BRITISH COLUMBIA
BCSRA
SHORTHAND REPORTERS ASSOCIATION

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August 19, 2016

Dear Members of the Washington State Supreme Court:

I am writing to you from the British Columbia Shorthand Reporters Association (BCSRA) to encourage you to adopt WCRA's proposed amendments to Washington CR 28(d), CR 28 (e), and CR 30(b)(1).

The reason I'm writing to the members of the Washington State Supreme Court is because here in BC, Canada, we have been continually experiencing a similar struggle to stop the unethical practices often associated with third-party contracting.

Adopting the proposed change to 28(d) will be beneficial for all parties, because if one party suspects their opponent may be receiving discounts or lower pricing for court reporting services, this rule change would allow a mechanism whereby they can request an affidavit of equal terms be submitted to the Court. If court reporting services have not been provided on equal terms, the Court may sanction the court reporter, the court reporting firm, as well as the counsel or party who hired the reporter or contracted with the court reporting firm to provide the services. This will provide a means of quick resolution of any violations as well as allow for transparency.

The proposed amendment to CR 30(b)(1) will require the deposition notice to disclose the existence of any known contractual relationships between the noticing party, its counselor, a third party paying to record the noticed deposition, and the person, court reporting firm, consortium, or other organization providing a court reporter for the noticed deposition, and will state whether the noticing party or a third party directed his or her attorney to use a particular court reporting firm. Once a party-in-interest – whether a lawyer, insurance company, or a corporation – is allowed to manipulate the business transaction to their exclusive benefit and/or exerts control over the work produced by the court reporter, the reporter and/or the reporting firm's impartiality can be called into question.

It is an often used quote *"Justice must not only be done, but must be seen to be done." (**R. v. Sheppard**, [2002] 1 S.C.R. 869 at para. 15 [Sheppard]).* The BCSRA, and the majority of our BC Official Court Reporters, believe that long-term, open-ended contracts between court reporters and litigants is contrary to this basic principle. Please find our article on this topic enclosed with this letter that the BCSRA had published in *The Advocate* legal journal.

Given the public's belief in and dependence on the court reporter's integrity and impartiality, it is all the more egregious when the consumers of court reporting services are unwittingly subjected to these exclusive contractual arrangements between a party-in-interest and the court reporter or reporting firm. Often these litigants are unaware of the contract's existence, the terms involved, the benefits that one party may be receiving, and how their interests will be affected as a result. The litigant who is not a party to the contract is nonetheless bound by an agreement entered into by their *opponent* in the proceeding.

It is for all of the above reasons that the BCSRA believes the proposed rule amendments should be adopted. Thank you for your considerations herein.

Leanne Kowalyk, OCR, RCR
President, BCSRA
www.bcsra.net

Court Reporter Impartiality in Jeopardy

Counsel and their clients rarely, if ever, turn their minds to the impartiality and fairness of the court reporter providing the verbatim record. Would that same unquestioning expectation of fairness and equitable treatment remain if one side in the litigation process was in receipt of special services or pricing negotiated with the reporter that was not available to all? What if that party received their transcript for less? What if they received it sooner? What if the court reporter failed to speak out against improper actions for fear of losing a major client? What if ...?

Would a plaintiff, in an examination for discovery for the first time, feel confident in the fairness of the litigation process knowing that the person responsible for preserving and producing the record was actually contracting with the opposing party? Would they think that their interests were being properly represented or considered when everyone else in the room was "on the other side"?

It is an often used quote *"Justice must not only be done, but must be seen to be done." (**R. v. Sheppard**, [2002] 1 S.C.R. 869 at para. 15 [Sheppard]).* The British Columbia Shorthand Reporters Association (BCSRA), and the majority of our BC Official Court Reporters (OCRs), believe that long-term, open-ended contracts between court reporters and litigants is contrary to this basic principle. Favourtism can take many forms, and it is not restricted to monetary advantage. There may be concessions made by the contracted OCR, particularly when it is time to renew the contract, that are not equitable with maintaining the fair and impartial role of an officer of the court, which OCRs are. Even if impartiality and fairness is compromised only in appearance and not in fact, it is nevertheless compromised.

