

O'BRIEN  BAILS

Thoughts on
Court Reporter Ethics
from a Court Reporting Firm Owner

By Dawn Houghton

About Dawn Houghton

Dawn Houghton is the owner of O'Brien & Bails Court Reporting and Video, with headquarters in Kalamazoo, Michigan, and offices in Grand Rapids, Lansing, Jackson, Bloomfield Hills, Troy, Mt. Clemens, Novi, Battle Creek, Livonia and Southfield.

With 32 years of freelance reporting experience, Dawn is passionate about legal technology. That is why O'Brien & Bails offers the newest technologies, such as internet streaming, realtime reporting, video syncing and web depositions. She shares her knowledge and experience with court reporting technology on the O'Brien & Bails blog found at <http://obrienandbails.com/blog/>.

One of Michigan's oldest and most reputable court reporting firms, O'Brien & Bails is known for quality and dependability. Their prompt, courteous and reliable court reporters ensure a pleasant legal deposition experience and an excellent transcription to follow. All reporters are state certified, each with a minimum of 18 years experience as a court reporter.

Allow O'Brien and Bails to handle all of your court reporting needs, even when you travel out of town. Our large network of reporters across the state and the country allows us to easily make arrangements for your next deposition. O'Brien & Bails' professional office staff will be pleased to assist you in arranging and confirming your deposition today.

Try our online deposition scheduler and enjoy the convenience of scheduling depositions 24 hours a day, 7 days a week.

Thoughts on Court Reporter Ethics

From time to time, the issue of professional ethics arises in the field of court reporting. Over the years, we have seen situations that might appear unethical, or at least seem to be in a gray area. As court reporters, we care about our profession and want it to thrive for many years to come. Abiding by standards of ethics allows us to protect the responsibility we have been given to be the keepers of the record and to stay neutral and impartial while carrying out our responsibilities.

This report is a compilation of some of the articles we've released over the past few years on this topic.

QUESTIONS OF ETHICS

The issues that raise the most questions often focus on three areas.

- I. Responsibilities of court reporters and court reporting firms
- II. Contracting and its effects on fair pricing and impartiality
- III. Gift-giving

These questions arise again and again. We, as court reporters, should take these matters seriously and strive to follow a standard that is both legal and ethical.



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I. RESPONSIBILITIES OF COURT REPORTERS AND COURT REPORTING FIRMS

The National Court Reporters Association has devised a standard code of professional ethics and asks reporters to agree to and abide by these standards. This code is a good reference to consult in any situation that may involve potential ethical issues.

NCRA Code of Professional Ethics

A Member Shall:

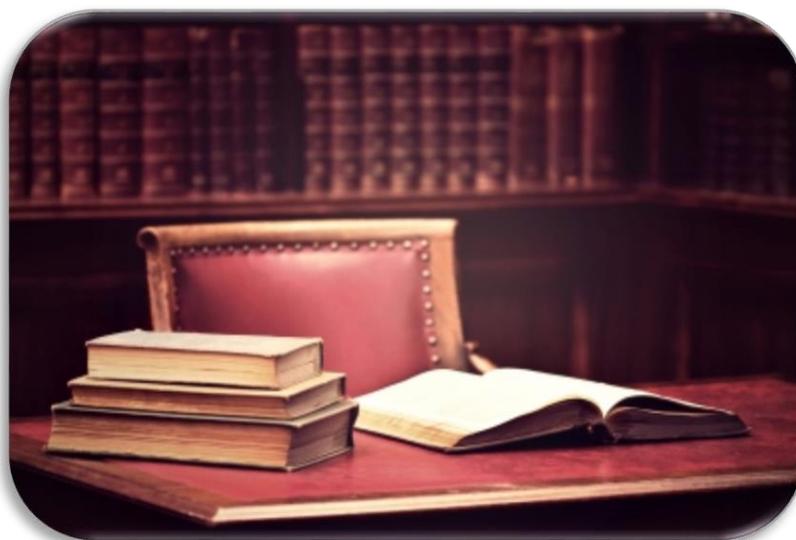
- Be fair and impartial toward each participant in all aspects of reported proceedings, and always offer to provide comparable services to all parties in a proceeding.
- Be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the Member shall disclose that conflict or potential conflict.
- Guard against not only the fact but the appearance of impropriety.
- Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding.
- Be truthful and accurate when making public statements or when advertising the Member's qualifications or the services provided.
- Refrain, as an official reporter, from freelance reporting activities that interfere with official duties and obligations.
- 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.
- Refrain from giving, directly or indirectly, any gift or anything of value to attorneys or their staff, other clients or their staff, or any other persons or entities associated with any litigation, which exceeds \$150 in the aggregate per recipient each year.

