

State Bar of California
180 Howard Street
San Francisco, CA 94105
(transmitted electronically and in hard copy)

January 17, 2009

Dear COPRAC Members:

As past president of the Deposition Reporters Association of California, it has come to my attention over the past few years that there has been an explosion of promotional programs being offered by those in the reporting community to attorneys and/or their staff in an effort to solicit their deposition business. I have attached several examples for your reference.

I respectfully request a formal opinion from COPRAC as to the professional ethics and legality of the acceptance of incentive gifts by attorneys and/or their staff, as relates to California Rule of Professional Conduct 3-310(F)(1), which states: "A member shall not accept compensation for representing a client from one other than the client unless there is no interference with the member's independence of professional judgment."

It is clear that these programs are designed and offered for the sole purpose of influencing attorneys' decisions in the selection of a court reporting service. I submit that these incentive rewards constitute "compensation," something of value. Based upon those premises, I offer the following questions for your consideration:

1. Many incentive promotions are based on the number of depositions taken; i.e., gift awarded for every third one. Does participation in these programs encourage taking more depositions in order to get the next gift, thereby increasing the cost of litigation to their clients?
2. Some promotions include a requirement that the deposition be of a certain length; i.e., a minimum of two hours. Do these programs present an unethical incentive to prolong a deposition, resulting in increased attorneys' fees and court reporting services?
3. Several incentive promotions are offered in connection with a specific deposition, either for each one taken or for the first one booked. Do these rewards, referral fees, commissions, or incentives rightfully belong to the client, absent their informed consent to the contrary, when directly attributable to the work done by the attorney on a single case? [Model Rule of Professional Conduct 1.8(f)(1).]
4. All promotions offer incentives only to the noticing attorney. Other parties have only that singular source for an official certified copy of the transcript. Even if the rebate/gift is passed on to clients, what is the damage to the integrity of the justice system when there is "compensation" accepted for the taking of a deposition that may result in cost-shifting to opposing counsel? Is this not the definition of "kickback," as well as a direct interference with lawyers' professional judgment?

5. The California Code of Regulations, Title 16, Section 2475 (b)(8) prohibits a licensed court reporter from giving or receiving any gift, incentive, or reward in excess of \$100 per recipient per calendar year, a regulation enacted to further define "unprofessional conduct" as used in Business & Professions Code Section 8025(d). Business & Professions Code Section 8019 makes directly or indirectly assisting and abetting violations of any provision of the chapter a misdemeanor. Is it the position of the Bar that attorneys and/or staff can sidestep the legislative intent by accepting these enticements from a nonlicensee; i.e., from the court reporting firm itself?

I wish to be clear that my concerns are not with discretionary nominal gifts sometimes given by court reporters to their clients in appreciation of their business in general, but rather, to promotions that are regularly advertised, contain parameters (specific criteria), and are designed to entice/reward the attorney as opposed to thanking him or her. This entire practice makes it difficult for ethical reporters and attorneys who believe that such gifts are an improper intrusion into a business relationship that should be based upon the service rendered to the client rather than the benefits received by attorneys or their staff. Accepting a "perk" from a reporting firm in connection with a deposition creates the perception of impropriety because the choice is influenced by gift-giving promotions rather than quality of service and product.

I sincerely appreciate your consideration of these questions on behalf of the many licensed reporters who will not work for reporting firms that violate the ethical parameters by which we are personally bound. I thank you for your time, welcome any questions, and look forward to your response.

Holly Moose
Certified Shorthand Reporter
License No. 6438
Certified Realtime Reporter
Registered Diplomat Reporter