DEPOSITION
REPORTERS ASSOCIATION
OF CALIFORNIA, INC.

October 15, 2014

Ms. Paula Bruning
Court Reporters Board of California
2535 Capitol Oaks Drive, Suite 230
Sacramento, CA 95833

Re: **PETITION FOR RULEMAKING REGARDING REGULATIONS RELATED TO SCOPE OF PRACTICE**

Dear Ms. Bruning:

In accordance with section 11340.6 of the California Government Code, the Deposition Reporters Association of California ("DRA") respectfully petitions the Board to amend Title 16 Division 24 of the California Code of Regulations, section 2403 ("section 2403"). To the extent that the filing of this petition on this date would require the Board to act on the petition before its next regularly scheduled meeting in December, as an accommodation to the Board, DRA waives the requirement of a response before that time.

DRA Supports Explaining A CSR's Scope In Regulations

It is useful to reflect a CSR's scope of practice in regulation, as the Board has done, so long as the regulations accurately reflect the duties and obligations of CSRs.

It is not intuitive that transcripts of what individuals say in depositions or prior court hearings would be admissible in court. Typically, writings reflecting out-of-court statements made by witnesses would be insufficiently reliable to be admitted as evidence and would be deemed to be inadmissible hearsay.

But, depositions (for example) are not out-of-court statements because depositions are not out-of-court proceedings. What makes what is said in a deposition a statement in a judicial proceeding is that they are reported not by an interested party or even a lay neutral one but by licensed court reporters who are "ministerial officers of the court," meaning officers charged with non-discretionary, *inherently judicial* duties. *Serrano v. Stefan Merli Plastering Co.* (2011) 52 Cal.4th 1018, 1021.

This is why the many court rules and statutes governing the licensure of CSRs exist -- to ensure the inherent reliability of what would otherwise be inadmissible hearsay.

Thus, California Code of Civil Procedure ("CCP") section 273 provides that official court transcripts done by official reporters are those that qualify as *prima facie* evidence not just of what occurred at a proceeding but evidence "of the testimony and proceedings" itself.

> 273(a) The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of that testimony and proceedings.

Said another way, transcripts that *are not* prepared in a fashion consistent with CCP section 273 (not prepared by official reporters or official reporters pro tempore) *are not* prima facie evidence of the "testimony and proceedings." *See also*, CCP section 2025.620 (use of depositions at trial).

And, this is why the regulation of shorthand reporting is critical to the functioning of California's judicial system. Depositions and other licensee-generated transcripts are a way for the court to weigh testimony without having to consume hearing time in an actual courtroom.

Moreover, the Legislature has embraced a definition of "regulation," and thus a role for the Board, that seeks to invoke the Board's expertise in addressing the gaps or ambiguities in state statutes. Addressing these gaps and ambiguities through the lens of the Board's expertise is in point of fact the reason for issuing regulations, which is why courts defer to a regulator's interpretations of statutes: ("A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Auer v. Robbins* (1997) 519 U.S. 452, 457–58, 462 (citations omitted)[1]

For this reason, the Legislature defines "regulation" as

> [E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to **implement, interpret, or make specific** the law enforced or administered by it, or to govern its procedure.

Government Code section 11342.600 (emphasis supplied). *See also, Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

Currently, the Business & Professions Code (with emphasis added) broadly defines the scope of practice of a shorthand reporter as follows:

[1] "Here . . . the underlying regulation does little more than restate the terms of the statute itself . . . The Government does not suggest that its interpretation turns on any difference between the statutory and regulatory language. . . . The regulation uses the terms 'legitimate medical purpose' and 'the course of professional practice,' but this just repeats two statutory phrases and attempts to summarize the others. It gives little or no instruction on a central issue in this case: Who decides whether a particular activity is in 'the course of professional practice' or done for a 'legitimate medical purpose'? Since the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation. Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language[.]" *Gonzales v. Oregon* (2006) 546 U.S. 243, 257, 268–69, 274 (citations omitted)

> 8017. The practice of shorthand reporting is defined as the making, by means of written symbols or abbreviations in shorthand or machine shorthand writing, of a verbatim record of **any oral court proceeding, deposition, court ordered hearing or arbitration, or proceeding before any grand jury, referee, or court commissioner and the accurate transcription thereof.** Nothing in this section shall require the use of a certified shorthand reporter when not otherwise required by law.

Thus, where the Legislature has not otherwise directed a contrary policy, the Board should strive to use the regulations to fill in gaps in current law, especially if technical or technological changes in the practice are not reflected in statute.

Against this summary backdrop, DRA would like to turn to the substance of this petition that seeks to correct errors in one part of the regulations that (i) do not reflect current law; (ii) do not reflect current practice; (iii) impose real and needless burdens on reporters while; (iv) offering no benefit to consumers.

