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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

Re: Comments on Proposed Amendments to CR 28

Dear Justice Johnson:

On behalf of the above Alliance of Deposition Firms (see list of firms below), we submit the following in opposition to the proposed rulemaking involving Civil Rule 28, in particular as it relates to so-called "third party contracting" for court reporting services.

We offer several concerns and observations. The first relates to the legislative history of the matter. The proponents of this rule change have tried and failed in two successive legislative sessions to convince the Washington State legislature of the need for these patently anti-competitive restraints. The efforts were rebuffed for one simple reason – the claims, ostensibly based upon ethical concerns, were finally understood to be a subterfuge for their true intent, namely, competitive protectionism. They now hope to prevail upon this Court to legislate that very same protectionism, again under the flag of ethical concern, when they have been unsuccessful with Washington's lawmakers.

The second concern is the content of the cover sheet to this proposal. The text suggests that this Court should start its consideration from the premises it alleges to be true. We sincerely hope – indeed, we feel certain – that that will not be the case, since virtually none of it is factually accurate. The statement would have you believe that there is an ethical crisis in the profession of court reporting and that local Washington court reporters cannot be trusted with their oaths of office. They assert this and then propose that the cure is not a revised code of conduct but rather *the regulation of the business of court reporting*. Indeed, we submit that this matter has nothing to do with ethics, and everything to do with business regulation.

In that respect, we note that this is not the first time this Court has dealt with the issue. It appears that the 2001 amendments to CR 28 were made to address precisely the same points being made now. Since that time, the sky has not fallen, and there is no evidence of any need to change the current rule. If there were a true crisis of confidence in Washington's court reporter community, surely we would have heard about it. Just as surely, this Court would have heard about it, and long before now – and not from court reporters complaining about court reporters, but from the lawyers and their clients who are purported to be the victimized parties. In fact, this same argument has been voiced, without substantiation since the mid 1990s. A letter from the US Department of Justice, Antitrust Division, which we attach, reveals the true intent of the proponents of the rule. Where is the demonstrated need for a regulatory system in the guise of a court rule? What have been the horror stories since this Court's rule was adopted in 2001 that show a need for a change?

To underscore the true nature of this aging dispute within the industry, we provide another important historical note. The WCRA mentions in the cover sheet that it and the NCRA (the National Court Reporters Association) both oppose these long-term contracts. Indeed, the NCRA at one time did oppose third party contracting, and did so vigorously (see the 1995 US Justice Department letter). And like the WCRA, they wrapped their business fears with the patina of ethical violations. But as recently as last year, in an outgoing address, Nancy Varallo, the president of the NCRA said the following:

> *...(s)hould we continue to battle contracting as an issue requiring legislation? If that was the right approach, it would have worked by now, but it hasn't. With two overarching life-and-death issues facing us—the need for* ***all of us*** *(emphasis in the original) to be realtime proficient, and the urgent need to graduate more students into the field—should we be focusing on the issue of contracting? Likewise, recognizing the limitations of our resources, should we expend time and money on feel-good programs like Ethics First? Whether you think Ethics First is a good idea or not, it does nothing to advance our most vital interests, which are graduating students and making all of us competent realtime writers. Unless we achieve those dual goals, we don't have a future.*
>
> *It's understandable that we might like to turn the clock back to a day when there were no national firms, and contracting was a nonexistent issue, and courts only wanted stenowriters in their courtrooms, and nobody cared about realtime and draft transcripts. But that day has come and gone. The world we live in is constrained by tight budgets, the preeminence of "big business" as the ideal business model, and the emergence of alternative technologies to do court reporting that employ digital voice recording, not human beings.*
>
> *It's a tougher world in which to succeed. That's the bad news. The good news is that we have the tools to succeed in that world. And your association is hard at work promoting those tools for your benefit, through our testing programs and the credentials you can earn, and the myriad continuing education opportunities you can take advantage of to stay abreast of changing technologies and marketplace demands. (Link to complete text. http://thejcr.com/2014/07/31/outgoing-ncra-president-announces-new-campaign-highlights-importance-of-education/)*

No one would confuse the above with an endorsement of "third party contracting." But what it does say in the most powerful way possible is that this issue is not – and has never been – about ethics at all, but about the struggle over the natural evolution of the court reporting profession to meet the ever growing demands of clients in the 21st century, clients who expect technology to serve them, as it does other highly trained professionals in many walks of professional life. The remarks lay bare for all to see the 20-plus-year stratagem employed by a segment of the court reporter community to hold back the future.