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Nothing offered in exchange for future work is permissible, regardless of its value. Pro bono services as defined by the NCRA Guidelines for Professional Practice or by applicable state and local laws, rules and regulations are permissible in any amount.

- Maintain the integrity of the reporting profession.
- Abide by the NCRA Constitution & Bylaws.

Not only is the NCRA Code of Professional Ethics a guideline for court reporters, it is also a declaration of what attorneys and other members of the legal profession can expect from court reporters. If the legal community is to continue to put their trust in us, we need to consistently demonstrate our integrity and commitment to ethical professional behavior.



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Ethics Guidelines for Court Reporting Firm Owners

It has been said that it is easier to know how to do the right thing if you have a code of ethics to follow. In court reporting, there is a code of ethics for court reporters but not necessarily a written code for court reporting firm owners. Owners of court reporting firms have an entirely different set of ethical situations that are likely to arise. We've outlined several ethical codes that could be applied by court reporting firm owners.

Since day one, these ethical codes have been a foundation from which I've run my court reporting firm.

A court reporting firm and its owners shall:

1. **Protect the record.** Court reporters are officers of the court. Court reporters and firm owners must ensure that the firm and the firm's court reporters are independent, impartial keepers of the record.
2. **Disallow any appearance of impropriety.** Disclose any contracts or agreements with any party to the case on the record at each deposition, including special rates charged to the party to the contract or agreement. This is required in the State of Michigan pursuant to MCL 600.1490-1493.
3. **Charge each party in the litigation fairly and according to the laws of the state in which you are reporting for transcripts and other court reporting fees.** Reporters in the State of Michigan must follow the 2/3rds rule for transcripts as set out in MCL 600.1491 (2)(b), i.e., you cannot be charged more than 2/3rds the cost of the original for a copy.
4. **Require a court reporter to transcribe back-ordered transcripts.** Only proceed with transcribing the reporter's notes if the reporter is unavailable due to death, disability, or if the reporter cannot be reached after due diligence. If the firm has to have another reporter transcribe the proceedings, indicate on the certificate page the identity of the transcribing reporter to sustain the integrity of the record. **Never indicate the original reporter transcribed the deposition if they have not done so.**

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5. **Do not sell the reporter's transcript unbeknownst to the reporter for the financial benefit of the firm owner at the expense of the court reporter.** As keeper of the record, the reporter is an officer of the court and should be fairly compensated.
6. **Regularly reinforce the practice of ethical behavior with reporters and provide ethics training.** It is important for a firm's reporters to know their firm owner is 100% behind the ethical behavior of their firm.
7. **Educate clients regarding the consequences of excessive gift giving and the potential tax implications to their client of such gift giving.** The gift may be considered as property of the attorney's client, not property of the attorney or staff. There may also be tax implications to an attorney's firm if an attorney and/or legal assistant for the firm is accepting gifts and not reporting such on their tax returns.
8. **Refuse to assist in deposition or trial strategy for either party to a lawsuit while simultaneously providing the court reporting services for the case.** There should be a complete separation of the trial technology business and the court reporting services business so there is no incidence where the court reporting firm appears to be working for one side to the detriment of the other in a case.

Firm owners set the culture in a firm. Court reporters look to firm owners to set the standards by which they will behave in their day-to-day performance of duties and responsibilities. Therefore, it is important to the profession that firm owners set the bar high and exhibit strong ethical behavior.

II. CONTRACTING AND ITS EFFECTS ON PRICING AND IMPARTIALITY

Within the last 20 years, a controversial practice has cropped up in the court reporting profession. Some court reporters have begun contracting exclusively with companies and organizations for large amounts of services. Many court reporters are not in favor of such contracting for ethical reasons.

The trend is found with companies that consume large volumes of court reporting services, such as insurance companies, hospitals and large corporations. These entities sometimes contract with specific court reporters directly.

Traditionally, court reporters are hired by attorneys representing clients involved in a lawsuit. With contracting, the practice has been that these large corporations and organizations are contracting directly with court reporting firms, rather than through their attorneys. The reporting firm who holds the contract will then deliver all the court reporting services needed by the company or organization.

