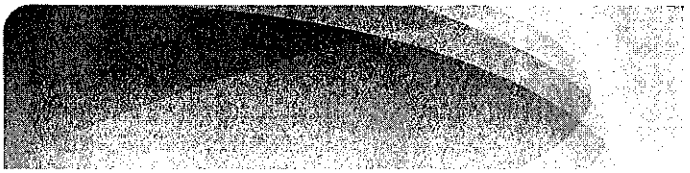

Alliance of Deposition Firms
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100 Overlook Center
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Via email: supreme@courts.wa.gov

August 19, 2016

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, 30

Dear Justice Johnson:

On behalf of the Alliance of Deposition Firms, we submit the following in opposition to the proposed rulemaking involving Civil Rules 28 and 30, once again as it relates to so-called "third party contracting" for court reporting services. We attach the submittal we made last year that addressed a similar proposal (and the 1995 letter from the Department of Justice that spoke to these same issues). Those comments remain apt and relevant and we commend them for your consideration. They contain the legislative history of this decades-long fight and responses to the fallacious arguments made by the proponents then and now. This matter continues to be a cautionary tale of a small industry segment fighting time and evolutionary change.

This year's version of the WCRA's attack on third party contracting is a bit subtler. It no longer proposes an outright ban on long-term or multi-case contracts entered into by national and regional firms. Having been rebuffed by this Court last year in that effort, it retooled the proposal to "merely" require the disclosure of those contracts by the noticing party (CR 30 (b)). After all, what harm can mere notice be? Well, this gets to the heart of the matter: is there something suspicious, unwholesome, unethical, contrary-to-public-policy, about a long-term or multi-case contract that necessitates state intervention or oversight? We think not. Indeed, we think that those WA state legislators who heard the arguments and declined the entreaties of the WCRA at least twice, agree with us. We also think that the US Department of Justice agrees with us and said so emphatically in a 1995 letter to the NCRA that is directly on point.

The wonder is that the arguments advanced by the WCRA (and the NCRA twenty odd years ago) somehow continue to be submitted as though they will not been seen for what they are and rejected again. We quote from the proponents of this year's rule proposal:

> WCRA believes this very common scenario (*referring to multi-case contracts*) effectively eviscerates the Court's mandates for fair dealing and equitable treatment, reduces and/or restricts the court reporter's accountability to the public and the courts, jeopardizes the security and confidentiality of the official record, and removes any meaningful avenue of redress, undermining the purpose of CR 28 in two critical ways.
> A court reporting agency that has a long-term contract with one of the parties is not a disinterested person under CR 28(c). Second, there is no mechanism for ensuring that all parties are actually receiving

> the deposition transcript on equal terms as the current CR 28(d) envisions. Instead, whether parties are treated equally is left to the discretion of the court reporting agency that invoices each party. As a practical matter, lawyers rarely inquire whether the reporting firm they used for a deposition is actually offering the transcript to the other side on equal terms. Even more troubling, the court reporting agency may not be regulated by the Department of Licensing and may or may not be aware of Rule 28(c) and (d). But it has a significant financial interest in not offering the same discounted terms to all parties.

It is difficult to unpack all of the disinformation contained in those charges. The list would have you believe that the administration of justice in WA is teetering. With respect, we begin with the proponents' basic premise – that a multi-case contract a court reporting service company has with, say a national insurer, somehow affects the judgment of a local WA court reporter they have provided to take the deposition, in such a way as to compromise the integrity of the transcript. Beyond the failure of logic, there is a wholesale failure of evidence. A court reporter who intentionally manipulated a transcript – in derogation of their oath and with so many witnesses – would be committing professional suicide. So, how many cases of this kind have been evidenced in WA, or anywhere? None. Not one that we have ever heard of. In fact, there is never a proffer of such evidence, because once the question is asked, the illogic of the proposition is revealed and the issue vanishes. In fact, there are read and sign rules where a witness can review the transcript and make changes as another backstop against the court reporter falsifying the record.

Unfair treatment? CR 28 has all the precision and teeth it needs. Note whose interests the WCRA is supposedly championing – the "negligent" or "unwitting" class of lawyers who don't know they are being duped! If not for the WCRA and its careful monitoring, the proponents assert, lawyers might not have a mouthpiece. Hyperbole aside, local trade associations like the WCRA are at pains to make coherent arguments that are not nakedly self-interested. Court reporters don't pay for these services – attorneys and their clients do. They are fully equipped to complain and demand redress. The argument that absent-minded lawyers need the WCRA's protection is preposterous. But the WCRA needs a policy hook – someone is being swindled. If not their members, then the unwitting lawyers. The illogical sleight of hand – pretending to protect another's interest when it is your own that you are truly protecting – becomes plain when you unpack the asserted rationale.

So what is this about? The attack on contracting is an attack on a business model, and has been from the start. That model is not born of chicanery or sleight of hand activity but of natural evolutionary forces. The business of supporting court reporting – back office work, billing, storage and retrieval, security measures for the transcript – has been evolving and changing over the last 25 years, as have all businesses, particularly with technology advances. Complex litigation today demands the most sophisticated technology available and that requires capital. The small practitioners who cannot afford to create their own rely upon the likes of our companies and other regional firms of size to provide them with the wherewithal to do what they do best, make the transcript. *Every* transcription job that we assign has a local WA certified court reporter at its epicenter. This is not about jobs. The complaints made by the WCRA (and fewer and fewer state associations), are pleas to turn back the clock to a simpler time, a time when adapting to technology and swift change was simply not a fact of life. The anxiety is understandable, but ultimately that anxiety is not supportable as a matter of public policy. Moreover, it is a discussion better suited to the legislature with its committee hearings and ability to investigate before regulating – an opportunity which has been repeatedly presented to the Washington legislature and through which it has chosen not to take further actions.

Each of the rule proposals – the requirement to notice third party contracts (falsely implying something venal, to be able to cause upset at the deposition), to provide "teeth" against altering transcripts (allegedly to backstop a needy Department of Licensing), and to give parties the right to have trial courts adjudicate equal terms

(because lawyers can't speak for themselves) – all these must be seen for what they are: efforts to reverse time and progress in an industry that has been in transition for quite some time, but where there is no genuine need to protect the integrity of the litigation process.

For these reasons, and those more fully set out in our submission last year, we respectfully ask the Court to decline to adopt these proposed rule changes.

Very truly yours,

Michael Faigen

Michael Faigen

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

Attachments

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, August 19, 2016 2:27 PM
To: Tracy, Mary
Subject: FW: Comments on Proposed Amendments to Civil Rules 28 & 30
Attachments: 2016-08-19.GMM-MBK Comments on Amendments Rules 28 & 30.pdf; AllianceTestimonyWA-CR28v.2016.pdf; Encs re ltr to Chair, Court Rules and Procedures Committee-CR 28[1].pdf

Forwarding.

From: Miller, Greg [mailto:miller@carneylaw.com]
Sent: Friday, August 19, 2016 1:54 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Norgaard, Cathy <Norgaard@carneylaw.com>; King, Mike <king@carneylaw.com>; 'Mickey Faigen' <mfaigen@issuesllc.com>
Subject: Comments on Proposed Amendments to Civil Rules 28 & 30

Dear Clerk:

Attached please find the comments from Mr. King and myself on the proposed amendments to Civil Rules 28 and 30, and the separate comments from the Alliance of Deposition Reporters.

Thanks for your assistance. Please let us know if you need anything further.

Greg Miller, WSBA 14459

CARNEY BADLEY SPELLMAN

Gregory M. Miller
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Bio | vCard | Address | Website
miller@carneylaw.com

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