



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF SHORTHAND REPORTING
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TO: Members of the Public

FROM: Dianne L. Tamaroglio, Executive Director 
Board of Shorthand Reporting

RE: Interpretation of N.J.A.C. 13:43-5.4

DATE: March 16, 2004

Enclosed is a copy of the Attorney General's opinion of the newly adopted regulation mentioned above.

Please use this opinion as a guideline so as to comply with the regulation.



State of New Jersey
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February 18, 2004

Members of the State Board
of Shorthand Reporting
124 Halsey Street
Post Office Box 45019
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Re: INTERPRETATION OF N.J.A.C. 13:43-5.4

Dear Board Members:

You have asked for an opinion addressing whether certified shorthand reporters ("C.S.R.") who enter into exclusive third-party contracts with corporate entities to provide reporting services violate the mandates of your newly adopted regulation, N.J.A.C. 13:43-5.4. This regulation enumerates prohibited practices and conduct for C.S.Rs. Your inquiry arose following your receipt and review of a written pricing offer for reporting services disseminated by State Farm Insurance Companies ("State Farm") to certificate holders in the State of New Jersey. Please be advised that a reasonable interpretation and analysis of the intent and spirit of N.J.A.C. 13:43-5.4 lead us to conclude that your certificate holders would be subject to discipline for entering into contractual arrangements and agreements such as that offered by State Farm because these types of contracts infringe and compromise the impartiality of a C.S.R. or, at a bare minimum, result in the appearance that a C.S.R.'s impartiality has been compromised contrary to the mandates of N.J.A.C. 13:43-5.4(a).

As you may recall, the Certified Shorthand Reporters Association of New Jersey initially approached the Board in or about 2000 and requested that it address a recent trend of court reporting firms entering into exclusive third-party agreements with corporate entities. In this nationwide trend, referred to in the industry as "contracting," insurance companies and other large corporate entities enter into long-term and exclusive third-party contracting agreements with large court reporting firms, exchanging all of their deposition work in a particular area for favorable

pricing or reporting services or both. The corporate entities maintain that these contractual arrangements are necessary in order to lower and contain litigation costs.

Opponents to contracting argue that these contractual arrangements force court reporters to compromise their ethical obligation to act as neutral officers of the court and compromise the public's perception of the justice system and its participants. This is so, it is argued, because the reporting firms are contracting directly with insurance companies that are parties in interest in the litigation. Additionally, the contractual arrangements often permit the insurance companies, who are the parties in interest, to dictate and control the terms and conditions of the court reporting services rendered. This occurs, for example, when contract provisions in the agreements require the court reporting firms to provide special services that are not made available to the opposing parties in litigations, such as expedited transcripts, the compilation of exclusive witness databases of all deposition transcripts from all cases in which the insurance company is a party, the production of summaries or abstracts of depositions and preferential pricing arrangements.

The effects and the ramifications of contracts between shorthand reporters and parties have been under review by numerous jurisdictions. Those states that have considered the contracting issue have concluded that the preferential agreements appear to compromise the impartiality of reporters and erode the public's confidence in the judicial system. Currently, twenty-eight states have enacted legislation or court rules to prohibit or strictly regulate contracting.* Several other states have proposals pending addressing the issue of third-party contracting. *Id.* National organizations whose memberships are directly effected by contracting have also analyzed and weighed in to support the ban of direct contractual arrangements between court reporters and parties to litigation. In April 1998, the American Judges Association adopted a resolution supporting the National Court Reporters Association's ("NCRA") efforts to limit or prohibit exclusive third-party contracting. In this resolution, the organization concluded that the preferential agreements were

* News Release, Foundation for Taxpayer and Consumer Rights; Ohio Becomes 24th State to Ban Preferential Deals with Court Reporters (June 27, 2001) (on file with author) and information on file with the author from the National Court Reporters Association.

allow[ing] parties in interest to directly control the terms and conditions of court reporting services in a manner sometimes indistinguishable from an employer-employee relationship. [AJA Resolution on Contracting, adopted April 24, 1998].