We are aware of how the courts look on bias. Think of how experts who work for only the plaintiff or only the defence have their impartiality questioned when they are giving testimony. The inference is that if one party is responsible for the majority of your income, you cannot possibly avoid some degree of bias. No one wants to jeopardize their livelihood by displeasing their major client.

The problematic nature of someone who is supposed to be impartial entering into a long-term contract with a litigant is addressed in a recent decision by Kirkpatrick, J., ***Tepei v. ICBC***, 2009 BCCA 28:

> This is an appeal from an order removing an arbitrator and vacating his rulings founded on a reasonable apprehension of bias. The chambers judge found that the Strategic Alliance Agreement entered into by ICBC and lawyers it retains provided comprehensive terms which emphasized the firm's commitment to ICBC as "partners" in its enterprise rather than simply as counsel acting from time to time on individual cases.

The *Professional Legal Training Course (PLTC)*, S. 2.05, put out by the Law Society of B.C. specifies:

> Perhaps the most important proceeding in the action, short of the trial itself, is the examination for discovery. It is normally an essential step in the preparation of a case.

(http://www.lawsociety.bc.ca/docs/becoming/material/CivilLitigation.pdf)

Fairness and impartiality is also expected of OCRs in their role as officers of the court during these "perhaps most important proceedings." In the absence of a trial judge, the official court reporter is empowered to administer the oath, enter and ratify the evidence independently and impartially, and thereafter safeguard the evidence for future use.

In mid-May of 2013 the Insurance Corporation of BC, in an attempt to place court reporters and their agencies under direct, long-term contracts, initiated a request for information (RFI) to court reporters. ICBC then proceeded to a request for prequalification (RFPQ). The BCSRA and the majority of reporters in BC were strongly against compromising their impartiality and refused to engage ICBC in this process. The fact that one reporting agency in January 2014 entered into an agreement with ICBC as a result of the RFPQ does not negate our strong opposition to engaging in such a partnership with a litigant.

This is not the first time ICBC has approached OCRs about contracting. In 1998, ICBC approached reporters with the idea of long-term contracting. At that time similar objections were raised by the BCSRA and its members. After months of discussion, ICBC advised that they would not be continuing on with their initiative.

We are again facing the same pressures from ICBC as they seek to exert governance over reporters while pursuing cost-cutting measures to their sole benefit, regardless of any far-reaching repercussions. They refuse to acknowledge the untenable conflict of interest this type of contractual relationship would cause.

Since January 2014, using this one contracted reporting agency as a microcosm, negative aspects of the arrangement are quickly becoming apparent. Defence counsel have cancelled their previous bookings with agencies all over Vancouver Island to reschedule with the one agency under contract to ICBC. Plaintiff lawyers have been encouraged to do the same, even though they are not technically required to follow ICBC directives. Where, when, and who to use when conducting an examination is no longer a matter of choice and preference. This will eventually affect their convenience and availability and ability to conduct proceedings as they see fit.

The complete terms of the ICBC contract are of a confidential nature. Due to the lack of transparency that now exists one must accept the word of any contracted reporting agency that they are extending any special pricing and terms to opposing counsel as well. Also the long-term ramifications are that if there is widespread cost reductions in one area of litigation, it will eventually have far-reaching, negative ramifications to the court reporting and legal community at large.

With some of these concerns in mind, there have been letters of support from counsel to the effect that they will refuse to book with an agency where impartiality is in question, but many, unfortunately, are taking the path of least resistance.

Why is this contract proposal by ICBC so objectionable when contracts have existed in the past

and, indeed, are currently in place with OCRs? Contracts made between the Office of the Attorney General and Official Court Reporters and between various government ministries and court reporters are substantially different than what ICBC proposes. Former contracts have simply facilitated court reporting services in the government's task of providing for the administration of justice in the province. The same has generally been true of agreements between court reporters and various departments of the federal government, such as the Federal Court and the Tax Court of Canada.

