

Ethics Advisory Notice: "Contracting" (December 2012)

Throughout the year 2012, the CSR Board engaged in an educational campaign to inform court reporters about the prohibited practice of "contracting." In CSR Board meetings, in continuing education seminars, and through written materials circulated for review and comment, the CSR board attempted to educate court reporters about the ethical problems that arise when a party litigant selects a court reporter or directs another to employ a court reporter for a deposition.

This concern with "contracting" is not new, dating at least from the 1990s when Code of Civil Procedure Article 1434 was amended to prohibit a direct or indirect employment relationship between a party litigant and the court reporter taking a deposition in the matter. (See the text of CCP Art. 1434 in footnote 1 below.)

Concurrently with its educational campaign, the CSR Board also amended its rules to address problems associated with "contracting." One amendment (effective January 1, 2013) requires every certified court reporter to attest on the certification page "that I have acted in compliance with the prohibition on contractual relationships, as defined by Louisiana Code of Civil Procedure Article 1434"

The CSR Board has announced its intention to begin enforcement actions against court reporters who engage in the prohibited practice of "contracting." This December 2012 Ethics Advisory Notice is intended to assist court reporters during 2013 and beyond in understanding and complying with the restrictions on "contracting." Its practical guidance (expressed in a question-and-answer format) will be supplemented from time to time with responses to additional questions as they are posed by court reporters.

The CSR Board will continue its educational campaign during 2013 **but will also initiate investigative and enforcement actions, where appropriate, to assure that all members of the court reporting profession comply equally and fully with the prohibitions on "contracting."** Accordingly, the CSR Board urges all court reporters to become familiar with the regulatory restrictions by reviewing this Ethics Advisory Notice, attending continuing education seminars, and posing questions when they need further guidance from the CSR Board. Court reporters would also benefit from reading the CSR Rules, particularly Chapter 11 ("Court Reporting Procedures") and Chapter 13 ("Code of Ethics"), which may be found in Title 46, Part XXI of the Louisiana Administrative Code via this link: <http://doa.louisiana.gov/osr/LAC/lac46.htm>.

The CSR Board has done its part to educate and inform the profession about its rules and its reasons for restricting the practice of "contracting." Members of the court reporting profession must now do their part by understanding and complying with the restrictions and by reporting possible noncompliance when they encounter it.

What is "Contracting"?

The term "contracting," which has historically been used to describe certain inappropriate practices and employment relationships, is somewhat misleading; it seems to imply that court reporters might be in violation of professional practice guidelines anytime they enter into a "contract." This is not the case. Contracts may be either written or oral. Whenever a court reporter agrees to take a deposition, whether in response to a phone call or a letter or an email, the reporter has entered into a contract to perform agreed-upon services for an agreed-upon price. Entering into such a contract does not constitute "contracting" as it has been described and disfavored within the court reporting profession.

Louisiana Code of Civil Procedure Article 1434 gives us guidance about the inappropriate practices and employment relationships condemned as "contracting."¹ The language is expressed in prohibitory terms, but the affirmative goal of CCP Article 1434 is to protect both the impartiality of the court reporter and the integrity of the record by requiring that the "officer" (court reporter) who takes the deposition must not be "an employee" of any party to the litigation.

The prohibitions in CCP Article 1434 apply explicitly to court reporters: (1) "an employee" is "a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services"; (2) "officer" specifically "means a certified shorthand or general reporter . . . , and an official court reporter, and a deputy official court reporter" The prohibited conduct may be summarized as follows: A court reporter (who is an "officer" of the court) may not simultaneously be "an employee" of a party litigant; doing so violates CCP Article 1434.

¹ Art. 1434. Person before whom deposition taken

A. (1) A deposition shall be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in the outcome of the case.

(2) For purposes of this Article, an employee includes a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services and also includes a person employed part or full time under contract or otherwise by a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services. A party litigant does not include federal, state, or local governments, and the subdivisions thereof, or parties in proper person.