Make no mistake. As written, this proposed rule constitutes a broad outright prohibition of multi-case contracts. Whether the proponents realize it or not, the impact would devastate the Washington court reporting community at large. Consider that the ban would apply to all local court reporters who have built reputations of excellence with clients over the years, who could no longer benefit from their past work and experience with a contract from say, a local law firm, for more than one case at a time. And precisely what public policy purpose would this ban achieve? The proponents of this rule are offering a "solution in search of a problem." With all due respect, we feel strongly that this Court should decline the honor of trying to find one.

Throughout the United States it is a settled matter of legal practice that a court reporter is *a de facto officer of the court*. Whether by law, court rule, or similar governing provision, a court reporter has an absolute obligation, independent of who engages the reporter to provide services, to promote justice and the effective

operation of the judicial system. Under that banner, a court reporter's allegiance is to the independent and wholly neutral exercise of his or her professional calling: to produce an accurate transcript of a legal proceeding.

This duty is so fundamental to the court reporter's job, that were it violated in any way other than by mistake, it would surely spell the end of the reporter's career. With so many sophisticated witnesses at hand (the parties, the lawyers, a judge, etc.), so obvious would be the attempt by a reporter to intentionally subvert the official record that any suggestion that such practices exist at all, let alone routinely, is beyond reason. It is no wonder, then, that in the administration of justice in this country, the reputation of court reporters has virtually never been called into question.

With no evidence of wrongdoing of any kind and no argument aside from the suggestion of hypothetical situations that have no basis in fact, the Washington Court Reporters Association – or, to be fair, a subset of same - has over the past several years called into question the ethics of many of its own members, accompanied by a call to arms to its wider membership to help pass legislation, and now regulation, outlawing if possible, or at minimum heavily restricting, the practice of "third party contracting." That practice, in which a court reporting service company contracts with a third party, say, an insurance company, on a national basis, to provide court reporting services when and where required, achieves economies of scale and efficiencies that benefit the client and the court reporter with a less expensive product than would otherwise be the case.

The WCRA would have you believe that that contractual relationship is sinister, and if not sinister in fact, then sinister in perception. The argument is merely a smoke screen. It is a cover for an effort to restrain trade and protect smaller servicing firms and individual court reporters who have been made to believe that larger servicing firms are villains, who either do not play by the rules, or if they do play by the rules press their size advantage in unethical ways. With respect, this proposed rule should be abandoned.

Very truly yours,

Michael Faigen

On behalf of the Alliance of Deposition Firms
Esquire Deposition Solutions, LLC
Magna Legal Services, LLC
US Legal Support Inc.
Veritext Corp.

Attachment

**DEPARTMENT OF JUSTICE**
Antitrust Division

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July 27, 1995

Jeffrey P. Altman, Esquire
McKenna and Cuneo
1575 Eye Street N.W.
Washington, D.C. 20005

Dear Mr. Altman:

This letter responds to your request for the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. § 50.6. You have requested a statement of the Antitrust Division's current enforcement intentions with respect to the National Court Reporters Association's ("NCRA") proposal to add provisions to its Code of Professional Ethics that would require a member, when making the official court record, to inform all of the parties to the litigation if it has a contractual relationship with one of the parties.