Similarly, the Board of Governors of the Association of Trial Lawyers of America, in a resolution passed in October 1998, endorsed legislative and judicial efforts to

[p]revent the establishment of any relationships between court reporters and parties to litigation that could create an appearance of partiality that is inimical to public faith in the fairness and impartiality of the judicial system. [ATLA Resolution, adopted October 24, 1998].

Finally, the National Conference of Metropolitan Courts, in its February 1999 resolution, found that the exclusive contracts between court reporting firms and parties interested in litigation "appear to compromise the neutrality of such court officers and negatively affect the public's confidence in the judicial process" and resolved to support "efforts to seek the limitation of exclusive court reporting contracts." [National Conference of Metropolitan Courts Resolution, adopted February 1, 1999].

The Board, following its review and consideration of the contracting issue, also concluded that exclusive, long-term agreements between court reporting firms and party litigants placed reporters in positions that compromise their ethical standards by providing special services to the contracting party. [33 N.J.R. 2408-2409.] Moreover, the Board found that even if there were no direct partiality, as a result of the requirements of the contract, the appearance of partiality was evident and equally unacceptable. [Id.] Hence, the Board promulgated N.J.A.C. 13:43-5.4 which became effective on March 18, 2002. The purpose of this regulation, as stated by the Board in its July 16, 2001, proposal of the rule, was to "protect the public and all parties from the appearance that the certificate holder may favor or appear to favor the party that is employing them." [33 N.J.R. 2409; Emphasis added]. This regulation, entitled "Prohibited Practices," provides, in the relevant portion, that

- (a) A certified shorthand reporter shall not:

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(2) Provide or arrange to provide reporting services, in a judicial or quasi-judicial matter and/or a deposition, if he or she:

(i) Is a party to the action;

(ii) Is a relative, agent or employee of one of the parties;

(iii) Has a financial interest in the action or its outcome; or

(iv) Is related to an agent or is an employee of a person or entity with a financial interest in the action or its outcome;

.
(4) Enter into or arrange any contract or financial relationship that compromises the impartiality of the certified shorthand reporter or that may result in the appearance that the impartiality of the certified shorthand reporter has been compromised. [N.J.A.C. 13:43-5.4(a)].

It is well established that court reporters are licensed or certified professionals with responsibilities and duties owed directly to the court pursuant to independent rules, regulations and codes of ethics requiring them to be fair and impartial to all parties in an action in the performance of their duties. *"Insurance Companies and Corporate Defendants Strike Special Deals with Officers of the Court: A Growing Threat to the Impartiality of our Judicial System," Foundation for Taxpayer and Consumer Rights, 1999, p. 1.* For example, the Federal Rules of Civil Procedure, as well as most state rules, prohibit a reporter from recording a deposition in which he or she is a relative or an employee of any attorney or party in the litigation. [See Fed. R. Civ. P. 28(c).]

Similarly, New Jersey's Court Rules, specifically R. 4:12-4, provide that

No deposition shall be taken before or recorded by a person, whether or not a certified shorthand reporter, who is a relative, employee or attorney of a party or a relative or employee of such attorney or is financially interested in the action. Any regulations of the State Board of Shorthand Reporters respecting disqualification of certified shorthand reporters shall apply to all persons taking or recording a deposition. [PRESSLER, Current N.J. Court Rules, R. 4:12-4.]

At least one court has held that the intent of these provisions was to "interpose a neutral party between the litigants to guarantee the neutrality of the proceedings and the trustworthiness of the record produced." Bennett v. Keadle, 334 S. E. 2d 643, 648 (1985). Finally, the Code of Professional Ethics of the NCRA requires that its members be fair and impartial to all participants in reported proceedings and to guard against the appearance of impropriety. Code of Professional Ethics of the National Court Reporters Associations, Provisions 1 and 3. It is clear that the independence, impartiality and neutrality of the court reporter is a necessary element of the court system and is a well established principle on which all parties and participants rely.

