
January 18, 2015

Ms. Toni O'Neill
Chair, California Court Reporters Board
2535 Capitol Oaks
Suite 230
Sacramento, CA 95833

**Re:**

**Request To Place On The Next Board Agenda The Issue Of Whether Charging An Additional Amount To Expedite A Copy Should Always Be A Ground For Discipline.**

**Request That The Board Refrain From Imposing Discipline On Licensees Pursuant To Its Recently-Announced Policy Until The Policy Is Vetted Through The Administrative Procedures Act Process.**

Dear Chair O'Neill:

In the last Board newsletter, in the helpful Question and Answer section and in response to a question about expedite charges for certified copies, the Board responded as follows, with emphasis supplied:

> The best practice would be to not charge an additional expedited fee to the party requesting a copy.
>
> As deposition transcript rates are not set in statute, reporters are permitted to set their own rates. However, the rates must be reasonable. Since the expedite fee is a fee added to the cost of the transcription for its early production and delivery, the **Board finds that an expedited fee should be a one-time charge for the original transcript and that charging the expedited fee twice would be unreasonable, thus grounds for discipline as unprofessional conduct** directly related to the practice of shorthand reporting, pursuant to subdivision (d) of Business and Professions Code (B&P) section 8025. Similarly, a reporter's refusal to provide a copy of a transcript unless the party agrees to pay an unreasonable (expedited) fee would be grossly unfair and also grounds for discipline pursuant to B&P 8025.

As we discuss, there are several problems with the highlighted assertion making, the issue worthy of being formally set on the Board's agenda and discussed prior to being implemented, not the least of which it is in its current form likely unlawful.

**Problems With The Assertion**

***It is an unlawful underground regulation***

Government Code section 11342.600 defines a regulation broadly and in this fashion:

> Regulation means every 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.

The way the assertion is presented, it is a generally applicable rule admitting for no exemptions and no room for case-by-case analysis, and is based on the Board's interpretation of statutory authority. The assertion therefore operates in a fashion indistinguishable from a regulation even though it has not been vetted by the public, approved by the Board, or been reviewed by the Office of Administrative Law, all as required by the Administrative Procedures Act.

The OAL correctly describes the rule on underground regulations this way:

> If a state agency issues, enforces, or attempts to enforce a rule without following the APA when it is required to, the rule is called an "underground regulation." State agencies are prohibited from enforcing underground regulations.
>
> http://www.oal.ca.gov/undergroundregs.htm

It is thus unlawful for the Board to enforce this assertion until it has been publicly vetted and approved by the Board and the OAL.

***As a statement of policy that exposes many reporters to discipline, it properly should be placed on a board agenda and discussed before the public before being announced and imposed.***

Even if for some reason the assertion is not an underground regulation, when the Board acts in such a way as to expose many reporters to possible discipline and disturb a practice that is long-standing in some areas of the State, it is best for the Board to elicit comment from the public and input from Board members in a Bagley-Keene open forum prior to so acting.

***The assertion has constitutional and other legal problems.***

The Court of Appeal in *Serrano v. Merli Plastering Co. (2008) 162 Cal.App.4th 10* pointedly refused to adopt the position of the Board and instead opined:

> This does not preclude a deposition reporter from charging a reasonable fee for expediting the making, certification, and delivery of a copy.

There are at least two likely reasons explaining why the court, unlike the Board's assertion, allowed for expedite charges for an expedited certified copy if they were "reasonable."

The first reason is that if the court had adopted an unqualified rule outlawing certain charge**s,** it would have unlawfully intruded upon the Legislature's judgment to de-regulate reporter pricing.

Prior to 1981, the prices for deposition products and services were set by statute. AB 1017 (Alatorre), enacted in 1980 and effective in 1981, changed that. Under the prior version of Government Code section 8211.5, deposition officers providing services in counties of certain population had their prices for copies and originals set per page. All other counties had their prices set per 100 words. ("Existing [i.e., prior to 1981] law regulates the fees of a notary public[1] in connection with the taking of a deposition and, where applicable, for services in recording or transcribing a deposition." (*Legislative Counsel's Digest* for AB 1017) AB 1017 repealed that fee regulation. ("This bill would delete those provisions regulating the fees of a notary public for services in recording or transcribing a deposition." *Ibid.*) .)

AB 1017 also increased the annual licensing fees that CSRs are required to pay the Board and used the increase to create the Transcript Reimbursement Fund. The Fund pays for reporting products and services for indigent litigants under certain conditions (*See* Business & Professions Code sections 8030.2 through 8030.8).

It is evident, then, that the Legislature sought to de-regulate prices for deposition products and services while at the same time establishing a mechanism to ensure that litigants who might not be able to afford de-regulated prices would not be disadvantaged. Not surprisingly, but equitably, the deposition officers whose fees were being de-regulated also had to pay to establish and maintain the Transcript Reimbursement Fund; an obligation upon deposition officers that still exists to this day. (*Accord*: *Urban Pacific Equities Corp. v. Superior Court* (1997) 59 Cal.App.4th 688, 691-92, "Although the fees charged by court-retained reporters are fixed by statute [citations], there is no statute regulating the fees charged by private reporting firms, and deposition reporters are free to charge all the market will bear.")

Thus, if the Board decrees which rates and charges are "reasonable" and which are not and regulates those rates by enforcing its own notion of "reasonableness," the Board would be reviving that which the Legislature has repealed; namely, government-set pricing. And it would be reviving government price regulation even though the obligation of deposition officers to support the Fund would endure.