NCRA is a 33,000 member professional association dedicated to representing and promoting the interests of verbatim shorthand reporters. It believes that parties to a judicial action have the right to an impartial and independent court reporter, who has no bias, financial or otherwise, in the outcome of the court proceedings being reported. NCRA suggests that its views are supported by Rule 28(c) of the Federal Rules of Civil Procedure, which provides:

> "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."

The NCRA is concerned that companies that are frequent users of court reporting services are entering into long-tenm contractual relationships with court reporters that in some cases may undermine the actual or perceived impartiality of the court reporter. In some cases, the court reporter agrees to provide litigation support services in addition to "standard" court reporting services. In others, copies of the transcript may be delivered to the contracting party or its representative before it has been reviewed for accuracy by counsel for all parties.

We understand that the NCRA does not seek to discourage or prohibit long-term contractual arrangements or fee discount agreements for court reporting services. It does, however, believe that the public interest in impartial court reporting services would be advanced if safeguards were imposed to assure the maintenance and appearance of impartiality. To that end, it proposes to develop a "Contracting Policy" that it would adopt as part of its Code of-Professional Ethics. The NCRA notes, however, that suspension from the NCRA for violation of the Contracting Policy would not prevent a member from continuing to act as a court reporter, since NCRA membership is not a legal prerequisite for performing court reporter services.

Professional Codes of Ethics serve many salutary purposes. If, however, ethical codes have the purpose or effect of restraining price or quality competition, limiting output, or discouraging innovation, the promulgation and enforcement of such codes can raise significant antitrust risks. To avoid raising antitrust concerns, amendments to NCRA'S Code of Ethics should observe the following guidelines:

1. 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.

2. Any change to NCRA's Code of Ethics 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. Each court reporter should determine independently what services it will offer and what prices it will charge.

3. A court reporter's disclosure of contractual relationships should be made to the parties to the case and their representatives so that the parties may exercise their rights under FRCP 28 (c),29 and 32(d)(2), and not to other court reporters (either directly or through NCRA).

4. Any such disclosure should involve the minimum facts necessary to enable the parties to exercise their rights under the Federal Rules.

To the extent that the NCRA's proposed amendments to its Code of Ethics follows these guidelines, and does not otherwise raise the antitrust concerns, the Department, based on the information and assurances that you have provided to us, would have no current intention to challenge the proposed conduct.

This letter expresses the Department's current enforcement intention. In accordance with its normal practices the department reserves the right to bring any enforcement action in the

future if the actual operation of any aspect of the contemplated changes in the NCRA's Code of Ethics proves to be anti competitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. S 50.6.- Pursuant to its terms, you business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph lO(c) of the Business Review Procedure.

Sincerely,

Anne K. Bingaman
Assistant Attorney General

## Tracy, Mary

**From:** OFFICE RECEPTIONIST, CLERK
**Sent:** Thursday, April 30, 2015 4:16 PM
**To:** Tracy, Mary
**Subject:** FW: Comments on Proposed Amendments to CR 28 - letter with enclosures
**Attachments:** Letter to Chair, Court Rules and Procedures Committee-CR 28.pdf; Encs re ltr to Chair, Court Rules and Procedures Committee-CR 28.pdf

For you.

**From:** Norgaard, Cathy [mailto:Norgaard@carneylaw.com]
**Sent:** Thursday, April 30, 2015 3:53 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Cc:** King, Mike; Miller, Greg
**Subject:** Comments on Proposed Amendments to CR 28 - letter with enclosures

Hon. Charles W. Johnson, Assoc. Chief Justice
Chair, Court Rules and Procedures Committee

Please find attached:

1. Letter from Michael B. King (WSBA #14405) and Gregory M. Miller (WSBA #14459)
2. Encs: 4/30/15 letter from Alliance of Deposition Firms to the Court Rules and Procedures Committee Chair, and 7/27/1995 letter from Dept. of Justice/Anne Bingaman to Jeffrey Altman/McKenna and Cuneo

Respectfully transmitted on behalf of Messrs. King and Miller,

**Catherine A. Norgaard, Legal Assistant**

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