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FROM THE PEOPLE WHO BROUGHT YOU SAFECO FIELD: SAFECO COURT REPORTERS!

BY GREG MUNRO, MISSOULA

Like most Montana trial lawyers, Paul Ryan had never heard of Spherion Deposition Services – that is until his injured client, her husband, and two daughters were all deposed by defense counsel hired by Safeco. Paul, a Missoula trial lawyer, didn't know the out-of-town court reporter designated by Missoula insurance defense counsel to report the depositions. She was, to his knowledge, a western Montana free-lance court reporter. Because he considered her to be disinterested and have no particular relationship to any party, he had no objection to her reporting the depositions. In fact, as is often done for convenience, Paul then asked her to report the depositions he took of the defense witnesses.

After the depositions, Paul happened to talk to a Missoula court reporter who surprised him by telling him she had previously been asked by Spherion, a court reporting service in San Diego, California, to report those depositions and had refused. She revealed that Safeco had contracted with Spherion to provide exclusive court reporting services on Safeco cases in the region. Spherion then contacts local court reporters to report the depositions under Spherion's contract with Safeco and to provide the transcript disk to Spherion. In essence, under the terms of the work with Spherion, a cooperating local reporter supplies the diskette containing the reporting to a party in interest (Safeco's agent, Spherion) thereby abdicating control of production, security of information, distribution, billing or responsibility for ensuring that all services are comparable to all parties. This would seem to severely compromise the reporter's independence. As a result, Spherion has had

to do much searching to find local reporters willing to be compromised in that manner. Safeco dictates to insurance defense counsel that they may only use court reporters chosen by Spherion. Defense counsel merely contacts the nearest "Spherion" (read: Safeco) reporter who appears at the deposition and reports it.

When the deposition is over, the court reporter provides the transcription disk to Spherion in California, which pays the court reporter, prints the transcripts with its logo, and ships them to the parties. Spherion charges the shipping to the parties and bills each party for its deposition transcripts. The local court reporter does not know how much the parties are billed for the depositions and neither does the defense attorney because the Spherion bill apparently goes directly to Safeco. The consequence is that no one knows how much Safeco pays for its depositions.

In the words of an old science teacher, "It is intuitively obvious to even the most casual observer" that there is likely a financial incentive for Safeco to be contracting all of its court reporting services. The consequence of any such financial incentive reminds one of the old joke about selling below cost and making it up in volume: Spherion's billing must garner enough money to 1) adequately pay the local court reporter, 2) make a profit for Spherion (the added entrepreneur), and 3) allow Safeco some significant break in its deposition transcript expense. This would be possible if the plaintiff pays a different, i.e., higher than normal rate per page, for deposition transcripts.

Plaintiff's counsel is not advised that there is a financial arrangement

between the court reporting service and Safeco or whether the injured plaintiff is paying more than normal per page for the transcripts. Indeed, plaintiff's counsel does not even know Spherion, the contracting court reporting service, is in the picture until the transcripts and bill arrive.

Paul Ryan received his copies of the six deposition transcripts C.O.D. and with unusual delay. It is common in Montana cities for the court reporters to deliver deposition transcripts to local firms free of charge. Because Spherion is located in California, they charge substantial shipping fees C.O.D. for the transcripts. Paul was interested to see that a logo for "Spherion Deposition Services" appeared on the front page of each deposition and that every transcript page contained that company's name and toll-free telephone number in large letters at the bottom. The address on Spherion's logo was San Diego, California. Paul would not have known how the California company happened to be involved in the depositions or how they came into possession of the transcripts absent the tip from the Missoula court reporter. He received the bill even later after he paid the C.O.D charges to get possession of his copies of the transcripts. It appears he was billed \$3.19 per page for work that normally costs \$1.90 to \$2.00 per page. One thing is certain: The arrangement takes advantage of the plaintiff.

This practice is not new. Like seven-year locusts, it comes around in various forms. Travelers Insurance Company has, in the past, been known to attempt to cut costs by means of exclusive reporting contracts. Court reporters believe there are other companies engaging in the

practice. When opposition to the practice began to build in 1998, and it appeared a change might be made to the Rules of Civil Procedure, the Travelers, at least temporarily, reverted to allowing defense counsel to use reporters of their own choosing. However, it has been reported that recently, Atkinson-Baker, a court reporting service that engages in contracting with Travelers, again appeared in depositions involving Travelers Insurance Company in Montana.

