, court rules or the Court Reporting Act, nothing which makes entering into such exclusive service agreements unlawful – such arrangements become unlawful only when all parties in a given case are not given the same rate for the same service in the case. The argument that such agreements are rampant within the industry sounds appealing and would be very concerning if backed up with any evidence, but unfortunately WCRA's allegations are simply not backed up by any evidence, because, as Susan Colard or anyone within the court reporting section at DOL will tell you, this allegation is not only unproven, but there is no record of even one complaint being made by attorneys or anyone else to the DOL about the "equal pricing" issue, an issue that DOL has full authority to investigate and sanction if sustained per

RCW 18.145 – the Court Reporting Act.

Given the complete dearth of consumer complaints about unequal pricing in a given case, and WCRA's admission in the missive recently sent out to its own membership that DOL has expressed its desire to ensure that any requested changes to the Court Reporting Act/WAC were "...to ensure *consumer protection* rather than court reporter protection" – I hope that the Court Rules Committee, Legislature and Supreme Court will do similarly. Frankly, given (1) the absence of any documented complaints to DOL about this "unequal pricing" issue; (2) the fact that clearly this is all part of a well-documented "program" hatched by NCRA to protect the small firm reporters from the competitive pricing larger reporting firms can offer attorneys; (3) the fact that equal terms to all involved in a given case for the same services is ALREADY required pursuant to both the WAC and CR 28; and (4) that violations of these provisions ALREADY subjects reporters to both professional and criminal sanctions per RCW 18.145, I wonder if all of this is really a bad "solution" to a non-existent "problem" which WCRA has created for its own purposes. Frankly, this reminds me a bit of the manufactured medical malpractice insurance "crisis" in years past. In my considered opinion, what DOL and the court, via Senator Kline's proposal to alter CR 28, now has before it is court reporter protection provisions dressed in the "sheep's clothing" of consumer protection. I know that may seem harsh, but the documentation can lead me to no other conclusion.

Furthermore, as an attorney and consumer of court reporting services fully capable of shopping the market for pricing and level of service, I must ask myself "Why is WCRA hiring lobbyists and attorneys to run around Olympia and attempt to enlist the assistance of DOL, State Legislators and/or Supreme Court justices to pass these WAC/rule changes, all in an alleged effort to protect *me* when neither I nor any other attorneys I know have ever had an issue with unequal pricing for the same services in a given case?" Why are they spending *their* time to allegedly protect *my* money? Is this *really* an attempt to protect me, a knowing consumer? I hope this is a question that you both will pose to those pushing these changes, as well. Ask them "Where is the problem? Show me proof of unequal pricing". Ask the proponents of these changes "Where are all of the complaints to DOL about this problem?" Ask DOL if they have ever sanctioned even a single court reporter for violating the "equal pricing for equal services" rule. Ask them to prove to you a single instance where a party with a contract with a given firm was charged less than another party for the same services – ask to see the bills on each side of the transaction. Challenge them with "Isn't all of this *already* covered by WAC 308-14-130, CR 28 and/or the Court Reporting Act (RCW 18.145)?" And, more importantly, ask them the really hard question: "Isn't this *really* more about you all – the freelance and smaller reporters - trying to protect yourselves against market forces, expensive technological advances you may not wish to have to invest in to compete and limiting competition from the larger or national reporting firms?"

When the onion is peeled back, and the truth emerges, the changes proposed by WCRA are at their core anti- competitive measures aimed at limiting competition (pricing and better technology and services) from the larger, out-of-state national reporting firms who are able to enter into agreements with large companies who frequently require court reporting services for reduced rates, rates which, per already existing law, then must be passed along to me and my

client when we use the same reporter/reporting firm in a given case, and to keep in-state reporters who are hired for such jobs by these firms from taking such jobs. It is not *unequal* pricing that WCRA is truly concerned about...but rather having to compete with larger firms and offer *lower* prices to attorneys. Frankly, this entire fight is akin to the fights in small towns which often occur when Wal-Mart or some other "Big Box" store wishes to come into town; they can offer consumers lower prices due to their purchasing power/volume purchasing, and the smaller, existing retailers do not like it, as they are faced with reducing their own prices if they want to compete, and their margins are cut. However, this is the reality of a "market economy", and when such stores do open in such towns, people ultimately shop at them. So it is with court reporting. Here is appears the proponents of these changes wish to artificially skew the market forces, and rather than allowing the market to determine pricing, they are seeking protectionist rulemaking/legislation to do this for them. In fact, the information from NCRA that is attached, at least for me, makes it difficult to come to any other conclusion, and demonstrates to me that this is all part of a larger scheme to protect "old school", solo or small firm stenographic court reporters from the lower pricing and superior technology that larger reporting firms can offer along with the basic transcript.

Senator Kline, as a long-time Senator, one-time WSTLA stalwart, attorney and someone who I have the utmost respect for, I am not bold enough to argue that you do not fully understand these issues, but I DO have some concerns that you (and Representative Goodman) may have been somewhat duped on these issues by WCRA and their political team. I can only view the proposed changes to CR 28 now being pushed by WCRA as a backdoor effort to accomplish what WCRA could not accomplish legislatively this past session.

