

Dollars for Depos:

Hanson Bridgett Legal Opinion Weighs In

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Nobody likes hearing the letters “I-R-S” in that order. But if you are a secretary or paralegal who books depositions, or the managing partner of a law firm that employs them, unless you are careful, those three much-dreaded letters could be in your future.

California’s two court reporter trade associations representing deposition reporters obtained a legal opinion from the prestigious law firm of Hanson Bridgett warning that the way that some law firms select who takes their depositions could place the law firms, their employees, and the court reporting firms in jeopardy with the IRS as well as California’s Department of Consumer Affairs Court Reporters Board.

Offering goodies such as champagne, gift cards and tickets to shows in exchange for booking deposition business has become commonplace. Some people refer to these goodies as “gifts.”

The Hanson Bridgett memo concludes that such incentives provided by reporting firms in exchange for business are not gifts at all but, in fact, payments for services, and the IRS requires the recipients of those payments to treat the value of the incentives as gross income. Recipients -- which could be either the secretary or assistant that books the deposition or the law firm that employs them -- must report the value of the incentives they receive as income on their tax returns.

As the memo warns in stark terms:

Given that the incentives provided by Reporting Firms in exchange for business are payments for services rather than gifts, the [Internal Revenue Code] requires the recipients of those payments to treat the value of the incentives as gross income. This means that recipients must report the value of the incentives they receive as income on their tax returns. Failure to do so could result in the assessment of additional taxes, interest and penalties by the Internal Revenue Service.

The memo also bluntly cautions that “law firms may want seriously to weigh the pros and cons of permitting their employees to receive such incentive gifts[.]”

The conclusion is obvious: Things of value provided only in exchange for steering business aren't gifts, under the legal or lay sense of the word. They, at best, are called "commissions." At worst, they are called "kickbacks."

Whatever you call them, not only does this practice risk unwanted visits from the IRS, it hurts anyone who cares about the quality of their transcripts and ensuring that the client gets justice. In a joint statement, Debby Steinman, President of the California Court Reporters Association, and Lisa Michaels, President of the Deposition Reporters Association, welcomed the opinion by saying:

"The practice of paying bounties and commissions to law firm employees in exchange for them selecting certain deposition firms is now revealed as bad for everyone involved: bad for law firms, bad for law firm employees and bad for deposition reporting professionals.

Just as it is impossible to imagine doctors or lawyers luring business with promises of gift cards, the interests of justice are best served when the deposition market rewards quality and accuracy, not goodies offered to secretaries. The Hanson Bridgett memo just underlines that this whole practice is a terrible idea for law firms and their employees as well."

The stakes here are high because the importance of an accurate written transcript to reasoned justice is hard to exaggerate. As one California Legislative Committee wrote:

An accurate written record of who said what in court is essential if the outcome of a judicial proceeding is to be accepted by the litigants and the public as non-arbitrary, fair, and credible.

In criminal cases, for example, courts of appeal rely exclusively upon written briefs and a written transcript to adjudicate the lawfulness of what occurred at trial. A conviction -- and thus in some instances the life or death of an accused -- can stand or fall based entirely upon what a witness said, what a lawyer said, what a juror said, or what a judge said, as solely reflected in the written transcript.

In civil cases, millions of dollars, life-long careers, and the fate of whole business enterprises can hinge on what was said or what was not said in a deposition or at trial.

The only factors that should determine whether one firm or another gets deposition business are those that serve the client's interests and those of justice: accuracy and price. Goodies distort market competition away from quality and price in favor of who can provide the choicest goodies.

Deposition reporters are officers of the court for a reason. As the Legislature recognizes, their job is too critical to turn on trivialities.

The reason this problem has arisen is because the person booking the deposition -- the secretary or legal professional -- is not the end user of the deposition. He or she isn't the client whose personal life or business hinges on every word. He or she isn't the lawyer who may see their summary judgment motion -- and relationship with the client -- destroyed because of a faulty transcript.

Surely, the person booking the deposition wouldn't want the written record of their lawsuit to hinge on which deposition firm handed out the nicest fruit baskets.

So-called "gift" giving has not been overlooked by the Department of Consumer Affairs Court Reporters Board of California. This agency, which is charged with policing the deposition profession, cited and fined US Legal for offering a so-called "gift" that exceeded the Board's limit of \$100.

Corporations engaged in court reporting services are not exempt just because they are not licensed court reporters. In the view of the California Court Reporters Board, these corporations are subject to the statutes and regulations governing licensees, and failure to adhere to these statutes constitutes a misdemeanor.

A lawyer summed up the whole situation best. In a letter written to one of the authors, Attorney Jed Peace Friedland put it well: "After reading your article, *Dollars for Depos: A Risky Business*, which appeared in the San Francisco Daily Journal, I'd like to commend you. It mirrors my own sentiments. I've been on a rant about this subject in private discussions with numerous attorneys who consistently utilize poor-quality court reporters either because they are blinded by a treasure trove of perceived 'freebies' or because someone harbors an undisclosed addiction to... the fleeting taste of Dom Perignon. If they check their transcripts and bills closely, they'll certainly think again before offhandedly booking court reporting services for such self-serving reasons."

Perhaps there should be a mandatory disclosure such as this affixed to every deposition transcript: "Notice is hereby given that receipt of deposition bookings in exchange for incentives offered to you by court reporting firms may expose you, your law firm and the court reporting firms to an IRS audit, and a citation and penalty levied against the court reporting firms by the California Court Reporters Board."

All right. Perhaps not. But, while that warning is fictitious, it nonetheless captures the drive afoot to realign the deposition market around rewarding quality and price and to educate legal professionals about the requirements of the Internal Revenue Code and the statutes and rules enforced by the California Court Reporters Board.

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