REQUEST

DRA respectfully requests that section 2403(b)(3) of the Scope of Practice regulations be amended as follows:

> (b)(3) Immediately n~~N~~otifying all parties attending the deposition of requests made by other parties for either ~~an original or copies,~~ the provision of rough drafts, partial transcripts, or expedited transcripts and offering or providing to all parties any deposition product or service, including but not limited to, any transcription or any product derived from that transcription.

Staff previously rejected this change in the prior regulatory proceeding as being without legal authority because the Scope of Practice regulations are supposed to "identi[fy] duties, not additional services." The staff also commented that this requirement is in the Professional Standards of Practice and so does not need to be reflected within these regulations laying out a reporter's scope of practice.

However, after a lengthy discussion, at the public hearing on the regulations, the Board seemed to invite this change, rejecting it only because to do so would have required the regulatory process to be re-booted.

For four reasons the change is urgently needed.

First, contrary to staff's prior position that DRA's request that the regulation delineate rough drafts and the like is about providing services, the regulation and DRA's requested amendment address "***[n]otifying***" the parties about requests for transcripts, ***not about actually providing*** those transcripts, and the statute relied upon by DRA for its suggestion is likewise about ***notice of services being provided, not*** the provision of the services themselves.

Second, the listed kinds of transcripts proposed here should be included in the regulation. Their omission severely reduces the guiding and explanatory usefulness of the regulation and wrongly implies that the legal requirement of notice extends only to complete transcripts.

CCP section 2025.510(d) currently and broadly requires notification by reporters when ***"any portion"*** of a transcript has been requested by and will be provided to one party before another. That statute (with emphasis supplied) provides:

> (d) If the deposition officer receives a request from a party for an original or a copy of the deposition transcript, **or any portion thereof, and the full or partial transcript will be available to that party prior to the time the original or copy would be available to any other party**, the deposition officer shall **immediately notify all other parties** attending the deposition of the request, and shall, upon request by any party other than the party making the original request, **make that copy of the full or partial deposition transcript available to all parties at the same time**.

The reference to a "partial" transcript is in the statute itself. Its omission from this regulation is unwarranted and, respectfully, poor regulatory practice.

A rough draft and an expedited transcript are forms of transcripts that, like partial transcripts, are "available… prior to the time the original or copy would be available" and can be made available to one party before another, giving one side an advantage over another, and, for that reason, notice to the parties when this is ordered reflects a reporter's current mandatory statutory "duty"; it is not part of a catalogue of additional services.

Indeed, if a reporter failed to provide notice of a rough draft (for example) being ordered, the Board would likely entertain a complaint against the reporter. For this reason, by omitting references to the notice requirement related to these products and services, the scope of practice regulations in this instance are inconsistent with binding statute and likely even the Board's own view of current law of what might subject a reporter to discipline.

Notifying all attending parties of the request for such transcription and making the same type of production and delivery available to all parties is a key requirement in the reporter's provision of equal and impartial services to all parties. If the definition of "accurate transcription" is to include production and delivery, as it clearly must, then included within the scope of practice must be the requirement that all transcripts – roughs, partials and expedites – are "made available at the same time to all parties or their attorneys," per CCP section 2025.340(d), and so notice of requests for these special-delivery transcripts must be called for to ensure a complete definition of transcription.

In sum, the draft regulations in these aspects fail to reflect arguably the most important facet of a reporter's license; namely impartiality in what the reporter provides to litigants, meaning at least not giving one side in litigation an advantage over another. This is indisputably one of the most important features of a reporter's scope – akin to a lawyer's duty of zealous advocacy for a client – and the regulations are currently deficient in this regard by failing to reflect those

products and services for which notice to all parties is under current law required, especially when partial transcripts are explicitly mentioned in the statute.

Third, this notice requirement properly resides within regulations explaining a reporter's scope of practice. **State law specifically commands that a shorthand reporter provide this notice. What the law requires of a licensee is *ipso facto* within the scope of the licensee's practice.** Therefore, the scope of practice regulations should not omit this mandatory duty, as if it was not within a licensee's scope.

Fourth, the reference to "copies" simply ***must be stricken***, as DRA proposes, because it is contrary both to law and common sense.

For excellent reason, the CCP contains no requirement for the deposition officer to notify a party when another party orders a copy by a standard delivery time. The code already ensures impartiality by requiring that copies be ***made available*** at the same time as the O&1. Based on CCP 2025.510(c), any party or deponent, at their expense, ***is already entitled to obtain a copy when they want, and that availability begins at the same time for all, preserving impartiality without the reporter having to notify the other parties when one side decides, for its own idiosyncratic litigation reasons, that it actually wants a copy.***

Again, the reason the Code imposes a notice requirement on a reporter is because there is a timing advantage for one party in obtaining a deposition-derived product or service faster than the other parties. Here, ***because the Code already ensures that copies are made available to all equally at the same time***, and lawyers are presumed to know the law (and in reality do at least in this instance), the only reason one side would suffer a timing disadvantage over another is if they elect for their own reasons not to obtain a copy as soon as it is available.