State Farm's pricing offer provides the Board with its first opportunity to address the issue of contracting in New Jersey in light of N.J.A.C. 13:43-5.4. In its July 2002 pricing offer correspondence, State Farm advises that it seeks to "standardize the fees it pays to court reporters." The company indicates that a survey of numerous reporting agencies in the State resulted in the enumerated schedule of fees. The pricing offer letter sets, among other conditions, the same fee per page for lay and expert depositions; transcript format requirements and miscellaneous guidelines, including State Farm's refusal to pay appearance or attendance fees or delivery or postage charges. State Farm, via the correspondence, also requests that all the reporters agreeing to the outlined terms and conditions be C.S.Rs in this State. Finally, State Farm's pricing offer advises that the names of those reporting firms that accept and agree to be bound by the enumerated terms and conditions will be furnished to its defense counsel as approved service providers. While the pricing offer advanced by State Farm does not seek favorable or special reporting services,

it does seek beneficial pricing terms, namely price and volume discounts, which are presumably advantageous to the insurance entity. There is no indication that State Farm intends to share or offer these beneficial terms to the other parties involved in its litigation.

Acceptance of State Farm's pricing offer by New Jersey certificate holders would constitute violations of N.J.A.C. 13:43-5.4 in many scenarios. For example, a reporter's assent to State Farm's offer would most often result in his or her direct contracting with a party litigant given the insurance company's presence in countless litigation matters in New Jersey. A reporter in such an arrangement may be, by virtue of the contract, considered an agent or employee, which would implicate N.J.A.C. 13:43-5.4(a)(2)(ii) and/or (iv). Additionally, contracting with a party litigant by a reporter certainly implicates N.J.A.C. 13:43-5.4(a)(4) in that this relationship constitutes entering into or arranging a contractual relationship that compromises the reporter's impartiality or appears that the reporter's impartiality has been compromised. In other circumstances, when State Farm acts as an insurer of a party litigant, it has an obvious financial interest in the outcome of the litigation. A reporter, with a contractual relationship with State Farm, also has a financial interest in the action or its outcome since his or her contract with the insurer could be adversely affected, thus implicating N.J.A.C. 13:43-5.4(a)(2)(iii).

However, and perhaps more importantly, the act of directly contracting with a party to an action erodes by appearance, if not in fact, a reporters's ethical obligation and responsibility to be a neutral and impartial officer. N.J.A.C. 13:43-5.4 seeks to preserve the integrity and impartiality of the reporter by banning such situations and any circumstance that "compromises the impartiality of the certified shorthand reporter or that may result in the appearance that the impartiality of the certified shorthand reporter has been compromised." N.J.A.C. 13:43-5.4(a)(4).

Exclusive third party contracting agreements between court reporting firms and large insurance companies, which are parties to civil actions, bring into question the impartiality of reporters, the cornerstone of the reporting profession. The Board has considered this issue and concluded that the appearance of partiality is inimical to the practice of shorthand reporting as well as to the public's confidence in the judicial system, hence, its promulgation of N.J.A.C. 13:43-5.4. Certificate holders would be subject to disciplinary action for entering into contractual

agreements or arrangements as offered by State Farm because these agreements either, depending on the nature of the contract provisions, compromise the impartiality of the C.S.R. or, at best, result in the appearance that the impartiality of the reporter has been compromised in violation of N.J.A.C. 13:43-5.4.*

As a result of the implications or consequences of this interpretation of N.J.A.C. 13:43-5.4, the Board may wish to consider other alternatives to limiting or banning contracting in this State. Rather than the blanket prohibition of contracting, the Board could consider regulating specific conduct that actually infringes and impairs a reporter's ability to be neutral and independent. Consideration of action taken by other states in addressing the issue of contracting may be helpful. For example, Georgia, New Mexico and Utah, have enacted legislation prohibiting reporters from entering into contracts for court reporting services not related to a particular case or reporting incident. Therefore, the Board could promulgate regulations that: 1) require court reporters to provide comparable services in quality and price to all parties in an action; 2) prohibit court reporters from relinquishing control of an original deposition transcript and copies before it is certified and delivered; and 3) prevent court reporters from providing reporting or incidental services in any action not yet pending.