This practice raises ethical questions that are frequently debated in the court reporting industry. Concerns involve the influence a contract-holder may have over the unbiased officer of the court, the court reporter. While this type of bulk buying of services is common in other industries, for court reporters, it may affect, or have the appearance of affecting, the specific duties and requirements of an officer of the court.



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Court Reporter Impartiality

One of the highest responsibilities court reporters hold, as officers of the court, is to maintain impartiality.

As an officer of the court, a court reporter makes an official record in the presence of a judge, or outside of a judge's presence. Officers of the court have a duty to be impartial parties. Court reporters are charged with the responsibility of creating an unbiased, true and accurate official record of proceedings.

With the practice of offering contracts to insurance companies and companies needing large amounts of services, that impartiality comes into question. Can a court reporter who is engaged in a special-rates contract with one party be considered impartial, especially if the contract is not disclosed to the other parties in the case? Contracting runs the risk of placing a court reporter in some potentially difficult positions.

For instance, if an attorney feels a portion of the record has not been transcribed accurately and requests changes be made to the transcript, traditionally a court reporter would check the transcript, compare it to the steno notes, and make a determination if an error has been made. If the reporter feels no error has been made, the reporter stands by the transcript as the official record.

With court reporters who contract large amounts of services to one company or organization, this situation may put the court reporter in an extremely difficult position. The court reporter may feel a certain level of obligation to the contracting attorney to make changes to the record. The reporter might fear jeopardizing the contract, which is likely worth thousands of dollars, maybe hundreds of thousands of dollars, to his or her court reporting firm. Might there be undue pressure placed on the court reporter in this type of circumstance that places bias on the court reporter? Is even just the appearance of undue influence a problem for the court reporting industry?

This scenario and others like it may cause there to be questions as to the true impartiality of a contracting court reporting firm and the reporters who are delivering contracted services.

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Court Reporters, Contracts and Ethics in Pricing



Pricing practices are a cause for concern for many court reporters. Court reporters and/or court reporting firms who enter into contractual agreements with large companies and organizations often bid a much lower price for services normally charged to other attorneys. Contracting and pricing practices can become an ethical issue when a court reporter then raises the price charged to opposing counsel in order to make up for the discounted price given to the contracting party. In this case, the attorney ordering a copy is paying far more than they would if there were not a contract in place.

Is this fair? Should opposing counsel be expected to make up the shortfall that the court reporting firm is experiencing? Ethically, if a court reporting firm bids and receives a contract of a large amount of services, the lower pay rate is a consequence for the reporting firm to bear, not opposing counsel who is not party to a contract with the court reporter.

In Michigan, there is statutory language which dictates how much a reporter can charge for a transcript copy as opposed to an original transcript.

MCL 600.1491 states "A court reporter, court recorder, stenomask reporter, or owner of a court reporting firm shall not ... charge more than 2/3rds of the price of an original transcript for a copy of that transcript."

For example, if the ordering attorney pays \$2.25 per page for an original transcript, opposing counsel should only be charged \$1.50 for the copy of the transcript.

But how are you to know if you are being charged the fair 2/3rds price?

MCL 600.1491(1)(b) provides that a court reporter may not "[e]nter into a blanket contract with parties, litigants, attorneys, or their representatives unless all parties to the action are informed on the record in every deposition of the fees to be charged to all parties for original transcripts, copies of transcripts, and any other court reporting services to be provided."

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There is much speculation as to whether contracting court reporting firms are indeed disclosing this information on the record. You and your client have the right to know what fee the ordering attorney is paying so that you can discern whether you are being charged fairly for your transcript copy. If a statement has not been disclosed on the record, it would be a good idea to make it a practice to ask the court reporter at a deposition whether they or their firm is engaged in a contract with any party in the case. If they are, you have the right to ask how much that party is being charged for court reporting services. Sometimes a court reporting firm does not keep the individual court reporter apprised of contracts or special arrangements. A telephone call to the court reporting firm may be warranted to inquire.

So that there is no question as to what constitutes a contractual agreement, MCL600.1490(1)(a) defines a “[b]lanket contract” as “a contract under which a court reporter...or court reporting firm agrees to perform all court reporting or court recording services for a client for two or more cases at a rate of compensation fixed in the contract.”