Bluntly put – that is not the reporter's problem and it should not be the reporter's obligation to remind lawyers via a Board-imposed notice requirement that appears nowhere in statute of what current law already clearly allows the parties and their counsel to do.

Additionally, there could easily be some undesirable results from requiring reporters to notify a party of the copy orders of all other parties. In giving notice of who ordered a copy, the reporter is also giving notice of who ***didn't*** order a copy, and in so doing the reporter could very likely be disclosing a strategic or economic decision by the non-ordering party. It happens with some frequency that a party will order a copy at a deposition while in the presence of his opponent parties and then will later contact the reporter to cancel that copy order. An attorney may attorneys will even stay after the deposition ends and wait until the other parties have left in order to cancel his copy order. This is often done when that party intends to settle the case soon but doesn't wish to give any hint of that intention to other counsel. Under this language, however, the reporter is now put in the unfortunate and perhaps inappropriate position of being required to notify all other counsel of this copy order being cancelled and, thereby, likely revealing the intention of this one party to the others.

It was never the intention of the CCP that parties all be notified of whether their opponents were ordering copies. That is why the Legislature has not provided for such notice. This reflects

common practice for, in most cases, orders for copies are placed at the deposition in the presence of all parties in attendance. And, of course, as pointed out above, the CCP already instructs that the noticing party is responsible for the preparation of the original, unless all parties agree otherwise. Thus, for the reporter to now notify all parties of that which has already been stated at the deposition is completely unnecessary and, frankly (and respectfully), absurd. The scope of practice regulations provide that reporters have to notify the attending parties ***of facts already known to them***, which makes no sense. And, if there is later a change in the copy orders – as pointed out above—and a new copy order is made or one is cancelled, the reporter must notify everyone and call attention to what may be some strategic decision by a party, a position no reporter should be put in.

In the end, these requirements are not anything that would be beneficial to the consumers of reporting services, which is, after all, the CRB's central concern.

Fifth, another way the regulation at worst contradicts statute or at best is confusing is that there is no need for the reporter to notify any party in attendance about a request "for an original," because CCP section 2025.510(a) already requires that the original transcript be prepared unless the parties agree otherwise. And if they agree otherwise, by definition they are notified of what they have agreed to. ("(a) Unless the parties agree otherwise, the testimony at any deposition recorded by stenographic means **shall be transcribed"—**emphasis added)**.**

Hence, the Board's proposed language requiring a reporter to notify all parties of ***original transcript orders*** by other parties is contrary to existing Code. The Legislature believes that impartiality is amply preserved without the reporter having to interject herself into the tactical decision-making of what could be a huge, multi-party case by alerting all the parties when one orders a product that the others could likewise legally order at any time.

For this reason, it respectfully makes no sense in regulation to require the reporter to notify anyone – *let alone lawyers!* -- of that which the law already requires by default; namely, that the deposition "shall be transcribed." Nor does it make sense for a reporter to notify parties of their own agreements.

Added to the above, not including the balance of the language in CCP 2025.510(d) related to notice being required ***"if"*** a transcript will be available early to one party is a serious misconstruction of the intent of this CCP section. As discussed above, there is no requirement in current law that the reporter notify all parties of what the other parties are ordering ***unless*** the order is for one of these special-delivery versions of the transcript (rough, partial or expedite). So a special request must be made for this notice to be required of the reporter. And "the request" that the reporter is required to give notice about is ***not*** the request for the original or a copy ***but only for one of these special-delivery versions of the original or a copy.***

None of this is accurately reflected in regulations that purport to define the scope of a reporter's license.

If what staff believes is objectionably overbroad about DRA's proposed amendment is the final reference to any deposition product or service, including but not limited to, any transcription or any product derived from that transcription, then that phrase can be modified as follows:

> (b)(3) **Immediately** notifying all parties attending the deposition of requests made by other parties for ~~copies~~**, ~~rough drafts, partial transcripts, or expedited transcripts and offering or providing to all parties any deposition product or service, including but not limited to, any transcription or any product derived from that transcription~~ where such a product or service would be governed by California Code of Civil Procedure section 2025.510(d).**

Conclusion

DRA thanks the Board and its excellent staff for the opportunity to address these important issues and respectfully requests that its petition be granted.

Sincerely,

Ed Howard

Howard Advocacy, Inc.
on behalf of DRA