DEPOSITION REPORTERS ASSOCIATION OF CALIFORNIA, INC.

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DANGERS OF THE "USUAL" STIPULATION

It is a mystery how the practice of "May we stipulate to relieve the reporter of his/her duties under the Code" began, but it has become customary, at least in the southern part of the state, often resulting in heated discussion should an attorney want to go "per Code." In fact, it has become so prevalent that many attorneys in Southern California believe -- as reporters have actually heard stated in depositions -- that a stipulation must be done before they can close the record. A favorite line was, "We have to do a stipulation, otherwise the reporter will just keep writing." Perhaps it was said in jest, but no one so much as chuckled, and no one challenged the assertion.

As licensed court reporters and past presidents of Deposition Reporters Association of California, we would like to offer some thoughts on the hazards of the all-too-common practice of stipulating away proper handling of the transcript by the deposition officer.

WHAT IS "PER CODE"?

Unfortunately, it is not uncommon to find that even well-respected attorneys and publications are unclear about how the transcript would actually be handled "per Code." In an article for *L.A. LAWYER* magazine, it was written, "The court reporter then maintains custody of the original transcript and lodges it directly with the court upon request by one or more parties." With all due respect, that is not the procedure per CCP Section 2025.550(a), and, realistically, no reporter would (or should) accept responsibility for maintaining the original transcript, let alone lodging a deposition transcript with the court.

After completion of the deposition transcript, the Code provides the witness 30 days (plus 5 days for mailing of notice) to either appear in person to review the transcript or submit changes/corrections in writing. After 35 days, the original transcript is sent to the noticing attorney, with the deposition officer notifying all parties of changes made by the witness.

WHAT ARE YOU STIPULATING AWAY?

Although some attorneys do include in the stipulation that the reporter is relieved after producing a verbatim transcript, consider that a blanket stipulation includes waiving that requirement, as well as even the basic requirement to certify the transcript upon completion.

Even with that parameter, there are many other unintended ramifications. Realize that by entering into the "usual stipulation," the reporter could argue (s)he does not have to maintain stenographic notes [CCP 2025.510(e)], does not have to notify parties and the witness should a nonparty request a copy of the transcript [2025.570], perhaps even provide a partial or expedite to one side without offering it to opposing counsel [CCP 2025.510(d)]. After all, everyone agreed that the reporter was "relieved of duties under the Code."

Beyond those duties attorneys routinely stipulate away, having the reporter send the original transcript before review by the witness effectively removes the deposition officer from any responsibility regarding corrections, signature, and notification to the parties thereof. Under that scenario, the deposition officer has no ability to certify the witness's execution of the original transcript and cannot ensure that all parties are notified of corrections, if any. Reporters have often discussed the propriety of attorneys themselves assuming duties that, by law, are required to be done by the independent officer of the court.

Perhaps more importantly, when opposing counsel is made responsible for overseeing corrections and signature, any certified transcript provided by the reporter at a later date, either to a party or a nonparty, will not reflect such corrections or changes made by the witness. It then becomes incumbent on the attorney to seek out important information regarding witness review. We ask you to imagine operating on a certified transcript without the benefit of knowing whether the witness reviewed, signed, made corrections.

IS IT PROPER?

The CCP clearly states that there are certain provisions that can be modified by stipulation; for instance, method of recordation of the deposition [CCP 2025.330(b)], and the ability to waive signature or change the time period for review and signing [CCP 2025.520(a) and (b)]. Absent specific language that parties alone have discretion to modify procedures, many would contend that, at a minimum, the court reporter must be a party to the stipulation. Just as the Code provides that a witness must agree to waive signature, it seems reasonable that a reporter must agree to waive his/her duties.

Although court reporters will usually agree to abide by a stipulation entered into between all counsel present at the deposition that calls for the release of the original transcript, our silence should not be interpreted as agreement. If reporters don't interject regarding the stipulation in a deposition, it is because we are in no position to educate attorneys on the law, are ethically bound not to comment on the proceedings in any way, and that we certainly don't want to jeopardize working relationships by being labeled as a "troublemaker" because we refuse to accommodate the wishes of the parties.

So the question becomes whether attorneys have the right to stipulate away a deposition officer's duties, either with or without agreement by the reporter.

WHAT IS THE EFFECT ON COST?

We offer our belief that stipulating away the original to opposing counsel effectively means the noticing attorney is subsidizing his/her opponent's case. Antitrust laws prohibit reporters from discussing specific rates; however, our combined personal experience of working for deposition firms throughout the state seems to bear out that rates for an O&1 are generally significantly higher in Southern California as compared to Northern California. It appears that Southern California rates reflect the fact it is customary for the noticing attorney to provide opposing counsel a "free" transcript (the original). In contrast, lower rates in Northern California for the O&1 reflect an expectation that the Code will be followed and that opposing counsel will order a certified copy of the transcript, which would seem to be a proper allocation of expenses in civil cases.

A byproduct of opposing/witness's counsel receiving essentially a free copy (the original) is that they have no financial stake in the length of the deposition transcript. Some have been known to take that opportunity to ask endless questions, sometimes exceeding that of the noticing attorney, to make his/her record. Perhaps it is a style; perhaps it is a tactic to increase costs for the noticing attorney. In either case, it has at times resulted in argument, with the reporter being asked by the noticing attorney to close the record, only to be reopened on opposing counsel's dime, so to speak.

Per CCP 2025.470, a reporter may not go off the record without agreement of the witness and all parties present unless a party or the witness states an intention to move for a protective order. Reporters cannot rule on whether the examination is "outside the scope." Reporters do not "work" for the noticing attorney, so the admonition that "I'm paying you, and I instruct you to go off the record" will fall on deaf ears. Just another consideration in deciding whether to release a "free" transcript to opposing counsel.

In closing, the law exists to protect the integrity of the deposition transcript. Should the current law need revision, perhaps attorneys and reporters can work together to change it. In the interim, given that procedures in the CCP seem to work well in Northern California, we would advocate that Southern California attorneys rethink the custom and practice of a stipulation at the end of a deposition. In all honesty, some reporters are more than happy to relinquish responsibilities, but we are at a loss to understand the benefit to attorneys in doing so.

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