Similarly, the State of Iowa sought to regulate contracting. In April 2003, its Supreme Court amended its court rules to limit third party contracting by regulating offending conduct. A review of the specific regulatory language may provide some assistance to and direction for the Board. The amendment to R. 1.713 prohibits an officer taking the deposition from entering into an agreement for reporting services which

- a. Requires the court reporter reporting the deposition to relinquish control of an

* This same conclusion, however, cannot apply to the contracts with state agencies since these agencies, through the Department of Treasury, are mandated to enter such contracts pursuant to the public contracts law, codified at N.J.S.A. 52:34-6 et seq. By law, the State cannot divorce itself from its responsibilities under this statute to "preserve to the state all economic benefits of full and free competition and to guard against favoritism, extravagance and corruption in the awarding of contracts." Lincoln Highway Realty, Incorporated v. State, 128 N.J. Super. 35, 40 (Ch. Div. 1974).

original deposition transcript and copies of the transcript before it is certified and delivered to the custodial attorney,

- b. Requires the court reporter to provide special financial terms or other services that are not offered at the same time and on the same terms to all other parties in the litigation,
- c. Gives an exclusive monetary or other advantage to any party. [Iowa R. Civ. P. 1.713(2).]*

Other states have attempted to address and neutralize the ramifications of third party contracting by requiring disclosure of the relationships. For example, the State of Oregon requires that, before recording a deposition, a reporter must disclose ". . . if [the reporter] has a contract to provide reporting services on a full-time or part-time basis. . . ." O.R.S. § 45.142(1) (2001). Following disclosure of the relationship, any party to the action may object to the use of the reporter. O.R.S. §45.142(2) (2001). Subsequent to the objection, the parties are required to attempt to agree upon a different reporter and, if no agreement can be made, any of the parties may request the court to appoint an independent reporter to record the proceedings. Id. Minnesota also requires disclosure of the existence of a contract or agreement for court reporting services. M.S.A. § 486.10(2) (2002). Written disclosure of the contract or agreement must be included in the notice of the taking deposition or the notice of legal proceeding prior to the commencement of the legal proceeding, while oral disclosure of the reporter's financial arrangements must be made on the record by the court reporter at the commencement of the legal proceeding. Id.

To date, the Board has begun the process of addressing third party contracting by its certificate holders by attempting to regulate offending conduct. In addition to N.J.A.C. 13:43-5.4, the regulation at issue here, N.J.A.C. 13:43-5.8, requires C.S.Rs to deliver transcripts to a client or court in a timely fashion and to

* The Iowa Board of Examiners of Shorthand Reporters followed the lead of its Supreme Court and amended its administrative rules to provide that a violation of R. 1.713(1) or 1.713(2), the portions of the rule relevant to preserving a reporter's neutrality, constituted cause for disciplinary action. [See Iowa Court Rules, R. 24.13.]

charge all parties in an action the same price for an original transcripts and copies. [See N.J.A.C. 13:43-5.8(a)(4) and (5)]. Additionally, the Board may consider promulgating a regulation which would bar reporters from providing legal support to a party in litigation by prohibiting reporters from compiling deposition databases of witness testimony and recording deposition summaries as dictated by counsel for the contracting party. Of course, regulations delineating specific offending conduct might not address every possible scenario, practice or act that will lead to preferential services, disparate treatment or the appearance of impropriety. A review of each and every contract, with a focus on the duration of said contract, the specific numbers of cases involved, as well as the specific services required of the reporter, may still be necessary in order to determine if a violation of N.J.A.C. 13:43-5.4 exists. Ultimately, the decision whether to consider other alternatives to limiting or barring contracting in this State rests with the Board.

For the reasons set forth above you are advised that a reasonable interpretation and analysis of the intent and spirit of N.J.A.C. 13:43-5.4 lead us to conclude that your certificate holders would be subject to discipline for entering into contractual arrangements and agreements such as that offered by State Farm because these types of contracts infringe and compromise the impartiality of a C.S.R. or, at a bare minimum, result in the appearance that a C.S.R.'s impartiality has been compromised contrary to the mandates of N.J.A.C. 13:43-5.4(a).

Very truly yours,

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By: 

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