I am also very concerned that WCRA's true intention is to seize on the "...with a financial interest in the outcome of the litigation" language now contained in CR 28 (and proposed to be added to WAC 308-14-130), and if grafted into the WAC, as they have done elsewhere in the country, they will then take the position that merely by working on a given case for a firm with a contract to provide services to one of the firms involved in the litigation, and being paid for the services provided, this constitutes the court reporter being "financially interested in the action" or having "...a financial interest in the outcome of the litigation", thereby disqualifying them pursuant to CR 28 (c) and (d). This may seem far-fetched, as this language of CR 28 clearly points to the court reporter having some stake in the *outcome of the litigation* – but as the materials attach attest to, this is exactly how this type of language has been misused elsewhere under the NCRA scheme to deter larger firms and reporters doing jobs for them from taking larger jobs.

Given all of this, I feel compelled as an attorney with an interest in these issues to write, once again, to speak out loudly and clearly against the Supreme Court making any of the WCRA-proposed changes to CR 28, or if changes are going to be made, to more definitively set forth that a reporter simply getting paid for providing court reporting services in a given case does not render them "financially interested" in the case for purposes of the rule. If such language is added, rest assured there will be extreme push-back from WCRA, as this defeats their real purposes in pushing these changes. If I am incorrect, they should, of course, have absolutely no issue with the addition of such language to the court rule, as it is in the best

interests of all court reporters not to be disqualified from a case so long as they are offering equal terms to all involved parties, right?

Furthermore, what WCRA says they seek through these changes is already currently required: WAC 308-14-130(1) *already* requires CCR's to offer fee arrangements on a given case to all parties on equal terms. CR 28(d) ("Equal Terms Required") already does the exact same thing, via slightly different language. In other words, pursuant to both the WAC and CR 28, court reporters working for multiple lawyers in a given case *already* must offer all lawyers the same/equal fee terms throughout the case. If a lawyer suspects that this is not occurring, the lawyer can go on the DOL website and hit the "File a Complaint" button and ask DOL to look into whether or not the WAC/Civil Rule is being complied with. Furthermore, RCW 18.145.130 *already* contains a list of acts which constitute "unprofessional conduct" for a court reporter, to include dishonesty, false advertising, violation of any administrative rule governing the profession, and not responding to subpoenas issued by the Director - provisions which clearly give DOL the power to investigate and punish reporters not following these rules. All DOL has to do now to investigate such a situation is to ask each attorney for the bill they received from the court reporter or firm for, say, an original transcript in the same case, and if they do not match, a violation has occurred. Thus, equal pricing for equal services is not, in my view, really the concern of those pushing these changes, as this is already required. If this is truly the concern of the proponents of these changes, and the Committee feels compelled to make any changes to the WAC discussing this (308-14-130(1)), no changes would be necessary, as these rules already exist.

As with most WCRA proposals of this ilk, the devil here is in the details. First, there is no documented problem or pattern of complaints about unequal pricing by consumers. Check with DOL on this. Further, as can be seen by review of the NCRA's "Contracting Article" and other materials on this topic, passage of rules of this ilk are simply part and parcel of NCRA's stated initiative to, state-by-state, enact protectionist laws which protect the small and solo reporters at the expense of larger, national reporter firms. Their proposed rules changes have nothing to do with ethics, but rather about preserving high market rates for the solo and small firm reporters, and hindering price competition from the larger reporting firms. They then, once they achieve these rule changes, use the "financially interested" language to scare off local reporters from working with larger firms to provide in-state services – again, a great way to deter fair competition or allowing the market to determine fair rates for services. Any fair reading of the existing rules consistent with long-established rules of statutory construction make clear that unless the reporter will financially gain from the *outcome* of the case or litigation they are working on (for example, as an heir in an Estate dispute, or as a plaintiff in a class action), there is no conflict or disqualification from providing reporting services on the case. Any attempt by the proponents of these changes to transform a reporter who is paid for providing court reporting services into a "financially interested" person in the litigation should and must be rejected, or language added to make clear that this is not the intent of any of these changes.

Compliance with these already-existing rules should stay with the court reporter/court reporting firm which is doing the billing for the services provided, and failure to abide by existing law can and should result in license sanctions by DOL – and even criminal charges - as

is allowed by both the WAC and RCW 18.145 as currently constituted. Again, as a lawyer, I am absolutely in favor of avoiding true conflicts of interest and ensuring a "level playing field for all". I have, in fact, dedicated my professional career to affording the "little guy" justice. If a court reporter is a relative, spouse, employee of a party or stands to gain from the end outcome of the litigation, they clearly have no business serving as a reporter in such a case, as the record must always be created by an impartial, non-interested party. Again, this is already clearly spelled out in CR 28(c), and given that those provisions apply only to court reporters providing services within the litigation setting, make perfect sense. If the court reporter is closely related to one of the parties or truly stands to gain from the outcome of the litigation (rather than from providing reporting services), they certainly should be disqualified from providing services in that case, as maintaining the sanctity of the record must at all times be paramount. This is as it should be.