Court reporter JoAnn Bacheller of Billings observed in the *MONTANA LAWYER* in May of 1998:

Insurance companies are large consumers of court reporting services. It comes as no surprise, then, that insurance companies would bring the same cost-containment concepts used in both managed health care and captive representation to the court reporting profession. But as the deals are struck and the court reporters become tied contractually to parties in litigation, many attorneys representing plaintiffs and defendants are alarmed.

The alarm is appropriate. Disinterest and neutrality historically have formed the foundation of the court reporting profession. Now, instead of serving in an impartial capacity, reporters are being asked to pledge allegiance to, and become part of, an advocacy team.

One assumes that Safeco would defend this practice, so we must ask: What is wrong with an insurer involved in litigation contracting all of its deposition reporting services in this manner? First, under Federal Rule 28, court reporters are officers of the court. That Rule, entitled, "Persons Before Whom Depositions May Be Taken" provides in part:
... depositions shall be taken

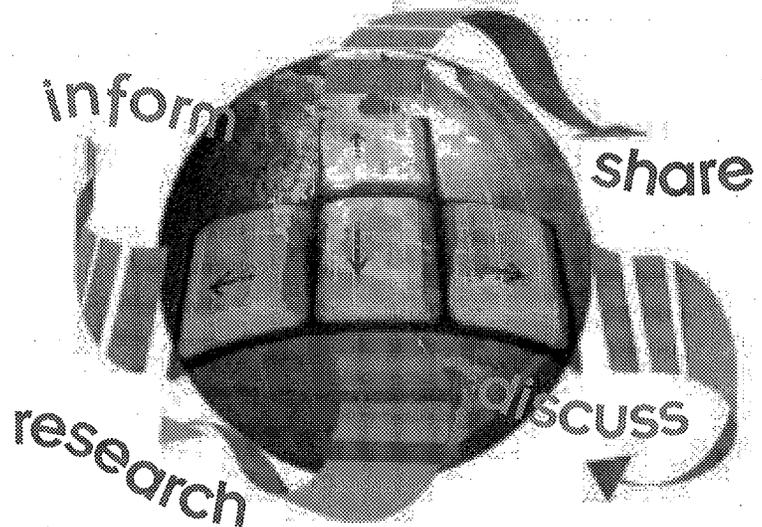
before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31, and 32 in-

cludes a person appointed by the court or designated by the parties under Rule 29.

Montana Rule 28 says that "depositions shall be taken by a person authorized by the laws of this state to administer oaths." Federal Rule 29 provides that, by stipulation the parties can agree that depositions may be taken before any person, at

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any time or place, or upon any notice, and in any manner and when so taken may be used like other depositions," but under Federal Rule 28, above, that person is deemed an "officer". More importantly, Rule 28 (c) of both the Montana and Federal Rules provides:

Disqualification for Interest.
No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Under both federal and state rules, court reporters are deemed to be officers of the court (regardless of whether they are official court reporters) and courts, attorneys, and parties have an expectation that the reporting of testimony is being done by one who owes the obligations of a court officer and who is disinterested and, specifically, not financially interested. A person who is employed part- or full-time by an entity that has a contractual relationship with a party litigant to provide reporting or other court services is not financially disinterested.

Accordingly, when the conflict over insurance company contracts with court reporters surfaced in 1998, the American Judges Association adopted a resolution endorsing "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 the public's faith in the fairness and impartiality of the judicial system." According to Aaron Frey at the National Court Reporting Association (NCRA), 28 states have adopted some form of regulation restricting such court reporter contracting. In eight of those states, the highest court has restricted the practice.

For court reporters, the practice appears to be entirely unethical under the National Court Reporting Association (NCRA) Code of Ethics which provides:

- 1) Be fair and impartial toward each participant in all aspects of reported proceedings, and always offer to provide comparable services to all parties in a proceeding;
 - 2) Be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the Member shall disclose that conflict or potential conflict;
 - 3) Guard against not only the fact, but the appearance of impropriety;
 - 4) Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding;
- * * *
- 7) Determine fees independently, except when established by statute or court order, entering into no unlawful agreements with other reporters on the fees to any user;
 - 8) Maintain the integrity of the reporting profession;
 - 9) Abide by the NCRA Constitution and Bylaws.