Long-term contracts such as the ICBC contract have been proposed from time to time by the insurance industry in the United States, with the result that presently 30-plus states in the U.S. have enacted some type of legislation against contracting out, with more pending, in order to preserve both the impartiality and independence of court reporting. For example:

a) New Mexico Supreme Court Rule 22-605, Grounds for disciplinary action: (K) against court reporters for entering into contractual arrangements (http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm);

b) Maine has signed legislation into law, *An Act to Ensure Ethical Standards for Court Reporters* (L.D. 1463; S.P. 543) (http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0543&item=1&snum=126);

c) The American Judges Association also has its own resolution:

> ...the American Judges Association endorses legislative and judicial efforts to prevent parties in interest from establishing any direct financial or other relations with court reporters which would create an appearance of partiality that is inimical to the public's faith in the fairness and impartiality of the judicial system. (http://aja.ncsc.dni.us/htdocs/resolutions/aboutaja-resolutions-judicialconcerns.htm).

Although here in BC we are not armed with any specific legislation to rely upon, the BCSRA generally follows the code of conduct and professional ethics of the National Court Reporters Association (NCRA). With over 14,000 members, the NCRA has defined "long-term (third-party) contracting" and outlined their position as the following:

> ...any entity that provides or arranges for court reporting services entering into an oral or written contractual agreement for more than one case with any party to an action, insurance company, third-party administrator, or other individual or entity with a financial interest in the proceeding. Ideal legislation prohibiting third-party contracting will also restrict offering any economic or other advantage to any party, including special credit terms, and preferential pricing. Further, legislation should contain provisions that bar any entity that provides court reporting services from restricting the noticing attorney's right to select a court reporter of his or her choosing. Once a party-in-interest - whether a lawyer, insurance company, or a corporation – is allowed to manipulate the business transaction to their exclusive benefit

and/or exerts control over the work produced by the court reporter, the reporter and/or the reporting firm's impartiality can be called into question.

The BCSRA endorses these comments and feel they properly recognize the need for keepers of the record to be truly neutral and impartial.

Over the last 30 years the position of Official Court Reporter (OCR) has undergone many changes. Originally primarily a government position, in 1984 the court reporting profession started down the road to becoming a privately-provided service. The civil side of litigation became fully privatized in 1998 and is the model as we know it today. Throughout this metamorphosis, OCRs have continued to fulfill their historical role as a neutral party in this litigation process, neither favouring one side over the other. It is our duty to act in the best interests of the fair administration of justice and to do otherwise would be to ignore our long history as officers of the court, *(see **Official Reporters Regulation**, B.C. Reg 222/84 and **Court Rules Act/SCCR 7-2, 7-5 & 12-5**)* yet this is exactly what we are being asked to do by ICBC.

Any erosion of the impartiality, fairness and independence of court reporters and their agencies is therefore a grave concern for the BCSRA and one the bar should also share. Contracting is not in and of itself a negative practice within certain limited parameters. However, when it comes to long-term, open-ended contracts between court reporters and ICBC, a major litigator and one of the largest property and casualty insurers in Canada, we must be wary and scrutinize how that will affect the scales of justice in the short and long term. We must be vigilant and unwavering in our resolve to ensure nothing compromises society's right to a just and equitable process.

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Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, August 19, 2016 11:07 AM
To: Tracy, Mary
Subject: FW: Proposed Changes to the Civil Rules
Attachments: BCSRA Letter to Support WA Proposed Rules for Out-of-State Reporters.docx; 1. Verdict article - FINAL.docx

Forwarding.

From: Leanne Kowalyk [mailto:leanne.bcsra@gmail.com]
Sent: Friday, August 19, 2016 11:00 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Changes to the Civil Rules

Good afternoon,

Please find attached our letter of support regarding the proposed change to the Civil Rules with a related article enclosed.

Thank you for your consideration,

Leanne Kowalyk, OCR, RCR
President
British Columbia Shorthand Reporters Association