B. "Officer" as used in this Article means a certified shorthand or general reporter currently holding a valid certificate issued by the Board of Examiners of Certified Shorthand Reporters pursuant to the provisions of R.S. 37:2551 et seq., and an official court reporter, and a deputy official court reporter, as defined in R.S. 37:2555(B)(1) and (2).

C. In a video deposition, the deponent can be sworn by anyone authorized to take oaths. The oath shall be recorded on tape.

Court reporters are prohibited from contracting directly as "an employee" with a party litigant. Court reporters also cannot contract with an entity that "has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services."² Thus, CCP Article 1434 imposes two distinct prohibitions on court reporters: (1) They cannot contract directly with a party litigant, and (2) they cannot contract with an entity that has its own contract with a party litigant. Court reporters who contract either directly or indirectly (through another party) with a party litigant are in violation of Article 1434.

The same "direct/indirect" principle applies with regard to "gifts." CSR Board Rule 1301(B)(9) prohibits court reporters "from giving, *directly or indirectly*, any gift, incentive, reward, or anything of value to attorneys, clients, witnesses, insurance company personnel or any other persons or entities associated with (the) litigation, or to the representatives or agents of any of the foregoing," except as otherwise specified. (Emphasis added.) Court reporters cannot "get around" these prohibitions by simply contracting with an entity that gives prohibited gifts.

CCP Article 1434 prohibits court reporters from contracting directly with a party litigant; it also prohibits them from contracting with others who have entered into a contract with a party litigant to perform court reporting services.

Why is the CSR Board enforcing these rules against court reporters when the Louisiana State Bar Association has not seen fit to enforce similar rules against lawyers?

CCP Article 1434 is explicitly applicable by its terms to court reporters. The CSR Board has spent considerable time over the last year informing court reporters of these requirements and has given ample warning of its intention to enforce the prohibitions in Article 1434.

Lawyers are governed by an entirely separate system of licensing and are bound to observe an extensive code of professional responsibility separate and apart from the statutes and rules governing the practice of court reporting in Louisiana. The CSR Board is simply discharging its responsibility to assure that court reporters comply with all applicable laws governing the practice of court reporting, including the requirements of CCP Article 1434.

Must court reporters have actual knowledge of corrupt practices (such as preferred pricing or early distribution of the transcript) by a firm that is "contracting" with a party litigant?

² Article 1434's definition of an employee "also includes a person employed part or full time under contract or otherwise by a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services." (Emphasis added.)

No, the court reporter need not have actual knowledge of wrongdoing by the "contracting" firm. All the court reporter must know is that the firm has a contract with a party litigant. If so, the court reporter must decline the employment, because to do otherwise would cast a cloud over the reporter's impartiality.

It's both fairer and more practical for court reporters to assess whether a firm is engaging in prohibited "contracting" based on whether the firm has a contract with a party litigant. Court reporters are not required to uncover evidence of actual wrongdoing—though they should report instances of such wrongdoing to the CSR Board when they do encounter it.

CCP Article 1434 prohibits "contracting," not "corrupt practices." Contracting is relatively easy to prove; corrupt practices can be quite elusive. Both the CSR Board and individual court reporters will be better served by adopting an enforcement standard that is relatively straightforward and objective—whether or not a prohibited contract exists—instead of having to prove actual wrongdoing.

CSR Board Rule 1301(B)(1) requires that court reporters must be "fair and impartial" in their actual conduct. Rule 1301(B)(3) directs court reporters to "guard against not only the fact but the appearance of impropriety." Entering—either directly or indirectly—into a contract with a party litigant gives a bad appearance that may lead members of the public to question the reporter's impartiality, thereby impugning the integrity of the profession and creating doubts about the integrity of the record. If the deposition scheduling firm has a contractual relationship with a party litigant, the court reporter must decline employment with that firm.

Why are court reporters expected to maintain control of the deposition transcript and exhibits until they have been delivered?

