FOR LEGAL PROFESSIONALS WHO PREPARE NOTICES OF DEPOSITION, YOUR LEGAL OBLIGATIONS HAVE CHANGED EFFECTIVE JANUARY 1, 2016

A new law, Assembly Bill 1197, authored by Assemblyperson Susan Bonilla, imposes modest but new obligations on legal professionals who prepare Notices of Deposition.

WHAT IS ASSEMBLY BILL 1197?

AB 1197, a bill passed this year which becomes effective January 1, 2016, simply requires that the legal professional preparing the Notice of Deposition include in that Notice certain disclosures, if applicable:

- whether there exists a contract between the attorney's party-client and the reporter or reporting firm being hired to report the deposition; or

- if that is unknown, whether the attorney's party-client has instructed the attorney to use a particular reporter or reporting firm.

Section 2025.220 of the Code of Civil Procedure dealing with deposition notices was amended by AB 1197 to read as follows, with the new law underlined and bolded:

> (a) A party desiring to take the oral deposition of any person shall give notice in writing. The deposition notice shall state all of the following:
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> (1) The address where the deposition will be taken.
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> (2) The date of the deposition, selected under Section 2025.270, and the time it will commence.
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> (3) The name of each deponent, and the address and telephone number, if known, of any deponent who is not a party to the action. If the name of the deponent is not known, the deposition notice shall set forth instead a general description sufficient to identify the person or particular class to which the person belongs.
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> (4) The specification with reasonable particularity of any materials or category of materials, including any electronically stored information, to be produced by the deponent.
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> (5) Any intention by the party noticing the deponent to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method as required by Section 2025.330 and any intention to record the testimony by stenographic method through the instant visual display of the testimony. If the deponent will be conducted using instant visual display, a copy of the deposition notice shall also be given

to the deposition officer. Any offer to provide the instant visual display of the testimony or to provide rough draft transcripts to any party which is accepted prior to, or offered at, the deposition shall also be made by the deposition officer at the deposition to all parties in attendance. Any party or attorney requesting the provision of the instant visual display of the testimony, or rough draft transcripts, shall pay the reasonable cost of those services, which may be no greater than the costs charged to any other party or attorney.

(6) Any intention to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or of any expert witness under subdivision (d) of Section 2025.620. In this event, the operator of the video camera shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties.

(7) The form in which any electronically stored information is to be produced, if a particular form is desired.

(8) (A) A statement disclosing the existence of a contract, if any is known to the noticing party, between the noticing party or a third party who is financing all or part of the action and either of the following for any service beyond the noticed deposition:

(i) The deposition officer.

(ii) The entity providing the services of the deposition officer.

(B) A statement disclosing that the party noticing the deposition, or a third party financing all or part of the action, directed his or her attorney to use a particular officer or entity to provide services for the deposition, if applicable.

(b) Notwithstanding subdivision (a), where under Article 4 (commencing with Section 2020.410) only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena shall serve as the notice of deposition.

SUMMARY OF NEW LEGAL REQUIREMENTS

- **If you have been instructed by your client or a third party paying your bills for deposition services to use a particular court reporter, reporting firm or corporation, then you must, after January 1, 2016, disclose that fact in the Notice of Deposition.**

- **If you know that a contract between your client or a third party paying your bills for deposition services and a court reporter, reporting firm or corporation exists, you have to disclose that in the Notice of Deposition.**

HOW WILL THE PROVISIONS OF AB 1197 BE ENFORCED?

A failure of a notice of deposition to comply with this new law could prompt an objection to the Notice under current law. The statute governing such objections is CCP section 2025.410.

WHAT PROBLEM DOES AB 1197 ADDRESS?

AB 1197 addresses the arrangements that may be made by court reporting entities that, at a minimum, could be seen to undermine the impartiality of the freelance court reporter. Some of these arrangements involve financial incentives offered by the court reporting entity and others, which raises the specter of actual bias by the reporting firm having an ongoing financial relationship with a party to litigation, unmediated by attorneys who are officers of the court.

