

The Real Story: How National Court Reporting Agencies' Contracting and Digital Recording Practices Can Damage Your Bottom Line

What Is “Contracting?”

Contracting is an agreement between national court reporting (CR) agencies and law firm clients – primarily insurance companies – to provide preferred client rates in exchange for which the law firm and/or insurance companies agree to give the national CR agencies all of their litigation work nationwide. These contracts involve depositions that take place even in states where there are anti-contracting laws, such as in Massachusetts.¹

How Does Contracting Impact My Practice?

Some lawyers (and law firms) are required to work with their clients' designated “preferred providers of reporting services,” which are generally national agencies. They are no longer allowed to work with *their* preferred, trusted CR agency or court reporter. This financial exchange creates an unfair advantage, in that law firms may receive vastly different bills for similar services, causing confusion and wreaking havoc on discovery budgets. In California, opposing counsel cried foul when they discovered that noticing parties were being billed at lower rates. AB 1197 became law in January 2016, amending California Code of Civil Procedure §2025.220(a) to ensure fairness and transparency.²

Contracting continues to be employed by these national CR agencies as a way to gain control of the marketplace and shut down smaller agencies that struggle to compete with their sales and marketing divisions. This is further complicated by the fact that national CR agencies are typically owned by venture capitalists, not the court reporters who must maintain the highest ethical and professional standards. Court reporters have no control over what these national CR agency owners do, including cost shifting; therefore, many are refusing to work for these agencies.

Enter “Digital Recording” at Depositions

In Massachusetts, national court reporting agencies are attempting to introduce digital recording into the deposition arena in place of credentialed court reporters. Contrary to Rule 30 language, they are encouraging lawyers to modify their deposition notices to include unlicensed personnel offering digital recording services as a method of capturing and transcribing sworn testimony.

Why are they doing this? The *real* story is that it has been increasingly difficult for them to enlist the services of local court reporters they desperately need to cover their book of contracted business with insurers. They claim it is because of a nationwide court reporter shortage, but the reality is that it is *their* shortage. Highly-trained, experienced court reporters are often choosing not to work for them because of their business practices, i.e., contracting with insurance carriers in this state (which flies in the face of our anti-contracting legislation M.G.L. C. 221, S. 91D9b -- see below); their offering of low rates to court reporters; and price-capping what reporters make at depositions on copy orders in order to pocket the difference for themselves.

¹ Chapter 146 of the Acts of 2002, AN ACT RELATIVE TO CONTRACTS BETWEEN COURT REPORTERS AND AN ATTORNEY, PARTY OR PARTY HAVING A FINANCIAL INTEREST IN AN ACTION

² California Notices of Deposition require statements disclosing (1) the existence of a contract between the noticing party or a third party who is financing all or part of the action, and (2) 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.

Massachusetts Rules of Civil Procedure – Rule 30

Rule 30(b)(4) specifically states that depositions are to be taken by stenographic or stenographic *and* audio-visual means. The only way a digital recorder can be present at a deposition is by bringing a motion before the court or having all parties enter into a written stipulation. In Massachusetts, it is not permissible to simply change the language on your deposition notice. In short, you do not have to agree to opposing counsel's desire to bring in a digital recorder instead of a qualified, certified, competent court reporter.

Failing Business Model = Increased Pressure to Win You Over

Since these national agencies are unable to solicit enough qualified court reporters to cover their calendar, they are attempting to circumvent multiple codes and laws by requesting attorneys and their insurance defense clients modify the Rule 30 language in deposition notices to allow them to send digital recorders; basically, suggesting you ignore the Massachusetts Rules of Civil Procedure. They are employing well-trained salespeople to persuade attorneys and staff to align with them in a desperate attempt to hold onto their market share and continue to grow their business, even willfully providing bad advice and inferior service. Why? Because their present business model is failing them and using digitals is more lucrative for them.

If you agree to bring in a digital recorder, the person who walks into your deposition with merely a laptop and some microphones will more than likely be unlicensed, uneducated in legal proceedings, and someone who has had only hours of training. After your deposition, the audio will be sent via Internet to a typist who is located elsewhere in the world. He/she was not at your deposition but will type your record from the audio file, and will simply add a disclaimer at the end of your transcript that the proceedings were transcribed to the best of his/her ability from an audio recording. In this scenario, you will undoubtedly encounter gaps in your transcript due to equipment failure, low audio, and/or background noise.

Protect Your Litigation: Don't Fall for Slick Sales Pitches

With many court reporters refusing to work for agencies that utilize questionable business practices, it leaves the marketplace wide open for lawyers and law firms to begin cultivating relationships directly with local reporters and credentialed court reporting firms. Per Massachusetts Rules of Civil Procedure, Rule 30, you have the right to demand that a court reporter be present at your clients' depositions, regardless of what opposing counsel requests. You do not have to be left vulnerable to the pitfalls of cost-shifting and digital recording.

As a successful litigator, you will be told that digital recording is technology that is cutting edge, brand-new, or the wave of the future. The concept of recording audio and having it typed up by one or more persons is not innovation. It is backward technology. Do not be won over by claims that a court reporter is unavailable, and do not fall for sales pitches by any company that cares only about its own bottom line under the guise of caring for yours. Protect your client, protect your litigation, and protect yourself: Demand the use of a certified court reporter every time.

For more information on what you can do to preserve Rule 30, email contact@mcraonline.com