The court reporter is an officer of the court and enjoys primary responsibility for preserving the testimony and exhibits until they have been properly certified and delivered in full discharge of the reporter's legal responsibilities. Someone has to shoulder these responsibilities in order to protect the integrity of the record and the confidentiality of its contents. Court reporters are assigned that legal duty in Louisiana.

Deposition testimony and accompanying exhibits often contain highly sensitive information, such as Social Security numbers or a description of medical conditions. Deposition transcripts remain private documents until placed into the court record. Court reporters are responsible for maintaining confidentiality right up until they deliver their work product into the hands of other appropriate and responsible parties.

Deposition formats can easily be changed in this current electronic age. Format changes can adversely affect the consumers of court reporting services. Court reporters must maintain control of a deposition transcript until it has been certified and delivered, so that they can retain the power to protect the interests of consumers who pay for their

services. This is why the CSR Board imposes strict and specific requirements in Rules 1101 and 1103 governing transcript formats and the certification statement attached to each deposition transcript.

Finally, CSR Board Rules require court reporters to render "comparable services" in discharging their duties: See CSR Rules 1107(A) and 1301(B)(1) and (8), requiring equal treatment of all parties in the timely delivery of transcripts. Early delivery of the transcript to one party in preference over another would violate this requirement. Court reporters must comply with the "comparable services" standard by maintaining control and distributing deposition transcripts at the same time to all parties.

Why is the CSR Board guided by advisory opinions of the National Court Reporters Association, and what do those opinions say about "contracting"?

The CSR Board has monitored for some years a series of advisory opinions by which the National Court Reporters Association (NCRA) addressed various issues related to "contracting." The CSR Board's deliberations about "contracting" have been informed by these NCRA advisory opinions, which constitute a national "best practice" in the professional regulation of court reporting services. NCRA's advisory opinions and the CSR Board's Rules are in harmony with regard to "contracting" by court reporters.

NCRA Advisory Opinion #2 (originally written in 1987; revised in 1998) deals with the "reporter's relationship to litigants," and more particularly with the duty of *disclosure*. Reporters are required to disclose before the start of a deposition "any relationship that may reasonably call into question the reporter's impartiality" so that counsel may either assert or waive any objections. If objections are raised, "the reporter must withdraw" from taking the deposition.

CSR Board Rule 1105(A) provides that any party at a deposition may request and the reporter must disclose "the complete arrangement, financial or otherwise, made between the reporter or any person or entity making arrangements for the reporter's services and the attorney or other party making such arrangements . . ." The Rule requires reporters to prepare properly for making such disclosure, stating that every "reporter is responsible for inquiring about and discovering such information before accepting any assignment."

NCRA Advisory Opinion #2 uses the specific hypothetical of a reporter who is "related by blood or marriage" to an attorney present at the deposition, but it extends the disclosure requirement much further to encompass "Any other relationship which may reasonably cause the reporter's impartiality to be questioned." Failure "to disclose any relationship that might reasonably call into question the reporter's impartiality is a violation of Provisions 1 and 2 of the Code of Professional Ethics."

Provision No. 1 in the NCRA Code of Professional Ethics requires reporters to be "fair and impartial" and to provide "comparable services" to all parties. So also, CSR

Rule 1301(B)(1) in the Code of Ethics governing Louisiana court reporters requires that they must "be fair and impartial toward each participant in all aspects of reported proceedings, treat all parties equally, and always offer comparable services and prices to all parties in a proceeding."

Provision No. 2 in the NCRA Code of Professional Ethics counsels reporters to "Be alert to situations that are conflicts of interest or that may give the appearance of a conflict" and directs them to "disclose that conflict or potential conflict." The identical language is found in CSR Rule 1301(B)(2), requiring that reporters must

be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the Certificate Holder shall timely disclose said conflict or potential conflict to all parties in the proceeding or take the action(s) necessary for extraction from said conflict or potential conflict.

