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April 26, 2007

Pauline C. May, Chairperson
State of Nevada
Certified Court Reporters Board
800 North Rainbow, Suite 208
Las Vegas, Nevada 89107

Dear Ms. May:

You have requested an opinion from this office regarding two matters concerning certified court reporters/electronic recorders. The first matter involves the fees that a certified court reporter may charge; the second concerns a certified court reporter's power to administer oaths over the telephone or other electronic means.

QUESTION ONE

Is a certified court reporter bound by the rates and fee schedule in NRS 3.370 when that reporter's services are requested by one or more of the parties in a civil case?

ANALYSIS

According to the information you have supplied, freelance (i.e., non-official) reporters are being hired by either private parties or by the court to perform services that are identical to the duties of the official court reporter. Sometimes these services are performed in conjunction with the official court reporter; other times they are performed independent of the official court reporter. For example, freelance reporters are sometimes hired to perform additional work that the official reporter cannot do, such as providing daily copy transcripts or real-time translation services.

The fee structure described in NRS 3.370 is complex with several contingencies present. However, this fee structure is only applicable to the official reporter or the official reporter pro tempore as that person is described in NRS chapter 3. NRS 3.370(1); see also NRS 3.320, NRS 3.340 (describing the official reporter and official

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reporters pro tempore). Thus the core question is whether the certified court reporter is acting in either capacity.

The judges of each district court may appoint one certified court reporter to be the official reporter of their department. NRS 3.320(1). The court may designate an official reporter pro tempore if the official reporter has been excused for good cause. NRS 3.340. The reporter pro tempore is entitled to the same compensation as the official reporter, and must also take the constitutional oath of office. NRS 3.340, 3.350.

Based on the information you provided, the certified court reporters in question are "freelance" reporters; that is, they are not the courts' official reporters appointed pursuant to NRS 3.320. Therefore the fee schedule in NRS 3.370 will only apply to them if they are official reporters pro tempore as described in NRS 3.340.

These statutes do not contain any exception or alternative procedure for the designation of official reporters pro tempore. If the certified court reporter is designated by the court and sworn in as an official reporter pro tempore, the reporter is clearly bound by the fee schedule in NRS 3.370. NRS 3.340. Conversely, if the reporter is hired by one or both of the parties, but is not designated as an official reporter pro tempore as provided in NRS 3.340, the reporter is not bound by NRS 3.370.

CONCLUSION TO QUESTION ONE

A certified court reporter is not bound by the rates and fee schedule in NRS 3.370 when that reporter's services are requested by one or more of the parties in a civil case.

QUESTION TWO

Is a certified court reporter bound by the rates and fee schedule in NRS 3.370 when that reporter's services are requested by the court in a civil case?

ANALYSIS

Based on the information you provided, it appears that the statutory procedure for appointing official reporters pro tempore is not always being followed. Thus a situation may arise where the freelance certified court reporter is requested by the court to act as an official reporter, but the reporter has not been designated and sworn in as an official court reporter pro tempore as provided for in NRS 3.340 and 3.350.¹

¹ This opinion does not contemplate the situation presented in *Molezzo Reporters v. Patt*, 94 Nev. 540, 542, 579 P.2d 1243, 1244 (1978), where the court reporter was hired by a private litigant, but in one instance, certain services were ordered by the court. In that case, the Nevada Supreme Court held that all the parties and their counsel should be jointly and severally liable to the reporter. *Id.* at 542, n. 2. In contrast, this opinion assumes a situation where the court reporter is being "hired" by the court such that the court and the reporter intend that the county will be liable for the reporter's fees.

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The clerk² of the Supreme Court of Alabama addressed a similar situation in *Opinion of the Clerk*, 568 So.2d 1223 (Ala. 1990). The clerk concluded that a freelance reporter who undertakes to perform the duties of the official court reporter also necessarily assumes all the burdens and responsibilities of the official court reporter, including the fee schedule. *Id.* at 1224. The clerk reasoned that a freelance reporter should be deemed a de facto official reporter if the functions and duties performed are the same as those required of the official reporter. *Id.* at 1223-24.

The clerk limited this opinion to the situation where an indigent criminal defendant is entitled to a transcript at state expense, because the opinion requester was the state comptroller who was responsible for approving such expenditures. *Id.* at 1224. Nevertheless, this reasoning is applicable to other contexts, particularly so where the court, rather than the parties, requests the reporter. Under NRS 3.340, the court may "designate" an official reporter pro tempore. Therefore, if the reporter is requested by the court with the expectation that he or she will be performing the duties and functions of the official reporter, then the reporter is a de facto official reporter pro tempore and is bound by the fee schedule in NRS 3.370.

The reporter's failure to take the oath of office as required by NRS 3.350 will not free the reporter from the requirements of NRS 3.370. The Nevada Supreme Court explained long ago: "mere irregularities which do not affect the final result . . . are not vicious." *Stinson v. Sweeney*, 17 Nev. 309, 321, 30 P. 997, 1000 (1883) (internal quotations omitted). In *Stinson*, an unsuccessful candidate for sheriff argued that certain votes should be excluded because the inspectors for those districts failed to take the official oath. *Id.* The court rejected this argument, noting that there was no challenge to the validity of the votes themselves or the qualifications of the voters, but only to the procedure by which the votes were counted. *Id.* To hold otherwise, the court reasoned, would be to circumvent the right of the people to vote merely because the inspectors inadvertently omitted to take the oath, or were ignorant of the law's requirements. *Id.*

Similarly, a freelance reporter who is hired by the court and who acts as an official reporter pro tempore for all intents and purposes is also bound by the fee schedule set out in NRS 3.370, even if the reporter fails to take the official oath. In these cases the reporter has taken on the role of the official reporter, and therefore must also bear all the responsibilities of that office. See *Opinion of the Clerk*, 568 So.2d at 1224.