If changes to CR 28 are going to be entertained at all, I would suggest: (1) adding language requiring the reporter and/or reporting firm providing the court reporting services to sign an Affidavit of Equal Terms, if asked by the party paying for said services, which certifies under oath that all parties in the case are receiving equal terms throughout the case, and by providing supporting billing information from the case to verify this, as reasonably needed; and/or (2) adding a sentence at the end of CR 28 which states that "As used in this rule, a certified court reporter is not considered 'financially interested' in the case or action simply because they are paid to provide court reporting services to the parties thereto, so long as all parties to the action are offered and given equal terms for the same services." This would, I think, remove any ambiguity, while strengthening the "equal terms" portions of the rule.

Again, if the intent of the proponents is "pure" and consumer-oriented, there should be absolutely no opposition to such additions...but there will be. That is because this "financially interested" language is necessary for proponents to use as an anti-competitive "sword" against larger or national firms who can provide clients with the need for significant amounts of such services a "price break", which then, per the existing rules, must also be given to all other attorneys/purchasers of similar services in the same case. What better way to keep in-state reporters from taking jobs from larger or out-of-state court reporting firms than to render them "financially interested in the litigation" simply by being paid to provide the same services the in-state small firms and solos would provide in the same case. This is akin to arguing that the plaintiff's lawyer in every case is "financially interested" in the outcome of the case because they have a contingency fee at stake in the case. This has never been the rule in the legal world; nor should it be in the court reporting world. What is clear from the materials attached to my letter is this: the true intent of the proponents of these changes is to keep prices high for themselves by deterring "volume" pricing offers being made at all (offers, I might add, which are ultimately good for the consumer-attorneys receiving them, so long as all involved receive them) – such that the smaller firms can compete better price-wise against the larger firms.

Our country was founded on the concept that "free market" competition, unimpeded by over-regulation by the government, is vital to a robust business environment which promotes creativity, progress and technological advances for the betterment of all. We all probably cringe when Wal-Mart or some other "Big Box" store has adverse impacts on smaller, local merchants.

However, as consumers, we have every right to not go to Wal-Mart to shop, and to pay a bit more to support the smaller, local merchant. That is consumer choice in a market-driven economy. Some members of the court reporting industry seem to have forgotten this basic core principle of a strong and vibrant democracy, and have instead concentrated their efforts towards passage of "protectionist" legislation or rules, not just in Washington, but nationwide, as the attached documents attest. I urge both of you (and other Legislators or those involved in court rule-making) to look "behind the curtain" relevant to these proposed changes, and if any changes are going to be made, that care is taken to ensure that the alleged consumer protection purposes behind these proposed changes are preserved by not allowing the "financially interested" language to be twisted in its meaning or misused.

Again, I apologize for the length of this letter and its attachments. My hope is that the attached information will assist the Legislature and Supreme Court in seeing what is really going on here – before what appear to be innocuous, consumer-friendly changes to the rules are made which are anything but that. I am not being paid to provide this information to you, but rather want to ensure you have full and complete information surrounding these issues prior to deciding whether or not to act in any fashion.

Thank you for considering the issues raised as part of any rule-making process you may engage in.

Sincerely,

Bradford J. Fulton

BJF:lq

Attachments:

A. Kirkland & Ellis, LLP letter/NCRA information packet
B. Magna Legal Services v. Board of Reporters information

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 29, 2015 10:39 AM
To: Tracy, Mary
Subject: FW: Proposed Changes to CR 28
Attachments: Letter to Madsen-Kline Opposing Changes to CR 28 (July 2013).docx

From: Brad Fulton [mailto:bjf@CarterFultonLaw.com]
Sent: Wednesday, April 29, 2015 10:36 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Proposed Changes to CR 28

To Whomever It May Concern:

Please see the attached in opposition to the proposed changes to CR 28, which I forwarded to the Court previously. I stand by the opinions stated in this letter, and for these reasons OPPOSE the changes being pushed relevant to CR 28, at least in large part (I support equal pricing for equal services, as is already required by 18.145 and via the WAC). These changes, when all of the alleged consumer protection clothing is stripped away, are really anti-competitive changes being proposed by smaller court reporting companies to attempt to keep the larger firms from doing business in Washington. I stand by my reasoning for opposing these changes to CR 28, and especially the "financially interested" language which clearly attempts to stretch the prohibition of a court reporter serving if he/she has a financial interest in te OUTCOME OF THE LITIGATION into a prohibition from reporting if they have some sort of agreement to provide court reporting services to one of the parties. I am a believer that the free market should determine pricing, not a small group of self-interested solo or small firm reporters. What I wholeheartedly support is equal pricing for equal/like services on a given case – the original should be the same for all parties in a given case, as should the copy rate for all involved parties. However, this is already well covered in the court reporting statute and WAC provisions, which should make clear that this is not the true intent of these changes. Thanks for your consideration.

Brad Fulton, attorney
Everett, WA