Still another example of how the Legislature intended deposition officer prices to remain unfixed is seen from the fact that the Legislature has expressly commanded the price regulation of similar services in other contexts, illustrating that the Legislature knows full well how to express a regulatory intent if it wishes. Thus, for example, Government Code sections 69947-50 set the prices for official reporters but not for freelance deposition officers. (*Accord*: *Gamage v. Medical Board* (1998) 60 Cal.App.4th 936, 938, "Government Code section 69950 specifies the transcription fee which must be charged by official superior court reporters, but does not purport to set or limit reporting fees for other reporters or proceedings.")

Second, uniform price regulation that forces a private actor to absorb costs it incurs is facially vulnerable to a constitutional challenge without some mechanism by which the regulated entity can seek an exemption. (*Calfarm v. Deukmejian* (1988) 48 Cal.3d 805, 817 ("any law which sets prices may prove confiscatory in practice")) *20th Century Insurance Co. v. Garamendi*, 8 Cal.4th at 257 ("At the same time, the regulations incorporate multiple company-specific factors into the rollback formula, and

[1] Prior law required deposition officers to be notary publics. ( *See*, e.g., Government Code section 8211.5 (repealed).)

then are applied in individual adjudicatory hearings. The company-specific hearings allow further tailoring to a company's situation ....")

***It is unfair.***

Any rule that sweepingly decrees a practice that might deny a court reporter or court reporting firm from recouping out-of-pocket costs warrants careful scrutiny to ensure there is no possible circumstance that it is unfairly applied. But, there are many possible problems with an unqualified application of the assertion. Please consider the following:

- Sometimes expedites mean a firm must pay for overtime for employees. As a matter of fairness, the agencies need to have a mechanism to recoup those costs. (As stated, this is likely why the Court of Appeal in the *Serrano* case did not adopt the position adopted by the Board and outlaw charges for expedited copies in every instance. Instead, the court said that such charges must be "reasonable;" a standard that—unlike the Board's assertion -- admits for a case-by-case inquiry.)
- The CCP provides that products and services must be made "available" at the same time, not ***delivered*** at the same time. If all transcripts needed to be ***delivered*** at the same time, a reporter would have to hold all transcripts until the last party who ordered a certified copy of a transcript was prepared to pay for their COD before any could be mailed. Agencies would get caught in the middle between parties who would deliberately hold payment to hinder the other side from being able to get their transcript.
- Government Code section 69951 allows for officials in civil matters to add a 50% daily-copy surcharge, or expedite fee, to their standard folio rates when same-day or next-day delivery of a transcript is requested, and there's nothing saying that applies to the original only.
- A reporter cannot ethically provide products and services for free to one side when the services might cost a reporter money to provide, while charging the other side for the costs the reporter incurs. This would result in the reporter subsidizing one side in litigation, i.e., the reporter not recouping its costs when one side orders a product, offering that side a subsidy.
- The CCP requires that reporters charge the same fee to all parties for both realtime hookups and rough drafts, per section 2025.220 (a)(5). If reporters were to follow the assertion's premise to its logical conclusion, then there should be no fee charged to the copy attorneys for either a realtime hookup or a rough draft, since if the reporter is already providing the realtime feed and/or the rough draft for the noticing attorney, and the fee, in their words, "should be a one-time charge for the original transcript and charging the expedited (or realtime hookup or rough draft in this case) fee twice would be unreasonable."
- Indeed, if you follow the assertion's premise a bit further, charging anything beyond the copying cost for any certified copy, even unexpedited, would be unreasonable. If a reporter has already generated the original for the noticing attorney, why should the reporter be charging anything more than a copy shop would for reproducing a copy for another party? The answer, of course, is what at core is unfair with the assertion's unqualified premise that an expedited copy charge is always and invariably unprofessional. These are not just plain vanilla copies produced by a copy shop. These are certified copies, certified as accurate and authentic duplicates of the original provided to the noticing party by a licensee operating pursuant to law and professional standards.

**DRA**

The Deposition Reporters Association of California ("DRA") DRA represents more deposition reporting professionals than any organization in California and is the only organization in the nation solely devoted to representing such professionals. DRA is a California affiliate of the National Court Reporters Association ("NCRA").

DRA was founded in 1995 by freelance deposition reporters seeking to preserve the impartiality and independence of their profession. In the early nineteen nineties, certain deposition companies and firms began the practice of offering services or prices to one party in litigation but not to others. DRA was founded to combat such practices.

DRA worked with the NCRA to organize and coordinate successful efforts across the country to preserve the impartiality of the freelance deposition reporting profession. As a result, court rules or laws preserving the impartiality of freelance deposition professionals were passed in fourteen states including Hawaii, Texas, Minnesota, Utah, West Virginia, New Mexico, Georgia, Louisiana, Nevada, Kentucky, Michigan, Arkansas, Indiana, and North Carolina.

**Conclusion**

DRA respectfully requests that the Board, in response to this letter, issue a statement saying that the assertion will not be enforced until it is lawfully vetted and approved pursuant to the Administrative Procedures Act. In the alternative, DRA respectfully requests that the assertion be withdrawn and that the Board consider complaints on such matters on a case-by-case basis.

Respectfully submitted:

Ed Howard, Howard Advocacy, Inc.
On behalf of DRA