CONCLUSION TO QUESTION TWO

A certified court reporter is bound by the rates and fee schedule in NRS 3.370 when that reporter is hired by the court in a civil case unless otherwise ordered by the court.

² Pursuant to Ala. Code § 12-2-19(d), the Clerk of the Supreme Court may issue binding opinions on questions regarding the rules of court administration. Such opinions are to be published in the official reporter of decisions, and may be relied upon by Alabama public officials unless overturned by the court. *Id.*

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QUESTION THREE

If a certified court reporter is retained by one or more of the parties to report a civil proceeding in a court that uses electronic recording, is he or she bound by the statutory rates as set forth in NRS 3.370?

ANALYSIS

NRS 3.380 allows for the use of electronic sound recording equipment to record both civil and criminal proceedings. NRS 3.380(1). The court may designate "the official reporter or a special reporter or reporter pro tempore or the county clerk or clerk of the court or deputy clerk" to operate the recording equipment and transcribe the recording. NRS 3.380(2)(3).

In proceedings where the court orders the use of electronic sound recording, any party may, at his own expense, retain a certified court reporter to take down in shorthand and transcribe the proceeding. NRS 3.380(5). However, the record prepared from the sound recording is the official record of the proceeding, unless it is inaccurate or incomplete due to equipment or operational failure. *Id.* In that case, the record prepared by the certified court reporter is deemed the official record for all purposes. *Id.*

The party desiring a certified court reporter's services must arrange and pay for them, and that reporter's record is generally not the official record. NRS 3.380(5). Furthermore, NRS 3.380 contains no reference to NRS 3.370 or the fees of the reporter. Therefore NRS 3.380(5) clearly contemplates that the services of the certified court reporter are optional and additional to the services of the person operating the sound recording equipment. Such a reporter is hired by the parties in a private capacity, and is not an official reporter or official reporter pro tempore. Therefore the reporter is generally not bound by the fee schedule in NRS 3.370, as discussed in the analysis of Question One.

However, NRS 3.380(5) states that in the event the sound recording fails, the certified court reporter's record shall be deemed the official record "for all purposes." This is the only circumstance in which the certified court reporter's record becomes the official record when the court has ordered the use of sound recording. NRS 3.380(5).

It is important to distinguish between the official *record* and the official *reporter*. Should the sound recording fail, the certified court reporter is not deemed the official reporter pro tempore, and therefore is not bound by the fee structure in NRS 3.370 for the services the reporter already performed. Only the record is deemed the official record. See NRS 3.380(5). However, if the court were to subsequently request the reporter to perform the functions of the official reporter, the reporter may become a de facto official reporter pro tempore, as discussed in the analysis of Question Two.

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CONCLUSION TO QUESTION THREE

A certified court reporter who is hired by one or more of the parties in a civil proceeding pursuant to NRS 3.380(5) is generally not bound by the fee schedule in NRS 3.370.

QUESTION FOUR

For purposes of a deposition, may a certified court reporter administer oaths over the telephone, videoconference, or other electronic audio and/or video connection when the court reporter is not in the physical presence of the person to be sworn?

ANALYSIS

In this day of teleconferencing, video conferencing, and other remote electronic communication, depositions are frequently taken remotely by the use of such technology. You have indicated that certified court reporters are often asked to swear in the deponent over the telephone or other electronic connection. In these cases, the deponent is not physically present with the court reporter who administers the oath.

Depositions must be taken before an officer authorized to administer oaths by the laws of the United States or of the jurisdiction where the examination is held. NRCP 28(a). A certified court reporter who receives a certificate of appointment as a notary public with limited powers is authorized to administer oaths and affirmations. NRS 240.069.³ This statute does not specify the manner in which the oath or affirmation is to be given. See *id.* The Nevada Rules of Civil Procedure permit depositions to be taken telephonically or by other remote electronic means. NRCP 30(b)(7). Depositions taken in this manner are deemed to be taken at the place where the deponent is to answer the questions. *Id.* This rule requires that the officer before whom the deposition is taken be physically present with the deponent, unless otherwise stipulated by the parties. *Id.*

Because the parties may stipulate that the officer need not be physically present with the deponent, it follows that the officer may administer the oath over the telephone or other electronic means pursuant to such a stipulation. Furthermore, the parties may stipulate to modify other discovery procedures, including the person before whom the deposition is to be taken. NRCP 29. Thus the certified court reporter may administer an oath over the telephone or other remote electronic connection if the parties so stipulate.

CONCLUSION TO QUESTION FOUR

In a deposition, a certified court reporter may administer oaths over the telephone, videoconference, or other electronic connection if the parties stipulate to allow this.

³ At the time of this writing there is pending legislation that would repeal this section and amend NRS chapter 656 to authorize certified court reporters to administer oaths without the requirement that they be appointed as notaries public with limited powers. See A.B. 100., 74th Regular Session (2007).

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Sincere regards,

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