Contracting raises many ethical issues. You will want to check the statutes in your state to see if such rules apply. This practice of charging more for a transcript to opposing counsel to make up for a contract shortfall is a form of price gouging being exercised by some contracting court reporting firms. The best way an attorney can ensure he or she is not one of the victims of this questionable practice is to ask the court reporter whether there is a contract between the court reporting firm and the opposing entity in each case. If there is, then a calculation can be run to see if fair prices are being charged for transcripts. If you suspect you are being treated unfairly, you may have the ability to file a complaint with your state licensing entity. In Michigan, complaints against court reporters and recorders should be made, in writing, to the Court Reporting and Recording Board of Review, P.O. Box 30048, Lansing, Michigan 48909.

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III. GIFT-GIVING

Recently there has been an increase in the number of gift-giving or reward programs offered to attorneys and their staff for scheduling depositions with a particular court reporting agency. The gifts clearly are made in order to influence the selection of court reporting agencies when scheduling depositions. There is an ongoing debate among court reporters whether this practice is ethical and whether it begins to erode the industry's reputation for operating with high integrity.

Taking a look at the question from the vantage point of a law firm and its staff, receiving these gifts and rebates presents several ethical questions. Let's say a legal assistant is offered gifts, such as \$25 gas cards, a \$250 shopping spree, maybe even an iPad if they book a certain number of depositions with a particular court reporting firm. This type of situation raises several questions of ethics.

- Who does the gift belong to?
- Should the attorney's client be entitled to a reduction in fees to reflect the cost of the gift or are the attorney's clients entitled to the gift itself?
- How does an attorney know his or her client is not overpaying for the reporting fees that cover this marketing practice?
- How does an attorney know if they are being overcharged for transcripts to cover the cost of these reporting rewards programs?



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What does the ABA think is ethical?

Someone pays for those enticing gifts, kickbacks and rebates. And the consumer, including the lawyer, is unprotected from the loss without even knowing it. The American Bar Association, in its published Opinion 278, states that a lawyer should not accept a gratuity from anyone without the client's consent and that the gratuity belongs to the client.

What does NCRA think is ethical?

The National Court Reporters Association has come out with an opinion on the ethics of such activities from the viewpoint of the court reporter in its "Ethics First" campaign. In 1993, NCRA adopted as part of its Code of Professional Ethics a policy that prohibits giving excessive gifts to attorneys, clients, witnesses, insurance companies, or other persons or entities associated with the litigation. The original policy set a limit of up to \$25 in value per occurrence and \$50 in aggregate per person per year. The limit later was set at \$150 per recipient per year.

The policy was established because the NCRA Board of Directors believed that the practice of providing gifts, rewards, or incentives to attorneys, clients, or their representatives or agents undermines and dilutes the integrity of the reporting profession and the status of the reporter as a neutral and impartial officer of the court. Giving excessive gifts and incentives can create, in the eye of the public, the appearance of partiality or favoritism on the part of the reporter towards the recipient.

The Board of Directors in 2008 asked the Committee on Professional Ethics (COPE) to review the policy. As a result of that process, the association's policy on gift giving was reaffirmed, and COPE Advisory Opinion No. 45 was issued to clarify the policy. In 2011, at COPE's recommendation, the policy on gift giving has been revised to prohibit all gifts, regardless of their value, given as an incentive for future work.

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What Constitutes a Gift?

To further define its position, NCRA recognizes that gifts of nominal value, such as pens, pencils, coffee mugs and other advertising paraphernalia or modest forms of meals and entertainment do not compromise the reporter or firm's appearance of impartiality and are permissible. However, NCRA has now chosen to distinguish gifts that are for marketing purposes or to thank clients for past work versus gifts that are given in exchange for future work.

The amount of a gift is measured by its retail or fair market value, that is, what the recipient would reasonably expect to pay if they were to purchase the gift for themselves from generally accessible sources. The actual cost incurred by the firm or individual providing the gift is irrelevant.

Most reporters understand their role in the legal system requires neutrality and impartiality. Offering incentives with high dollar values could begin to chip away at that reputation of ethical behavior that court reporters earn through fair practices. At O'Brien and Bails, we do not offer incentive gifts to capture more business.

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ETHICS MATTER

The court reporting industry is a long-standing and well-respected profession. That reputation has been earned by court reporters consistently exhibiting high levels of integrity and ethics. Court reporters are trusted with the responsibility of being the keepers of the record, and have proven to be worth the trust that is placed in them. By taking great care to ensure high standards of ethics continue in the field, each court reporter and court reporting firm will help strengthen this level of trust in our profession.