In summary, NCRA Advisory Opinion #2 and the CSR Board Rules require reporters to disclose "any relationship that may reasonably call into question the reporter's impartiality." Disclosure is required for any "conflict or potential conflict."

NCRA Advisory Opinion #9 (*originally written in 1989; revised in 1997*) deals with the reporter's duty of *confidentiality* in handling deposition transcripts—the reporter's "obligation to preserve the confidentiality of information entrusted to the reporter by the parties." Provision No. 4 in the NCRA Code of Professional Ethics establishes a reasonable expectation that "any information entrusted to the reporter will be kept confidential until the parties themselves decide to make the deposition a public document." This means that a "reporter must obtain the permission of all parties and the deponent (not just the hiring party) before selling or otherwise releasing the transcript to any third party."

CSR Rule 1301(B)(4) also counsels reporters to "preserve the confidentiality and ensure the security of information . . . entrusted to the Certificate Holder by any of the parties in a proceeding." Only after the deposition has been made a part of the record in a public proceeding may a reporter sell or release the transcript without the consent of all parties and the deponent.

NCRA Advisory Opinion #15 (1993) addresses "the order of transcript delivery" and "submitting transcripts to third parties to distribute." It uses a hypothetical that is directly on point with "contracting"—a transcribing service arranges for reporters to take depositions, followed by the reporter's submission of a transcript and diskette to the transcribing service, which is then responsible for delivering the transcript and diskette to all attorneys. The hypothetical also contemplates a working relationship between the transcribing service and a management consulting firm whose corporate client is a party to the litigation.

Advisory Opinion #15 finds it a clear violation of Provisions 1, 2, 3, 4, and 9 of the NCRA Code of Professional Ethics for a reporter “to submit the deposition transcript and a diskette of the deposition transcript to third parties (i.e., the management consulting firm) before all the parties and their counsel have had an opportunity to read and review them.” Delivering a copy of the transcript to the management company and its corporate client (a party to the litigation) before distributing it to all other parties and their counsel violates the ethical obligation to render *comparable services* to all parties, because an interested party is getting a copy before other parties to the litigation. CSR Rules 1107(A) and 1301(B)(1) and (8) also require even-handed treatment (“comparable services”) for all parties.

But—and this is important—the NCRA advisory opinion goes even further and finds an additional problem: A reporter violates the *duty of confidentiality* when a third-party management firm gets early delivery of a transcript, “regardless of whether or not the management consulting firm has any kind of relationship, affiliation or association with a party to the action.” This same duty of confidentiality is imposed by CSR Rule 1301(B)(4), quoted above. Court reporters must maintain the confidentiality of deposition transcripts by delivering them at the same time to the parties and their counsel—not to third parties.

Thus, in summary, court reporters are bound by two ethical duties: “comparable services” and “confidentiality.” They discharge these duties by assuring “that transcripts and diskettes are not provided to third parties (in this case, the management consulting firm) prior to the initial, contemporaneous distribution of such transcripts and diskettes to all the parties to the action and their counsel.”

CONCLUSION: Practical Guidance for Court Reporters—The CSR Board counsels all court reporters to familiarize themselves with this Ethics Advisory Notice and to gain an informed understanding of CSR Board Rules through continuing education seminars. In addition, the CSR Board offers the following practical guidance:

- (1) Reporters must not deliver an uncertified transcript into the control of anyone who would not already be entitled to receive a certified transcript.
- (2) Reporters must not allow others to attach their certification page to a transcript.
- (3) Reporters must not relinquish control of their official seal or deliver into the possession of others a pre-signed certification page.
- (4) Reporters must not be so poorly informed about financial and other arrangements that they lose the ability to assure “comparable services” for all parties.
- (5) Reporters must not surrender their control of the final certified transcript until they have satisfied and fully discharged their custodial responsibilities under CCP Article 1446.
- (6) Reporters must not allow themselves to be placed in a position where their neutrality, impartiality, or independence is compromised, either in fact or in appearance.