



BAM TASK FORCE MEETING MINUTES - DRAFT

February 28, 2008

1:30 p.m.

Board Member Present: Toni O'Neill, Chair

Task Force Members Present: Bill Greenley
Judy Gillespie
Toni Pulone
Debby Steinman

Staff Present: David E. Brown, Executive Officer
Dianne Dobbs, Staff Legal Counsel
Yvonne Fenner, Staff Services Analyst

Chairperson O'Neill called the meeting to order at 1:33 p.m., and roll call was taken.

Ms. O'Neill noted the background materials that were provided. She reminded the task force that the CRB is tasked with protecting the consumer and that all discussions related to BAM will be with an eye toward how it may affect the consumer. She noted that the mission of the task force is to propose guidelines for the use of BAM by CSRs to ensure protection of the consumer.

Ms. Dobbs explained that there is no technical difference between a guideline and a regulation because the imposition of a guideline can be seen as an underground reg. She suggested a better term would be "best practices" as that would simply be suggestion and would not be something with which the Board could take enforcement action. She noted that the task force may want to complete its discussions before deciding if there is a problem that would warrant going to regulation or if best practices would suffice.

The following responses were given in response to Ms. O'Neill's request of key issues from the task force members:

Ms. Pulone offered her assumption that actual banning of BAM is off the table, and Ms. O'Neill confirmed that. Ms. Pulone contrasted qualitative questions versus more concrete questions which may be addressed more quickly, such as if BAM is used, how long should the file be maintained.

Mr. Greenley noted that the use of BAM does not have to be noticed because the reporter is not a party, but he noted if it's being used as a crutch, that's a mistake. He brought up Penal Code 632 which prohibits eavesdropping or recording confidential communications and notes that it dovetails with the issue of editing out off-the-record discussions. Current CAT systems will stop recording when the writer pauses, but not all reporters are using the most current software. He offered that best practice is disclosure; if you're sitting there recording something, they should know it. From a businessperson's perspective, it does

have a value add, meaning if you use it the right way, it can be a profit center. Software exists to make audio searchable, increasing the value of an audio file. There is an issue with firms demanding a reporter's audio file, and he recommends that reporters take a stance of not until it's been edited. He noted there are cost issues associated with retention of audio files, and his recommendation is holding it for 30 days after the deadline for witness review. He agreed there is no way to tell a reporter how to do their business, but it is important to educate the reporter that if you do certain things, there are various possible consequences. He believes the CRB has the obligation on behalf of consumers to develop and educate reporters on BAM best practices.

Ms. Gillespie presented the viewpoint that in reviewing the NCRA guidelines, obviously a lot of work has gone into that effort and there is no need to revisit what's been covered, but noted that the task force should look at that work with an eye toward adapting it for California needs. She sees a couple of areas that might move into the realm of regulation, the first being BAM versus notes. She asked what becomes the basis for disciplinary action when BAM is used to augment steno notes. She questioned if the consumer is put in peril if an audio file is sold and then posted to the web, for instance. She asked if her understanding was correct that a depo transcript is confidential until filed with the court. Mr. Greenley said that she was wrong in that the reporter is not releasing the information but the parties are, so there is no control over where it ends up. Ms. Gillespie's final issue dealt with how schools are teaching BAM and the importance of the educational aspect.

Ms. Steinman expressed a concern with the concept of turning over audio files from the perspective of if a reporter is only listening to trouble spots, the transcript might not match the audio perfectly, yet if a reporter fixed a spot based on audio, it's a better transcript than had he/she not done so. She noted that storage space was not a burden in her opinion. She does see a complication arising if supplying the audio with the transcript becomes a demand as opposed to an optional service in that many reporters claim not to use BAM in any way, shape or form. She noted that with the advancement of wireless technology, there's no way to know if attorneys are recording on their laptops, creating an issue of notes matching the transcript. She also sees the importance of the education aspect, both students and working reporters. She sees it as a great form of protection as far as backup as well as a tool to help with punctuation.

Ms. Gillespie stated she sees BAM as a way for reporters to really finesse their transcripts, including double-checking for correct punctuation.

Ms. Steinman noted that voice writers are gaining popularity across the nation and they have always gone in with a tape backup without anyone questioning it whatsoever. Some firms have required reporters to bring along a tape backup, so this is really not that new of an issue.

Mr. Greenley noted that some states not only do not object to tape as a backup, but they in fact require it and that maybe there should be an educational piece in schools about how to use it appropriately. Ms. Pulone offered that it may be something that the mandatory CE committee could add to their subject matter list. Ms. O'Neill noted that on the Board's strategic planning agenda is the question of does school curriculum need to be updated and she plans to ask the Board to look at the question of requiring a certain number of hours in the curriculum devoted to the best practices associated with BAM.

A discussion ensued regarding whether the task force should proceed with best practices, guidelines or regs. It was decided to start with best practices because it can be gotten out into the industry much quicker and then pursue regulations at a later time if it becomes necessary.

Ms. Gillespie asked if there was a technology component to current school curriculum, something in addition to computer.

Ms. Fenner noted that the CSR is based on the entry level skills identified in the last occupational analysis and that a new one is budgeted to begin next fiscal year, and that analysis may bring up BAM.

