



## **THE OHIO COURT REPORTERS ASSOCIATION**

*Provides the following information as a service to its members of the court reporting community.*

*It is intended as an informational guide and does not replace individualized professional assistance.*

### **COURT REPORTER CONTRACTING**

Effective July 1, 2001, Civil Rule 28 of the Ohio Rules of Civil Procedure pertaining to persons before whom depositions may be taken was amended by the addition of division (D) prohibiting certain contractual arrangements for court reporting services. Civil Rule 28(D) states as follows:

(D) PROHIBITED CONTRACTS.

- (1) Any blanket contract for private court reporting services, not related to a particular case or reporting incident, shall be prohibited between a private court reporter or any other person with whom a private court reporter has a principal and agency relationship, and any attorney, party to an action, party having financial interest in an action, or any entity providing the services of a shorthand reporter.
- (2) “Blanket Contract” means a contract under which a court reporter, court recorder, or court reporting firm agrees to perform all court reporting or court recording services for a client for two or more cases at a rate of compensation fixed in the contract.
- (3) Negotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis is not prohibited.
- (4) Division (D) of this Rule does not apply to the courts or the administrative tribunals of this state.

The Staff Note to Civil Rule 28 as amended sets forth the reason for the change as follows:

“This rule was amended in response to communications from members of the bench and bar indicating that certain types of long-term financial arrangements between court reporters, court reporting firms, or other firms and litigants or other entities have given rise to concerns about the appearance of or potential for differential treatment of parties to an action. The appearance of impartiality and the existence of impartiality are no less important for those officers who take depositions than for judicial officers and other persons whose responsibilities are integral to the administration of justice.”

Civil Rule 28(D) is an extension of Civil Rule 28(C). Civil Rule 28(C) prohibits the taking of a deposition before a person who is a relative, employee or attorney of any of the parties, or is a relative or employee of the attorney or is financially interested in the action, unless the parties agree otherwise by written stipulation. Note however, that Civil Rule 28(D) does not authorize any modification by written stipulation.

The role of the court reporter in the litigation process is to accurately record proceedings, including in particular, oral depositions. The integrity of the deposition process is based upon the neutrality and independence of the court reporter and the unbiased and impartial recording of testimony taken during the course of a deposition. Any practice, procedure or contract which impairs the integrity of the court reporter, or which creates a perception of partiality impairs the administration of justice.

Generally, the court reporter's services are retained on a case-by-case basis. In recent years, certain entities have contracted with third party entities for the purpose of providing court reporting services in numerous cases. The contract may have a term of one or more years.

Contracts for court reporting services encompassing more than one case have been perceived as impairing the neutrality and independence of the court reporter because of the longer-term financial arrangement which does not exist when the court reporter is retained on a deposition-by-deposition or case-by-case basis.

Judicial organizations such as the American Judges Association and the National Conference of Metropolitan Courts adopted resolutions endorsing restrictions on any court reporter contract which could create an appearance of partiality. The American Judges Association resolution was adopted April 24, 1998<sup>1</sup> and the National Conference of Metropolitan Courts resolution was adopted February 1, 1999.<sup>2</sup>

In addition to Ohio, at least 19 other states have enacted legislation or adopted rules limiting, prohibiting or requiring disclosure of contract arrangements.<sup>3</sup>

Neither Civil Rule 28(C) nor Civil Rule 28(D) expressly encompasses an enforcement mechanism. However, as stated in the Staff Note to Civil Rule 28: "The prohibition in division (D), like the pre-existing prohibitions in division (C), is enforceable by the court in which the underlying action is pending. Enforceability is implicitly recognized by Civ. R 32(D)(2), which requires reasonable diligence of a party in raising a disqualification issue." In the event there is a violation of Civil Rule 28(C) and (D) it would be incumbent upon one of the parties to the litigation by and through their attorney to seek an order precluding the use of the deposition, or other remedy. See *Ott v. Stipe Law Firm*, 169 F.R.D. 380 (E.D. OK 1996). See also *Gale v. National Transp. Co.*, 7 F.R.D. 237 (D.N.Y. 1947); *Michels v. Ripley*, 1 F.R.D. 332 (D.N.Y. 1939).

Notice of the court reporter's compliance with Civil Rule 28(C) and (D) can be monitored by a modification to the transcript certification currently used by court reporters in Ohio. The current certification pertains to Civil Rule 28(C) and should be modified to not only encompass Civil Rule 28(C) but to also include Civil Rule 28(D) and could read as follows:

"The undersigned court reporter hereby certifies that:

1. I am not a relative, employee of or attorney for any of the parties in the above-captioned action;
2. I am not a relative or employee of an attorney of any of the parties in the above-captioned action;
3. I am not financially interested in the action;
4. I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D)."

Court reporters should voluntarily submit the Certificate of Compliance. Moreover, the attorneys involved in the case should be vigilant in obtaining the Certificate. If the Certificate is not in compliance, or is not provided by the court reporter, the attorney should inquire as to why it is not in compliance or why it has not been provided and if appropriate, assert an objection to the deposition and seek judicial intervention.

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<sup>1</sup> WHEREAS, court reporters are officers of the court whose impartiality, as with judges, must remain utterly beyond question in order to ensure the enduring confidence and faith from which our judicial system derives its legitimacy; and

WHEREAS, some court reporting firms are contracting directly with the parties in interest in litigation, thereby circumventing counsel and their related ethical obligations to the courts; and

WHEREAS, those arrangements allow the parties in interest to directly control the terms and conditions of the court reporting services in a manner sometimes indistinguishable from an employer-employee relationship; and

WHEREAS, certain of these contracting arrangements require court reporters to provide special services to the paying party in interest that are not available to the opposing parties in the litigation; and

WHEREAS, the National Court Reporters Association has adopted a resolution to lobby at the state and federal level and work with its affiliated organizations and coalitions at the state level, to seek the enactment of laws and court rules that will limit or prohibit contracting arrangements in order to maintain the impartiality and independence of court reporters in their capacity as officers of the court; and

WHEREAS, numerous states (including, Hawaii, Georgia, Utah, Louisiana, New Mexico, Nevada, West Virginia, Texas, Kentucky, Michigan, New Jersey, Alabama, Massachusetts, Montana, Rhode Island, and Ohio) have recently enacted or are considering laws or court rules that prohibit or strictly regulate contracting arrangements between parties in interest in litigation and court reporters to ensure the impartiality of the court reporting profession specifically and the integrity of the court generally;

NOW, THEREFOR, BE IT RESOLVED, that the American Judges Association endorses legislative and judicial efforts to prevent parties in interest from establishing and direct financial or other relationships with court reporters which could create an appearance of partiality that is inimical to the public's faith in the fairness and impartiality of the judicial system. Unanimously adopted April 24, 1998, Portland, Oregon.

<sup>2</sup>WHEREAS, The National Conference of Metropolitan Courts seeks to promote the independence and neutrality of all court officers and urges that any appearance of impropriety and bias in the judicial process be avoided.

AND WHEREAS, court reporters function as officers of the court,

AND WHEREAS, some court reporters and court reporting firms have entered into exclusive contract with parties and/or parties interested in litigation and such contract appear to compromise the neutrality of such court officers and negatively affect the public's confidence in the judicial process;

AND WHEREAS, the National Court Reporters Association has resolved to support legislative efforts to oppose and limit contracting arrangements in order to maintain the impartiality and independence of all court reporters,

AND WHEREAS, legislation has been enacted in various jurisdictions to prohibit or limit contracting arrangements between parties in interest or their attorneys and court reporters, or require full disclosure to all such contracting arrangements,

NOW, THEREFORE, BE IT RESOLVED, that the National Conference of Metropolitan Courts fully endorses the efforts of the National Court Reporters Association in its efforts to seek the limitation of exclusive court reporting contracts and its efforts to maintain and preserve the integrity and impartiality of the judicial process. Dated February 1, 1999.

<sup>3</sup>See Section 22 of the regulations of the Board of Certified Court Reporter Examiners adopted by the Supreme Court of Ark. On March 4, 1999; CAL. CODE OF CIV. PROC., § 2025(k); 15 GA. CODE ANN. § 15-14-37 as amended July 1, 1999; 32 HAW. REV. STAT. § 606-13.6 eff. July 1, 1996; IND. CODE ANN. §§ 33-15-27-2 and 33-15-27-5; KY. REV. STAT. ANN. § 454.280, eff. July 15, 1998; LA. CODE CIV. PROC. ANN. art. 1434(A); MICH. COMP. LAWS § 1491, eff. July 10, 1998; Rule 28.03 of the Minnesota Rules of Court as amended in 1988 and MINN. STAT. § 486.10 eff. Aug. 1, 1999; NEV. ADMIN. CODE

656.330, eff. April 13, 1998; N.H. REV. STAT. ANN. § 517:3 eff. Jan. 1, 2001; N.M. Court Rule 22-605K eff. Jan. 1, 1996; N.C. GEN. STAT. § 1A-1, Rule 28(c); OR. REV. STAT. § 45.142; S.D. CODIFIED LAWS § 15-6-28 (c) eff. July 1, 2000; TENN. CODE ANN. § 24-9-136 (2001); TEX. GOV'T CODE ANN. § 52.034; UTAH CODE ANN. § 78-56-16.1 eff. May 1, 1995; W. Va. CODE § 57-4-1 (1997).  
See also CONN. GEN. STAT. § 20-656 (2001).

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