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April 30, 2015

Hon. Charles W. Johnson, Assoc. Chief Justice
Chair, Court Rules and Procedures Committee
Washington Supreme Court
Temple of Justice, Olympia, WA 98504

Via email: supreme@courts.wa.gov

Re: Comments on Proposed Amendments to CR 28

Dear Justice Johnson:

We represent The Alliance of Deposition Firms.[1] The Alliance brought to our attention its concerns about the proposed amendments to Civil Rules 28. The underlying issues of 1) whether the integrity of court reporters may (or may not) be affected by various contracting models; and 2) whether different contracting models for court reporting will increase or decrease litigation costs, have been under discussion nationally and locally for over 20 years. Since GR 9 provides for comments by any interested party, we are transmitting the Alliance's detailed discussion of those issues with this letter.

Because we have practiced regularly before this Court for many years and are intimately familiar with civil litigation, we examined the proposed amendments and the history of the rule ourselves. We have concluded the proposed amendments are highly problematic, would sap judicial resources from the decision of cases, and should be rejected.

First, the amendments raise serious antitrust issues. Serious antitrust issues arise from the facially anti-competitive restrictions in the amendments. As the Alliance addresses in greater detail, the U.S. Department of Justice has voiced concerns about the potential anti-competitive effects of such restrictions. A copy of the DOJ's written statement is attached to the Alliance's statement.

Second, the issues raised by the proponents of the present amendments were resolved in 2001. The history of CR 28 shows that the concerns raised by the present amendments' proponents were raised in 2001 and taken into account when CR 28 was revised then. *See* 3A K. Tegland Washington Practice: Rules Practice (Superior Court -- Civil Rules 1 to 37) at 28 (2013). The comments supporting the proposed amendments do not show any specific problems have arisen since the 2001 amendments.

Given the judiciary's sparse resources, we strongly suggest the amendments not be adopted. The courts will find themselves entangled in discovery disputes over whether

[1] The Alliance consists of: Esquire Deposition Solutions, LLC, U.S. Legal Support Inc., Magna Legal Services, LLC, and Veritext Corp., who may be contacted care of us.

reporters and lawyers have transgressed the ban on multi-action engagements, diverting resources that should be devoted to addressing and resolving the merits of cases.

We have reviewed all of the comments submitted through April 29 posted on the Washington Courts website. Several aspects of these comments strike us as noteworthy.

• The proposed amendments were proposed by the WCRA. Unsurprisingly, a substantial portion of the comments appear to be the result of a campaign by the WCRA urging its members to submit comments supporting its proposed amendments. The internet makes it easy for an interest group to generate a substantial volume of "support" for a proposal simply by providing a proposed text and encouraging potential supporters to cut-and-paste that text into an e-mail and send it along; that appears to have been the case here.

• The comments in favor of the proposed amendments are striking as much for what they do not say as for the reasons they give supposedly justifying the amendments' adoption. First and foremost, they state ***no hard evidence or specific facts*** showing a genuine need for the amendments. Rather, supporting comments boil down to little more than general "soundbites" about how the amendments supposedly will be beneficial.

This is especially significant given that in 2001 WCRA (when it was known as the "Washington Shorthand Reporters Association") put forth substantially the same claims in support of adopting what became subpart (d) of the rule in 2001. ***No*** comment supporting the new amendments makes ***any*** effort to show what has happened since 2001 that justifies going beyond the adoption of subsection (d) by imposing what amounts to a bar on the ability of parties or lawyers to retain court reporters for multiple actions. Nor do any supporting comments address the practical problem of the effect of the new amendments, which could ***preclude*** lawyers -- for both plaintiffs and defendants -- from retaining the same court reporters in multiple and related actions with similar parties and circumstances.

• The proponents claim that the amendments are "pro-consumer." In fact, the amendments eliminate the ability of parties and counsel to retain court reporting services for multiple actions. It is an anti-consumer, anti-choice measure because it will reduce work opportunities of free-lance court reporters with a consequent decline in the availability of court reporting service, particularly in rural areas. This anti-consumer effect is compounded by the provision which effectively requires court reporters themselves to undertake the task of final assembly, invoicing, and distribution -- a burden that, as described in some negative comments, could drive many independent court reporters out of business, again reducing the availability of court reporting services, or force them to dramatically raise their prices.

• Many proponents insinuate that the integrity of deposition transcripts is compromised if they are the product of a contract under which a court reporting service provider is engaged for multiple matters. But none of these comments points to any case in Washington in which such a concern has arisen. As counsel with nearly 60 combined years of practice, we are familiar with literally thousands of deposition transcripts in the literally hundreds of trial court matters and appeals in which we have participated before all court levels in Washington. We can assure the Court that neither of us has <u>ever</u> come across <u>any</u> issue concerning the integrity of a deposition transcript. We cannot find a problem.

The court reporters with whom we have worked directly, or whose work product we have seen and relied on, have not exhibited any of the problems the proponents of the amendments claim exist and which require the amendments to set the system right. More -- ***much*** more -- than a hypothesized possibility should be required before any change is made in any court rule of this state, based on a concern about the integrity of those who fulfill so key a role to the litigation process. This is particularly true here where adoption of such a rule would implicate antitrust concerns and establish a court-based regulatory system to police any claimed problems or disputes that arise. This new system would distract the Bench from focusing on the merits of the cases before it while also depleting it of scarce resources that we would hope to see devoted to cases.

We would be happy to provide any additional information or responses that the Court may think would assist it in this matter.

Respectfully,

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Enclosures
cc: clients