

REGULATION OF "FREE-LANCE" COURT REPORTERS

House Bill 5604 as passed by the House Second Analysis (5-4-98)

Sponsor: Rep. Ted Wallace
Committee: Judiciary

THE APPARENT PROBLEM:

Court reporters and court recorders take verbatim records (either transcribed by shorthand or stenographically) of testimony during court proceedings or during related proceedings, such as depositions. The general duties of court reporters and recorders and the procedures for their certification are set forth in Michigan Court Rule 8.108. Under MCR 8.108, a nine-member Court Reporting and Recording Board of Review appointed by the Michigan Supreme Court tests, certifies, and annually reviews court reporters. In order to be certified a court reporter or recorder must pass the Michigan Certified Shorthand Reporters test, a skills test that examines for accuracy and speed.

Last year, the Supreme Court amended the MCR 8.108 to require certification of "free-lance" court reporters. Although some court reporters and recorders are appointed to courts to keep records of court proceedings, many others work "free-lance" for attorneys or parties to litigation to provide services for a particular case by taking down a record of testimony, such as a deposition, outside the courtroom. Many of these court reporters work for court reporting firms, some are unionized, and many others work on their own.

The records made by free-lance reporters and recorders, even though not made in court, form a part of the court's official record of a case and may be relied upon in court for evidentiary purposes. For example, when a witness is unavailable at trial, the testimony of the witness may be read in from the transcript created at the deposition. According to some, the integrity of free-lance court reporting has come under attack as certain companies (primarily insurance companies that often find themselves parties in lawsuits) have begun entering contracts with free-lance reporters or reporting firms to cover all of the court reporting work on all of the cases that involve that particular company. Many assert that these types of contracts put the court reporter's impartiality in

question and lower the overall quality of the work produced by the court reporter or the court reporting firm. As a result of increases in this practice, many have become concerned about the lack of regulation in a field that has so much potential for impact on the judicial system. Because the records produced by free-lance court reporters are an integral part the judicial process, it is argued that legislation is necessary to subject the activities of free-lance reporters or recorders to a higher standard of integrity, reliability, and accuracy.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to establish guidelines and restrictions for "free-lance" court reporters, court recorders, stenomask reporters and firms that offered the services of such reporters or recorders. These types of reporters and recorders would be required to meet certain standards in the performance of their duties and to refrain from certain business practices under the bill. The bill would specifically provide that its intent was not to unduly interfere with fair competition between court reporters or firms where competition did not involve financial arrangements that tend to, or appear to, compromise impartiality. Official court stenographers, recorders, reporters, or stenomask reporters appointed either under the Revised Judicature Act or to serve in municipal court while in the performance of their duties would be specifically excluded from the bill's provisions.

The State Court Administrative Office (SCAO) would be responsible for enforcing the bill's provisions and could do so either through the court recording and reporting board of review or by other administrative means. The SCAO could refuse to issue renewal certificates to certified reporters for violation of the bill's provisions and, for willful violations, could discipline or censure, or suspend or revoke certification.

Registration. Court reporters, recorders and firms, including those from out of state, would be required to register with the State Court Administrative Office through a form that would be adopted by the SCAO. Any rules that were applicable to court reporters and recorders would also apply to court reporting or recording firms. The SCAO could punish failure to comply with the registration requirement with an administrative fine payable to the state general fund. The fine would be prescribed by rule of the Michigan Supreme Court and could not exceed \$500.

Contractual relationships. Reporters, recorders and the owners of firms that employed them would be prohibited from entering any financial relationship that would compromise or appear to compromise their impartiality. Unless he or she disclosed the relationship, a reporter or recorder could not provide or arrange to provide services where he or she was a relative, employee, attorney, or counsel of any of the parties, or was a relative or employee of an attorney or counsel to any of the parties. In addition, a reporter or recorder would be prohibited from providing or arranging to provide services where he or she had a financial interest in the action.

Reporters, recorders and the owners of firms that employed them would be prohibited from entering into a "blanket contract" with parties, litigants, attorneys, or their representatives unless the parties to the action were informed of and consented in writing to the fees that would be charged. A "blanket contract" would be defined as a contract where the reporter or firm agreed to perform all court reporting or recording services for a client on two or more cases at a fixed rate set in the contract. Furthermore, before accepting a court reporting or recording assignment as an independent contractor or employee, a reporter or recorder would be required to get information from the prospective client to determine whether the contract was a prohibited blanket contract. A person or other entity that was a party to a blanket contract who knowingly provided false information to the court reporter seeking such information would be considered to have committed an act that was grounds for discipline or censure. However, the requirements regarding blanket contracts would not apply to contracts for reporting or recording services for courts, agencies, or instrumentalities of this state or the United States.

Duties. The bill would require a reporter or recorder to provide complete, accurate and timely transcripts to his or her clients or the court. However, a portion

or excerpt of a transcript or statement of facts could be furnished if authorized by court order, agreement of the parties, or request of a party.

When selling original transcripts, copies, or other services, a reporter or recorder would be required to charge all parties the same rates for like services. In addition, the charge for a copy of a transcript could not be more than two-thirds of the price of the original transcript.

Reporters, recorders and firms would be prohibited from directly or indirectly giving any incentives or rewards to an attorney, client, or their representatives or agents. However, nominal items that did not cost more than \$25 per transaction or \$100 in aggregate for a recipient in a year would be allowed.

A reporter or recorder regulated under the bill would be required to truthfully advertise or represent that he or she was a certified court reporter and that only a certified individual would be making the record.

Reporters and recorders would also be required to stay "on the record" during a deposition unless ordered by the court or unless all the parties or their attorneys agreed otherwise.

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FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have a minimal fiscal impact on state costs depending upon the increase in workload volume based on the number of freelance reporters/recorders that need to be registered. (4-24-98)

ARGUMENTS:

For:

By defining proper conduct, prohibiting financial conflict of interest, and requiring ongoing professional educational standards the bill will improve the overall quality of the transcripts and records provided by freelance court reporters.

Given the importance of court reporters in providing an accurate record of testimony in legal actions, the increasing practice, primarily on the part of insurance companies, of entering into blanket contracts with court reporting firms is very troubling. These blanket contracts potentially create a conflict of interest, compromise the integrity of the record, and at the very

least, give rise to the appearance of impropriety. Court reporters are expected to be the only impartial participants at a deposition and as such should be above any appearance of impropriety, particularly in their dealings with attorneys and litigants. If court reporters are allowed to enter into blanket contracts with a party or a potential party to a lawsuit, the court reporter will appear to have taken a side and the record made by that court reporter would be tainted.

In addition to the concerns about the conflict of interest and the appearance of impropriety resulting from the practice, a number of complaints have arisen about the lowered quality of the reporting done by some of the reporters or reporting firms working under blanket contracts. For example, there are concerns that in order to make up for the lower rates offered to the contracting company, reporting firms hire cheaper, less qualified reporters, leading to transcripts that are error-ridden, incomplete or not completed in a timely fashion. Or a firm may try to cover the required caseload with fewer reporters, which inevitably leads to scheduling conflicts and occasionally means that depositions scheduled well in advance are forced to be canceled when the court reporter assigned to cover the deposition is unable to attend.

According to testimony, as a result of the actual and potential problems that are attributed to the use of blanket contracts, about ten other states have passed or are considering legislation to prohibit or restrict the practice of blanket contracts. One of the more restrictive state laws instituted in response to this practice is reportedly to disallow the use of transcripts created by a court reporter who is under a blanket contract.

Against:

The bill would interfere with the ability of insurance companies and other businesses that are annually involved in significant amounts of litigation to lower their costs by entering into volume contracts with court reporters and court reporting firms. It seems that whenever insurance companies try to lower costs so that they can decrease their rates, there is an objection that the quality of the product purchased is being lowered.

Although its supporters claim the bill is needed to improve or sustain the quality of the transcripts created by free-lance reporters, as of January 1, 1998, all court reporters, including free-lance reporters, are required to meet the same certification requirements.

As a result, all court reporters should be equally qualified and capable of performing adequate work. Therefore, the assertion that quality is an issue is a smoke-screen. The real issue is whether or not free-lance court reporters and their clients will be allowed to enter into contracts that help both the reporters and the companies that hire them. No one forces either court reporters or the companies into blanket contracts; they enter them because they recognize that the contract is mutually beneficial to both parties.

Since current law requires court reporters to swear an oath that they will be unbiased and will provide accurate transcripts, the bill's attempt to prevent court reporters from being influenced by those who hire them is unnecessary. There is no evidence that the practice of blanket contracting has induced court reporters to violate their oaths. The allegations of an appearance of impropriety or risk of impartiality are hardly sufficient grounds on which to make a law. It is unlikely that making these contracts illegal will truly serve the intended purpose of preventing court reporters from engaging in dishonest behavior. They have already taken an oath; those that will not violate that oath do not need a law and those that will violate the oath will not be less likely to violate it because there is a law. Even if the bill is enacted, honest people will continue to act honestly and dishonest ones will continue to be dishonest.

Response:

These contracts are rarely beneficial to the court reporters who enter them; usually the prices they have to offer the companies are so low that they have difficulty breaking even. Often, because such a large portion of the reporter's business is one client, that client can often dictate its prices. Furthermore, these contracts are hardly as much of a benefit to the companies as they might believe; since reporters charge by the page, one of the ways some reporters deal with the lowered rates is to change the margins of the pages. According to testimony, subtle changes in the margins, font sizes and spacing can significantly increase the number of pages in a transcript. Although most court reporters follow the SCAO guidelines for transcripts, a reporter who has had to accept significantly lower rates as part of a blanket contract could make up the difference by lengthening the transcript.

Finally, it should be noted that the assertion that certification requirements will solve all of the quality problems brought about by blanket contracts is unsubstantiated. The purpose of the bill is not merely to prevent court reporters from violating their oaths; it is intended to prevent court reporters from being

placed in a position where they can be subjected to undue pressure to violate that oath.

Against:

The bill raises many questions and leaves too many things unresolved. For example, the bill should specify due process procedures (appeal options, etc.) for reporters whose certification has been suspended, revoked, or denied for violating the bill's provisions.

POSITIONS:

The Michigan Association of Professional Court Reporters supports the bill. (5-4-98)

The National Court Reporters Association supports the concept of the bill. (5-4-98)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.