The basis for such action is eloquently addressed in a resolution issued by the American Judges Association in April of 1998, with emphases supplied:

> 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 such arrangements allow 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 …
>
> NOW, THEREFORE, BE IT RESOLVED that the American Judges Association endorses legislative and judicial efforts to prevent parties in interest from establishing any direct financial or other relationships with court reporters which could create an appearance of partiality that is inimical to public's faith in the fairness and impartiality of the judicial system.[1]

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1 http://www.ncra.org/Government/content.cfm?ItemNumber=9376

There are **two reasons** why judges and other objective observers, not to mention many states, have acted. So-called contracting poses risks to impartiality and the perception of impartiality of judicial officers and results in unfair cost shifting from the contracting party to the other parties in litigation.

Impartiality. Non-licensee-owned corporate providers of the services of a deposition officer have for many years been aggressively soliciting, through commissioned salespersons, exclusive contracts with companies that are frequently parties in litigation, in essence seeking to become the "in-house" reporting firm for parties in litigation. This practice of a party to a proceeding entering into such a possibly cozy relationship with a vendor of deposition services has long been recognized as troubling and has, anecdotally, been expanding.

From the website of the National Court Reporters Association:

> Once a party-in-interest … is allowed to manipulate the business transaction to their exclusive benefit and/or exerts control over the work produced by the court reporter, the reporter and/or the reporting firm's impartiality can be called into question….
>
> Not just actual neutrality but the perception of neutrality is equally important to consumers of court reporting services when taking a broad look at the court reporting profession….

While commenting on the Kentucky Court Reporters Association's efforts to work with the state legislature to implement court reporter licensure, Charlie Cunningham, a Jefferson County Circuit Court trial judge in Louisville, Kentucky, mused on the court reporting profession and the concerning issue of party contracting. Judge Cunningham stated:

> Suffice it to say that opportunities for, and temptations to, cut corners or (offer) special deals are more endemic than we would like to think. Just because the vast majority of court reporters resist and refuse those temptations is no reason to ignore the reality that a small number will not. Indeed, it is precisely because most court reporters are so professional that even experienced litigators can get snookered because we assume every court reporter is similar to 'our' reporter with whom we are familiar. Wrong.[2]

As so aptly stated by the Supreme Court of Indiana in a case disqualifying a court reporter who was employed by one of the attorneys in the action: "It is not claimed in this case that any improper influence was exerted . . . but the result in other cases, and under other conditions, might be different, and the only safe rule is one which declares every such clerk

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2 http://www.ncra.org/Government/content.cfm?ItemNumber=13274

an interested person, and hence incompetent to act." *Knickerbocker Ice Co. v. Gray* (1904) 72 N.E. 869, 872.

Indeed, the issue of impartiality and future compensation between judicial officers and parties or counsel is specifically addressed in code when it comes to judges. For example, California Code of Civil Procedure section 170.1(a)(8)(A) provides that disclosure must occur if: "The judge has a current arrangement concerning prospective employment or other compensated service …(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding..."

One non-licensee-owned company that aggressively markets and provides court reporting services also offers to aid one side in ongoing litigation, and has in fact done both ***in the same case on multiple occasions***. This company advertises:

> "Our role is to work with your legal team to plan, prepare and present your case effectively at trial[.]"

Cost shifting. Beyond the risk to impartiality posed by ongoing financial entanglements between officers of the court and parties, corporations offer cut-rate deals to their clients for the original transcript plus one copy (called the "O and 1"), and in exchange the party agrees to steer all of their deposition business to the reporting firm. The reporting firm then makes up for their loss-leader pricing by increasing the charges on the copies ordered by the other parties, both co-defendants and plaintiff.

Recognize the unfairness of this: Those clients and lawyers that order copies cannot shop for the best price. Only the one reporter or reporting firm that provided the reporter can produce the copies. In this way, these non-licensee-owned reporting firms are making money by shifting costs to those who have no choice but to pay their prices, and the result is that the parties in the case (plaintiff, co-defendants) who order copies are, in effect, subsidizing the litigation costs of the party that entered into the contract.

THE BILL MENTIONS "SERVICES" AND NOT SIMPLY DEPOSITION SERVICES. WHY?

