

## FLSA-444

March 18, 1993

This is in response to your request for our views concerning the application of the Fair Labor Standards Act (FLSA) to \*\*\* court reporters. We regret the delay in responding to your inquiry.

The questions which you presented are: (1) whether an \*\*\* court reporter continues to be an employee of the trial court, or is jointly employed by the trial court and the attorney for the appealing party, when engaged exclusively in the preparation of a transcript for appeal in both indigent and non-indigent cases; (2) whether the court reporter is an employee of the trial court when the court reporter prepares transcripts for appeal during regular working hours, when free time is available, for which he or she continues to receive a regular salary, as well as a fee per page; and (3) whether the court reporter is an employee of the trial court when preparing transcripts during off duty hours at the court's offices, due to the fact that the reporter is not permitted to remove tapes of the court proceedings from the court's offices.

According to the information that you have provided, an \*\*\* trial judge is an elected official who is required by statute to appoint a court reporter to record the proceedings of the court. The court reporter is an employee of the governmental unit, which pays his or her salary; the salary is set by the judge, subject to approval of the governmental unit. The \*\*\* court reporter works a regular fixed schedule, receives overtime or compensatory time off, and fringe benefits. The court reporter is appointed for an indefinite period of time, is subject to the supervision of the judge, and may be discharged by the judge at any time. In addition to the duties relating to the court, the court reporter is also required by statute to prepare a transcript of the proceedings upon the request of any party, for purposes of appeal. The court reporter is not permitted to prepare the transcript for a party during regular working hours, except when authorized by the judge in indigent criminal cases. In that regard, the reporter receives his or her regular salary. If the court reporter chooses to prepare the transcript on his or her own time, in the case of indigents, the governmental unit pays the reporter a per page fee, authorized by the judge. All other transcripts must be prepared during off duty hours, and under a per page fee agreement with the attorney requesting the transcript.

The hours worked in preparing a transcript are not counted for purposes of overtime pay, and the court reporter pays taxes as a self-employed person for that aspect of the work. In addition, the court reporter may hire other people to assist in preparing the transcript, but they are subject to approval by the trial judge. Usually, the reporter receives \$2.50 per page for a transcript. If the reporter uses the court's equipment, the court charges a per page fee. The judge must sign the transcript, certifying its accuracy. In addition, the court reporter may be authorized to work for more than one judge, or to fill the position of a judge's clerk, while also performing the duties of court reporter.

As discussed above, an \*\*\* trial judge is an elected official who is required by statute "[f]or the purpose of facilitating and expediting the trial of causes," to appoint a court reporter to attend and record all court proceedings. (IC 33-15-23-1). The court reporter, who has been appointed by an elected official for the purpose of recording and transcribing the proceedings of the court, and who has sworn an oath<sup>1</sup> to uphold the duties of his appointed office, is required to provide a transcript when requested by a party for purposes of appeal. The court requires the court reporter to prepare the transcript outside of working hours, in most cases. The court reporter has a statutory duty to furnish and certify an accurate transcription of the court proceedings whenever a party requests it.

Under the FLSA, the definition of "employer" is not limited by the common law concept, but is to be broadly construed to effectuate the remedial purposes of the Act. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983). Economic reality is the test of whether an employment relationship exists. Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961). Under

the economic reality test, the employment relationship is determined by the exercise of control over the terms and conditions of employment. "[T]he determination of the relationship does not depend on ... isolated factors, but rather upon the circumstances of the whole activity." Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

The following factors indicate that the court reporter is an employee of the trial court when engaged in the preparation of a transcript for purposes of appeal:

- (1) The state statute requires the court reporter to prepare the transcript whenever it is requested by a party. This law creates an obligation on the part of the court reporter which is directly tied to his or her appointment. The court reporter has no choice regarding whether to prepare the transcript; the court reporter or an assistant is under a legal duty to provide the transcript. This demonstrates the court's control over the terms and conditions of employment.
- (2) The government pays for a transcript prepared for an indigent party in a criminal case, upon approval by the trial judge, even if the court reporter does the work on his or her own time. The fact that the government unilaterally determines the per page fee indicates economic control. This, coupled with the trial judge's certification of the completed transcript and the statutory mandate requiring the court reporter to provide the transcript to a requesting party, points to an employment relationship between the trial court and the court reporter.
- (3) The court reporter may hire assistants to help in preparing the transcript, but the trial judge must approve them. This tends to show that the government has supervisory power with regard to the court reporter's hiring of assistants, which is another indicator of control over the terms and conditions of employment.
- (4) The trial judge signs the transcript, certifying its accuracy. In giving its seal of approval to the court reporter's transcription of the court proceedings, the court demonstrates supervisory control over the court reporter's final work product.

When the "economic reality" test is applied to the situation described, i.e., court reporters preparing transcripts for outside attorneys pursuant to statutory mandate, whether or not during regular working hours, we conclude that they are in a continuing employment relationship with the courts that employ them. Thus, the hours worked and compensation earned in preparing such transcripts must be combined with their regular hours and compensation for FLSA overtime purposes.

Courts have found the existence of a joint employment relationship where (1) there is an arrangement between two employers to share the services of an employee; (2) one employer was acting in the interest of the other employer by providing the employee to perform the services; or, (3) two employers shared control over an employee.<sup>2/</sup> Karr v. Strong Detective Agency, 787 P.2d 1205, 1206 (7th Cir. 1986) (holding detective agency and a warehouse were joint employers with respect to the employment of an undercover agent.)

While it is true that the attorney who orders the transcript pays the court reporter directly on a per page basis, the attorney exercises no control over the hiring or firing of the court reporter, nor does the attorney supervise the preparation of the transcript. The court proceedings, which are recorded during the court reporter's regular work day, provide the basis for the transcript. Most importantly, state law requires the court reporter to provide the transcript upon request. Thus, the preparation of the transcript for appeal purposes is an extension of the court reporter's official duties performed for the benefit of the trial court.

We, therefore, conclude that the attorney is not the "employer" of the court reporter merely by virtue of

ordering and paying for a transcript. In view of this conclusion, there is no reason to analyze the relationship of the attorney and the court as one of joint employment.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require different conclusions than the ones expressed herein.

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1/ IC 33-15-23-3 provides, in part: "At the time of appointment, such reporter shall take an oath . . . to faithfully perform his or her duties as such official reporter."

2/ 29 C.F.R. 791.2(b) provides, in pertinent part, "[w]here the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) where there is an arrangement between the employers to share the employee's services, as, for example to interchange employees; or (2) where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

We trust that the above is responsive to your inquiry.

Sincerely,

Acting Administrator