In the landmark case of *In the Matter of the Rules of Professional Conduct*, 2000 MT 110, the Montana Supreme Court found many of the insurers' cost containment procedures that interfered with insurance defense counsels' exercise of independent judgment and duties under the Rules of Professional Conduct violated ethical rules and constituted the unauthorized practice of law. When an insurance company dictates the court reporting service that the lawyer will use, the same specter of interference

in independent judgment arises.

For plaintiffs, the question is whether counsel meets the duty of zealous representation of a client if he or she does not inquire whether the court reporter is independent and treating each party equally or whether the reporter is compromised possibly to plaintiff's financial detriment. Can counsel ignore the possibility that the reporting service may bill the plaintiff additional fees to subsidize cheaper deposition transcripts for the defendant's insurer? Even if there were not a cost differential, is it okay to agree that depositions necessary to your client's case will be reported by an officer of the court with financial ties to the tortfeasor's insurance carrier? Defense attorneys also oppose this practice. Every lawyer has his or her favorite court reporters, those that the attorney feels are competent, objective, and comfortable to work with. They bristle at being ordered to use a reporter who may be unknown to them and may be located halfway across the state from where they are taking the deposition. While plaintiffs' counsel are free to pick the best court reporter they can find, defense counsel find themselves relegated to the court reporter selected by an insurance company for being willing to compromise his or her integrity and violate the code of ethics.

The Montana Trial Lawyers Association and all plaintiff's lawyers in the state already owe a debt of gratitude to many Montana Court Reporters Association members in the state who have steadfastly refused to contract with Spherion and other court reporting services attempting to implement their agreements with Safeco and other insurers by roping in local court reporters. We owe particular thanks to reporters Melody Jeffries of Missoula and JoAnn Bacheller of Billings who have been stalwarts in not only refusing to compromise their integrity by engaging in the offending practices but have

worked so hard to alert the MCRA membership to violations of the code of ethics, to effect a change in the rules to prohibit insurance company/court reporting contracting in Montana, and to bring the matter to the attention of the attorney associations in the state and the federal and state civil rules committees.

The plaintiffs' bar has the power to make a real difference in this conflict. MTLA members should concentrate on the following actions:

- 1) Before accommodating defense counsel in setting defense depositions in a case involving an insurer that may be contracting court reporting services, inquire whether the court reporter will control the production, distribution, and billing of the work. If not, who will? Your client has a right to know whether the "officer" authorized to administer oaths is actually tied by financial arrangement to one of the parties. If so, you can refuse to accommodate the setting of the deposition and tell defense counsel that they should convey your position to the insurer they represent. Chances are they will be more than happy to do so.
- 2) If you have any doubt about whether the reporter is working for a company contracting with the insurer, make a record in a letter that you are proceeding with the

depositions under the belief that the reporter has no hidden direct or indirect contractual relationship with agents of either party and make the same record at the start of the deposition.

- 3) If counsel simply notices up the deposition without agreement with you and you believe the court reporter to be delivering the disk to a reporting company contracting with the insurance carrier, ask the court reporter or defense counsel on the record at the start of the deposition whether the court reporter will be controlling the production of transcripts, security of information, distribution and billing of the work. If not, inquire who is and object on the record under Rule 30 (c) M.R.C.P. That rule provides that "All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it . . . shall be noted by the officer upon the deposition." If you make the record and object, you have preserved an issue to bring before the court, and defense counsel cannot be certain that the deposition is going to be usable. Hopefully, good defense counsel will advise the insurer of the problems created by the insurer's misguided effort at cost containment.

- 4) The MTLA should propose to the federal and state rules commissions a language change that would, in the language of the American Judges Association, bar "parties in interest from establishing any direct financial or other relationships with court reporters which could create an appearance of partiality of the judicial system." MTLA Board members Syd McKenna and Jim Manley are in the process of identifying language from other states that have adopted rules banning the practice so that a proposal can be made to the rules commission. When the rule change is published for public review and comment, individual members should express their support for the change.
- 5) MTLA needs to educate its membership about the issue and take a public stand on it. Hence, the board passed a resolution at its last meeting, and by this article, MTLA aims to sound the alarm for the membership.
- 6) Plaintiffs' counsel need to see this through and not drop the issue even if the offending insurers wisely stop their contracting with local court reporters through such entities as Spherion. The problem should be dealt with now before the carriers find another angle to tamper with the independence of court reporters. ♦

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