

## Contracting: Don't Check Your Ethics at the Door By Judy Hobart

The popular argument to promote court reporter contracting is "business is business. Come into the '90s." That is the point. Court reporters are coming into the 21st Century. A number of years ago the nation was surprised when there was an unexplained 16 minute gap in the analog Watergate tapes during President Nixon's administration. Now we have digital. Imagine what could be accomplished now!

Rushworth M. Kidder, President of the Institute for Global Ethics, Camden, Maine :  
"What is truth? We know that totally realistic images and conversations -- eventually probably even people -- can be produced by technology. This really brings home our question -- how are we going to recognize truth in an age where technology permits such sophisticated manipulation of the truth?"

"If you would like a picture of George Bush with his arms around Saddam Hussein in a wonderful hug of friendship, that can be done easily. Would you like, by the way, the conversation that they had? Also possible.

"So how are we going to verify that which we describe as truth in a technological age? That is a question of profound importance which gets right to the heart of what court reporters do. In the end, the answer to that has to do with integrity. 'I was there. I saw it. I reported it. And I have credibility.' If you don't have credibility, that verification is gone.

"If there is one thing the folks in your profession cannot afford, it is to check at the door as you walk into the 21st Century your sense of integrity, your sense of ethics. The technology will only provide what the technology is good at providing. But it will provide, frankly, whatever anybody wants it to provide. So the verification is going to come down to you and the credibility that you have established." Presentation at NCRA Annual Symposium, July 1996, San Diego, California.

An official court reporter is hired by a judge for a specific courtroom to record testimony. A freelance reporter is basically a court reporter for hire by either party in a case for pre-trial discovery. Since the advent of contracting with parties at interest, instead of the attorneys, the freelance reporters are taken out of that impartial, unbiased role in many instances, and instead are placed in a position of financial obligation.

Attorneys are meant to be advocates for their clients; court reporters are not. The foundation of professional and ethical court reporting is the impartiality and independence of the court reporter as an officer of the court. Attorneys answer to the

State Bar of Texas on ethical issues; court reporters answer to the Court Reporters Certification Board of Texas on ethical issues, and parties at interest, such as nationwide insurance agencies, answer to neither on ethical issues.

Corporate clients expect the attorney to be biased and in their employ. The corporate client views the court reporter in the same manner, although the judicial system is the court reporter's ultimate client.

West Virginia Supreme Court of Appeals, 1985: "The intent of Rule 28 presumably was to interpose a neutral party between the litigants to guarantee the neutrality of the proceedings and the trustworthiness of the record produced. There undoubtedly are situations in which a captive deposition officer could cause either real or perceived bias in the conduct of a pretrial discovery."

Judge Joe Spurlock, Texas: "An ethical violation of a single reporter can destroy the trust placed unhesitatingly in hundreds of others. Achieving justice in our society depends to a large degree upon your personal conduct, upon your abiding by the standards of ethics of your profession. You must ignore the lures of those people and corporations who would have you align with them in contracting agreements to become their team players." NCRA Annual Symposium, July 1996, San Diego, California.

Theodore L. Mussler, Jr., Attorney at Law, Kentucky: "If contract reporting is not stopped here in Kentucky, someday soon attorneys will bring their own court reporters to take testimony down because they will not be able to trust the other lawyer's reporter." NCRA Journal of Court Reporting, July 1996

Court reporters provide a quality service and not a commodity. The great volume of work that contracting brings creates pressure to cut corners, both economically and ethically. No court reporter begins the day with, "Well, today I'm going to be unethical." Even if someone starts with an untarnished motive, a slow ethical erosion can easily take place if we are faced on a daily basis with a contractual obligation.

CONTRACTING ANALOGY: A major company with a large amount of litigation decides to save costs on mediating their cases by entering into an exclusive arrangement with a specific mediator or a mediator group to do the facilitating on all their cases. How long would a mediator's credibility and integrity last in that arena if it was disclosed that they had a contract with ABC corporation to do all their mediating? That one contract could show an appearance of partiality, either real or perceived, and destroy the appearance of impartiality of the mediator.

This same analogy should apply to court reporters as officers of the court.

## Answers To Commonly Asked Questions

### About Contracting in the Court Reporting Profession

Q: How does contracting affect impartiality? Aren't ethical codes enough?

A: Any arrangement that threatens the impartiality of court reporters or merely threatens the appearance of impartiality will lead to a breakdown of our justice system. What if the judge in a case of yours was being paid by your opponent in the litigation? Would their oath to be impartial be enough for you? If you lost, would you feel as though you got a fair shake? It is our faith in the impartiality of the judicial system that is the very basis of our Rule of Law and ordered government, and this foundation erodes when the antagonists in litigation--the parties--start directly paying the bills of the allegedly impartial.

Q: Insurance companies and their attorneys say that they have established contracting arrangements with court reporting firms in order to cut the costs of their litigation. Isn't that a good thing?

A: Only if the success of our system of justice is measured solely by how it affects corporate balance sheets. Regardless of whether certain contracting arrangements result in a cost savings to insurers (and there is a lot of evidence that both the short term and long term savings are illusory), the point is that the higher--or, at least, different--aims of the justice system should not be compromised in favor of the bottom line. Otherwise, why not simply contract out judges to insurance companies? That would save the taxpayers millions. The reason why such arrangements are offensive to our notions of justice is that, like with health care, while cost isn't irrelevant, neither is it everything. For example, HMOs exist first to cure people. Cost savings methods that conflict with this goal should be forbidden (and are currently under attack everywhere). Likewise, the justice system exists first to provide a neutral, fair forum for the resolution of often bitter disputes. Any payment arrangement that threatens the impartiality of the justice system should likewise be barred.

In other words: everyone wants to save money, but some things are more important than just a cheap price tag. That's true even for companies. How can we tell? Ask a corporation what they pay their CEO . . . and why.

Q: What has been the response of state legislators and rule-makers to anti-contracting proposals?

A: Where state legislatures and state supreme courts have considered anti-contracting legislation and/or rule changes, the trend has been to outlaw or strictly curtail contracting arrangements. So far, 28 states, including Hawaii, Texas, Utah, West Virginia, Minnesota, New Mexico, Georgia, Louisiana, Nevada, Kentucky,

Michigan, Arkansas, North Carolina, Oregon, Indiana, New Hampshire, Tennessee, South Dakota, Connecticut, California, Oklahoma, Arizona, Ohio, Delaware, New Jersey, Massachusetts, Iowa, and Wisconsin have enacted legislation, approved rules or taken other official actions through their state board to limit or ban contracting. At least five other states have anti-contracting legislation or rule changes currently pending before their legislatures or state supreme courts.

Q: What about the argument by proponents of contracting that rather than reducing a court reporter's impartiality, contracting actually does the opposite as it eliminates any personal relationship between the attorney and court reporter?

A: This argument completely ignores the fact that unlike attorneys, corporations have no ethical obligations to the court. The public is often skeptical of politicians because it is inferred that their positions on policy are influenced by the largest contributors to their campaign. The judicial system, since its legitimacy rests upon public faith, cannot tolerate arrangements that could create the same skepticism. Court reporters are professionals with independent codes of ethics. As such, they are responsible to these ethics even above the person paying them and before any other duty.

Q: Isn't a prohibition on contracting an unlawful restraint on trade?

A: Prohibiting parties in interest in litigation from having a direct contractual relationship with court reporters, as officers of the court, is necessary to ensure the public's faith in the integrity and impartiality of the judicial system. If this is an unlawful restraint on trade, then so are:

- laws prohibiting lawyers from representing parties on both sides in a case
- laws providing for fair bidding of contracts for state and local governments
- laws prohibiting politicians from conducting self-dealing financial transactions
- rules allowing for the challenging of judges for bias.

Q: What about antitrust concerns?

A: Lobbying for laws that are aimed at prohibiting certain types of contractual arrangements does not violate anti-trust laws. State governments are free to make any law which is not prohibited under their constitution or is not pre-empted by the U.S. Constitution or federal law. The antitrust laws were designed to prohibit collaboration among businesses in order to keep prices artificially high. The Supreme Court has long recognized under its Noerr-Pennington doctrine that petitioning government to take action, such as is done in lobbying for legislation, regulations, or official rule changes is also insulated from anti-trust laws and is protected.

Q: How is contracting to provide court reporting services for government entities different from contracting with private entities? Should government agencies who are parties to litigation be allowed to contract for court reporting services for litigation

purposes?

A: Government agencies are required to comply with Federal statutes and regulations for all procurements, including court reporting services. The federal statute governing government procurements is the Competitions in Contracting Act (CICA) 41 U.S.C. Sect. 251 et. seq. The Federal Acquisitions Regulations are the implementing regulations for CICA. These regulations prescribe policies and procedures to promote full and open competition in the acquisition process, generally through sealed bids or competitive proposals. Because government agencies must comply with these procedures for the procurement of court reporting services, most states that have passed legislation or court rules prohibiting contracting have specifically excluded government agencies from their provisions.

This exemption for government agencies has raised the question as to why private entities should be prohibited from contracting with court reporting firms while government agencies are free to solicit bids. The most important distinguishing factor is that government agencies are ultimately beholden to the general public while private corporations are not. Governments are not responsible to stockholders demanding the highest possible return each quarter. Governments are ultimately responsible to you and me. This means that, where the perception of impartiality is concerned, there is far less of a risk that a losing litigant against the government will view the process as biased even if the same government is paying the reporter. This can be proven: Judges too get paid by the government. Has there been any cry about the bias in that arrangement? Compare that silence with the loud concerns voiced about free lance contracting, and one can easily perceive the difference.

More to the point: if a corporate defendant loses a big case, it could result in a reduction of pay or bonuses, or a reduction in the value of stock options. Likewise, a win in a big lawsuit could enrich the personal bank account of corporate officers by millions. In short, corporate officers stand to gain or lose lots of their own money in litigation. Government officials have no similar, personal stake in the outcome of litigation.

As a practical matter, because it is the taxpayer's money, not their own money, at stake, and because government officials don't face the "bottom line" pressures of stockholder- responsible corporate executives, government contracting poses little if no risk of real or apparent conflicts of interest in most circumstances.

At least one state has taken the position that where government agencies are parties to litigation, they should also be prohibited from directly contracting for court reporting services related to the litigation. In a 1997 advisory opinion, New Mexico's Court Reporter Board sets up a functional capacity test for governmental and quasi-governmental entities. The opinion states that under Rule 22-605(K) NMRA 1996, "a court reporter may contract with a governmental entity, the City of Albuquerque, for example, to report its hearings when the City is acting in an adjudicative, legislative, or administrative capacity. However, when the City of Albuquerque is a litigant and

wishes to contract with a court reporter to do all its depositions in Tort Claims Act cases, for example, then that will be considered contracting and will be considered prohibited by Rule 22-605(K)."

*About the Author: Judy Hobart is a Texas CSR; past president of the Texas Court Reporters Association; Fellow of the National Court Reporters Association; and former chair of Citizens of Impartial Justice, an organization that aided various states in enacting anti-contracting legislation.*