

# NEW JERSEY LAWYER

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## Ensuring your deposition isn't at risk

You are about to use a deposition at trial either to cross-examine a witness or to read pretrial testimony of the other party into the record. An objection is made because the reporter who took the deposition had a contractual relation with one of the parties. Should you be concerned?

Definitely.

Rule 4:12-4 prohibits a deposition being taken by a shorthand reporter who is an employee of a party or is financially interested in the action. How close a reporter is to the line of being an employee or financially interested has been given some guidance by N.J.A.C. 13:43-5.4, a regulation adopted by the state Board of Shorthand Reporting effective March 18, 2002, and a letter opinion regarding the regulation issued Feb. 18 by the Attorney General's Office.

So why the concern whether the reporter has a contract with a party interested in the litigation? Because a deposition

attempted to enter, contractual arrangements with a reporter or reporting firm. In its simplest form, the contract provides that in exchange for a favorable fee, the litigant will place the reporter on an "approved" list, and lawyers representing that litigant may use only such approved reporters. It may be argued this is an independent contractor relationship — rather than an employee — but the label doesn't matter.

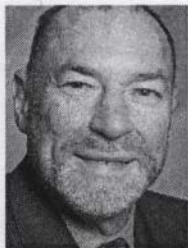
Place yourself in the position of the lawyer — or rather, the client — who learns that the person about to administer the oath and record the witness's testimony is under contract to the other party. That simple fact is sufficient to cast doubt on the reporter's neutrality. The attorney general's opinion suggests a contract could render the reporter financially interested. The West Virginia court said there are "situations in which a 'captive' deposition official could cause either real or perceived bias in the conduct of pretrial discovery."

In addition to the reporter's tarnished neutrality, a contract between a reporter and a litigant leads to other evils. A lawyer complained to the Certified Shorthand Reporters Association that when she called to ask when a transcript of a deposition would be received, she was told by the reporter that under its arrangement with the other side, the copy was not to be sent to her by the reporter but was to be *first* sent to the other side to be forwarded. Another complaint was that the ASCII disk of a deposition transcript

had been provided to the party with whom the reporter had a contract, but was not provided to the other party until after "unnecessary and exasperating efforts."

Is a reporter truly delivering transcripts to both parties at the same time when the contracting party's are delivered by hand while the other side receives them by surface mail? What if the reporter, treating both sides equally, makes up the discount it has offered the contracting party by increasing the number of pages through format changes? The contracting party may not achieve the savings it thought it was getting, and the other party incurs an unnecessary cost, as it would if the reporter made up the discount by raising the copy charge.

The AG's opinion refers to other issues involved in contracting such as when the litigant requires the reporter to provide



**The Law**  
**and More** Stuart L. Pachman

under court rules is a judicial proceeding, and when opposing lawyers and their clients walk into a room containing the reporter's equipment, they (or at least one side) expect the reporter to be neutral. Bound by professionalism and law, the reporter is an "officer" under R. 4:14-3(b) authorized to administer oaths. And according to a federal decision, the reporter should be totally disinterested and "independent," and whose function, according to the West Virginia Supreme Court, is "to guarantee the neutrality of the proceedings and the trustworthiness of the record produced."

Most people are never or rarely involved in litigation. For others, like insurance carriers, litigation is part and parcel of their everyday business. In recent years, some litigants who use court-reporting services on a large scale have entered, or

special services not made available to the opposing party, such as expedited transcripts, a compilation of exclusive witness databases, production of summaries or abstracts and preferential pricing arrangements.

### **Limiting contracts**

Twenty-eight states have prohibited or limited the practice of contracting with shorthand reporters, in some by legislation, in others by court rule or regulation. Proposals are pending in several other states. The practice has been criticized by the American Judges Association, the board of governors of the Association of Trial Lawyers of America and the National Conference of Metropolitan Courts.

In New Jersey, the Board of Shorthand Reporting adopted N.J.A.C. 13:43-5.4, which prohibits a certified reporter from entering into a contract or financial relationship that compromises the reporter's impartiality or that results in the appearance the reporter's impartiality "has been compromised." In 2002, Rule 4:12-4 was amended to make the Board of Shorthand Reporters' regulations applicable to everyone taking or recording a deposition.

In interpreting that regulation, the attorney general concluded that if a certified shorthand reporter entered into an arrangement proposed by a certain insurance carrier, the reporter would be subject to discipline "for entering into a contractual arrangement because these types of contracts infringe and compromise the

impartiality" of the reporter or "result in the appearance that a [reporter's] impartiality has been compromised." Of particular significance to lawyers is the AG's statement, "A reporter in such an arrangement may be, by virtue of the contract, *considered an agent or employee*, which would implicate" the regulations prohibiting a reporter from providing reporting services. (Emphasis added.)

So what about the objection raised at trial when a lawyer wants to use a deposition by a reporter under contract to a party in interest? If the regulation is implicated, is not R. 4:12-4 also? While no case appears to have interpreted that rule, its prohibition that "no deposition shall be taken ..." could result in the deposition recorded by the reporter under contract to one of the parties being deemed inadmissible or rendered useless. The AG's opinion advises that a review of the contract with a focus on its duration and the specific services required may be necessary to determine a violation of the regulation. That's fine, insofar as it may provide a defense to a reporter in a disciplinary proceeding, but do you want to become sidetracked in an argument over the propriety of some reporter's contract? Why risk the loss of crucial discovery or testimony primed for a killer cross-examination because the transcript may be tainted?

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