Mr. Greenley cautioned that when we start talking about regulations, we be careful not to stifle free enterprise. He noted that attorneys may some day find a use for an audio file, for instance as a replacement to video, that will make it a valuable service provided by the court reporter.

Ms. O'Neill directed the task force to the NCRA guidelines as the jumping off point.

Ms. Pulone wondered if there should be something in the guidelines about BAM files being released under the same guidelines as transcripts. Mr. Greenley stated it should be made clear that BAM is not the official transcript and that it should not be released to a non-party, and that might actually be an appropriate spot for a regulation.

Ms. Pulone expressed concern about the retention of the audio files and suggested none or limited retention requirements.

Ms. O'Neill suggested procedurally the task force go through and see if there are any of the NCRA guidelines that can be adopted as is and then mark the others for future discussion.

Ms. Sandy Bunch VanderPol noted that the NCRA guidelines are a good starting point, but urged the task force to answer the many questions that have been raised by the industry. As one example she described a situation where a reporter used BAM to augment the transcript, did not keep the BAM file, and then later the transcript is questioned and the subject matter expert is limited to the steno notes.

Mr. Greenley noted that it might be a good idea to include in the guidelines a reminder that the law recognizes steno notes as the basis of the official record so that the door isn't opened to it being okay to rely on BAM for production of a transcript. He also noted that the consumer needs to be educated.

Ms. O'Neill proposed that the guidelines include a preamble stating that the stenographic notes are the official record, including the code section. If the reporter chooses to use BAM, the Board recommends the following best practices.

No. 1 was approved, agreeing it was clear that it was the CSR's duty to edit out off-the-record discussions. There was a discussion of what "confidential" means. It was recommended "confidential" be taken out, so it now would read:

1. If the backup audio media is made available to any party in a case, it is the responsibility of the CSR to ensure that no off-the-record discussion

or testimony sealed by order of the Court or statute are contained in the released recording.

No. 2, Mr. Greenley noted NCRA has no teeth while the CRB does and that perhaps “may” should be “should.” Mr. Brown suggested adding “firm” in addition to No. 1, thus eliminating the need for No. 2 completely. So it would now read:

1. If the backup audio media is made available to any court reporting firm or party in a case, it is the responsibility of the CSR to ensure that no off-the-record discussion or testimony sealed by order of the court or statute are contained in the released recording.

No. 3, another discussion of the use of “shall” versus “should.” Ms. Pulone brought up the possibility of using BAM at the request of the attorney, and a discussion ensued on the responsibilities that would put on the reporter and that being a good reason that NCRA advises against performing video functions at the same time as writing stenographically. Legal advised using “should” instead of “shall.” So it would now read:

2. If the CSR decides to release the backup audio media, the reporter should release a copy and not the original (unless ordered otherwise by a court.)

No. 4 was approved as is, simply renumbered to No. 3.

3. If the CSR makes available a copy of the backup audio media to one party, the same offer must be made to the other party(ies) to the proceeding.

No. 5 was approved with the addition of a reference to PC 632. So it would now read:

4. CSRs should check all applicable local, state and federal laws, rules and regulations to ensure that creating a backup audio media is in compliance with those laws, rules and regulations, including but not limited to California Penal Code 632.

On No. 6, the retention discussion was revisited. The consensus was to hold for 30 days after the original is prepared, unless requested to hold it longer by a party.

5. If a CSR uses backup audio media, it should be preserved upon request by any party to the proceeding for no less than 30 days after the preparation of the original. The reporter may request that the party seek a court order before making it available.

Housekeeping issues were discussed, including allowing a longer meeting time and sending out drafts and the NCRA guidelines electronically ahead of time.

Ms. Bunch VanderPol, who participated on the NCRA committee that developed their BAM guidelines, noted that the language in No. 2 of part B regarding “does not distort” was taken from the codes governing videographers.

Ms. Pulone took issue with No. 1 under B, noting that she does not think it's necessary to offer them the advisement prior to the start of the proceeding unless it's considered to be some sort of disclosure, in which case she thinks the whole disclosure issue should be explored. Ms. Bunch VanderPol confirmed that it was put in for reasons of disclosure so that if anyone wanted to object they would be able to do so before the proceedings begin.

Mr. Tom Lange, firm owner in Sacramento, offered his viewpoint from the standpoint of the consumer that he believes the Board should be more definitive in its best practices, specifically that some of the items include "if the reporter decides to release or make available," and those should be more definitive in saying the reporter should release the audio file or that the best practice is not to make the audio file available, but definitive either way. He noted that as long as they're best practices, the reporter is still allowed to do whatever they want. He wants more clarity.

Mr. Greenley asserted that it's an individual business decision.

Ms. Steinman asked for a correction to be made to the minutes of the townhall meeting of July 13, 2007, in which the fourth paragraph is attributed to her and she did not make those statements.

Ms. Bunch VanderPol asked the task force to be careful when releasing any information about BAM and asked that any preamble or document that is released, including minutes, include a statement to the effect that the official record is the shorthand reporter; it has been proven to be the most accurate record. She stated it may potentially be used against the court reporting industry in a fight against ER.

Future meeting dates were discussed. A Saturday meeting was agreed to be a possibility.

The meeting concluded at 3:25 p.m.