To implement current law regarding impartiality. CCP section 2025.320 already in pertinent part recognizes the need for the reporter and the corporation arranging for the reporter's services to be a neutral participant, not showing favoritism to either side, when (emphases supplied) the law provides:

> (b) **Services and products offered or provided by** the deposition officer or **the entity providing the services of the deposition officer to any party or to any party's attorney or third party who is financing all or part of the action shall be offered to all parties or their attorneys attending the deposition**. No service or product may be offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party or any party's attorney or third party who is financing all or part of the action unless the service or product is offered or provided to all

parties or their attorneys attending the deposition. **All services and products offered or provided shall be made available at the same time to all parties or their attorneys.**

(c) The deposition officer or the entity providing the services of the deposition officer **shall not provide to any party or any party's attorney or third party who is financing all or part of the action any service or product consisting of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition**. The deposition officer or entity providing the services of the deposition officer shall not collect any personal identifying information about the witness as a service or product to be provided to any party or third party who is financing all or part of the action.

CAN THE LEGAL INTERPRETATION OF "PARTY" INCLUDE THE LAW FIRM ITSELF REPRESENTING THE PERSON OR ENTITY INVOLVED IN THE LAWSUIT?

No, for two reasons. One, "party" means party, not the attorney. Two, to underscore this difference between "party" and "attorney," the bill contains a distinct approach to when a party instructs the attorney representing them to hire a particular reporter or reporting firm (this is in subsection (B)), further underscoring that they are not one and the same, because we are writing about them and treating them differently.

IS AN AGREEMENT TO REPORT ONE DEPOSITION A "CONTRACT"?

No. The bill specifies that it isn't when it provides that it applies only to "**any service beyond the noticed deposition.**"

ARE THERE OTHER PROBLEMS WITH COURT REPORTING CORPORATIONS THAT CONTRACT?

Yes! ***And, one of these problems could get your law firm in hot water with the IRS!***

Some non-licensee-owned corporations hire commissioned salespersons to aggressively "schmooze" paralegals and secretaries, ***frequently without the knowledge or consent of lawyers or law firm management***. Harmfully distorting the market for court reporting services away from rewarding quality and price – most important to clients and lawyers – and toward kickbacks is bad for clients and the legal profession writ large. As the Senate Business & Professions Committee has rightly observed:

> If an attorney hires a firm because of a large gift … rather than competitive rates or quality of service, the consumer, the lawyer, and the litigant are the unknowing potential victims.[3]

But kickbacks also raise potentially serious tax consequences for lawyers and law firms. The law firm of Hanson Bridgett has recently analyzed these possible consequences in a written legal memo. Here are the key excerpts:

> Incentives given by Reporting Firms in exchange for bookings will not be treated as gifts for tax purposes because there is a clear relationship between the incentive and the performance of a service by the recipient. The *quid pro quo* nature of the transaction removes any possibility that the incentive is given out of disinterested generosity. …
>
> Law firms therefore cannot with precision predict how the Internal Revenue Service will treat the matter …
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> For attorneys and law firm employees, failing to report the value of the benefits received as income, and paying tax on that income, could result in the imposition of tax and penalties.

The Hanson Bridgett tax memo and a video crafted by CalDRA on the possible tax liability for your law firm can be found at caldra.org.

AB 1197'S APPROACH TO THE ISSUE

AB 1197 elects to approach the issue by requiring disclosure of these arrangements so that the litigants can determine whether the arrangements are acceptable or whether they could affect the impartiality of the court reporter.-

Disclosure is the approach endorsed by the U.S. Department of Justice: "A court reporter's disclosure of contractual relationships should be made to the parties to the case and their representatives so that the parties may exercise their rights under FRCP 28 (c), 29 and 32(d)(2), and not to other court reporters[.]"[4]

AB 1197's approach of requiring disclosure in order to provide an opportunity for opposing counsel to object to the contracted reporter is likewise consistent with how questions of impartiality of judicial officers are generally handled.

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3 Senate Business, Professions & Economic Development Committee, Background Paper for the Court Reporters Board, (2011-2012 Regular Session) March 12, 2012, at pp. 6-7, http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/Court%20Reporters%20BACKGROUNDER%20%282012%29.pdf

4 http://www.justice.gov/atr/public/busreview/0377.htm.

For example, California Code of Judicial Ethics Canon 1E provides that "[a] judge shall disclose information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification."

Likewise, California Rule of Court 3.855(b)(1) regarding mediators provides: "A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties."