

**INTEREST OF AMICUS CURIAE DEPOSITION REPORTERS
ASSOCIATION OF CALIFORNIA**

The Deposition Reporters Association of California (“DRA”) represents more freelance deposition reporters – what the Code of Civil Procedure refers to as “deposition officers” -- than any other organization in California.

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 certain services or prices to one party but not others. DRA was founded to combat such practices.

DRA worked with the National Court Reporters Association to establish and fund Citizens for Impartial Justice, a nationwide organization that coordinated successful efforts across the country to preserve the impartiality of the deposition reporting profession. As a result court rules or laws were passed in fourteen states including Hawaii, Texas, Minnesota, Utah, West Virginia, New Mexico, Georgia, Louisiana, Nevada, Kentucky, Michigan, Arkansas, Indiana, and North Carolina.

Thus, DRA supports laws that seek to ensure the even-handed treatment of parties by deposition officers. In point of fact, DRA was founded to advocate for such fairness and, by doing so, ensure the enduring credibility and impartiality of deposition professionals. For these reasons, DRA believes it has a perspective useful to the Court in deciding the questions it has posed.

However, as we discuss, treating parties to litigation even-handedly does not *ipso facto* require the judiciary to assume for itself legislative or quasi-legislative-like rate setting powers over deposition services, even if there were some legal authority that authorized such rate-setting.

DRA respectfully requests that its views on the questions posed by the Court be considered.

STATEMENT OF APPLICABLE FACTS

For purposes of responding to the Court's questions, only two undisputed facts need be highlighted.

When the defendant’s counsel in the action below ordered an original transcript of the deposition, counsel was charged the base rate for producing the original transcript plus the customary additional copy. When the appellant here (the plaintiff’s counsel below) sought a copy after the defendant had already ordered the original, the appellant was charged *a lower base rate for the copy* than what the officer charged the other party who had requested the original transcript. (Appendix at A51: “The cost per page for a certified copy is less than one-half the cost of the original transcript.” – Declaration of Nancy Holly)

Moreover, when the defendant in the underlying action ordered that the original transcript be expedited, that defendant was charged an additional percentage fee on top of the normal charge for producing the original transcript plus an additional copy. When the appellant’s copy was expedited too, he was apparently charged *the same additional percentage*. (Appendix at A52) Of course, because the percentage for the appellant was a percentage applied to a lower base rate, the appellant here was apparently *charged less for his expedited copy than his opposing party was charged for their expedited original transcripts*. (See Appendix at A-124 through 136)

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QUESTIONS

The Court has posed the following two questions:

1. Does a trial court have the authority under Code of Civil Procedure section 2025.510, subdivision (c) to require a certified shorthand reporter acting as a deposition officer to provide a copy of a deposition transcript to a party for a reasonable fee?
2. If the answer to question No. 1 is yes, does a trial court ordering a deposition officer to provide a copy of a deposition transcript to a party in a pending action have the authority to determine the amount of a reasonable fee payable by that party to the deposition officer?

ARGUMENT

- A. Does a trial court have the authority under Code of Civil Procedure section 2025.510, subdivision (c) to require a certified shorthand reporter acting as a deposition officer to provide a copy of a deposition transcript to a party for a reasonable fee?**

For four reasons, the answer to question number 1 is “no.”

First, the answer is “no” because one of the Court’s sister branches – the Legislature – has enacted binding code that treats the copies sought by the appellant differently than other deposition products or services such as original transcripts. This, in turn, makes the statute cited in the Court’s question -- California Code of Civil Procedure section 2025.510(c)¹– an unlikely authority for supporting the judiciary’s power to fix the prices for deposition copies.

Section 2025.510(c) reads as follows (emphasis supplied):

(c) Notwithstanding subdivision (b) of Section 2025.320, any other party or the deponent, at the expense of that party or deponent, may obtain a copy of the transcript.

This statute provides that the appellant here may obtain a copy of the transcript at his own expense and “[n]otwithstanding subdivision (b) of Section 2025.320.”

¹ All “section” references are to the California Code of Civil Procedure unless otherwise indicated.

Section 2025.320(b) that mandates that general deposition “products and services” “offered” to one party be “offered” to other parties. Likewise, such “products and services” “shall be made available at the same time” to all the parties.²

But, while section 2520.320(b) generally governs “products and services,” section 2025.510(c) governs copies specifically. It applies [n]otwithstanding” the even-handedness mandated for “products and services” by section 2025.320(b). It is hornbook law that courts, in harmonizing statutes, should look to and give force to a specific statute over a more general one because such specificity is a better indication of how the legislative branch sought to address a particular situation. (*See* Civil Code section 3534: “Particular expressions qualify those which are general.”; section 1859: “a particular intent will control a general one that is

² Section 2025.320(b) reads as follows: “(b) Services and products offered or provided by the deposition officer or the entity providing the services of the deposition officer to any party or to any party's attorney or third party who is financing all or part of the action shall be offered to all parties or their attorneys attending the deposition. No service or product may be offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party or any party's attorney or third party who is financing all or part of the action unless the service or product is offered or provided to all parties or their attorneys attending the deposition. All services and products offered or provided shall be made available at the same time to all parties or their attorneys.”

inconsistent with it"; *Woods v. Young* (1991) 53 Cal.3d 315, 325, "specific provision relating to a particular subject will govern a general provision' ".)

Hence, the Legislature has decreed that copies of deposition transcripts shall not be as a general matter governed by section 2025.230(b). To rule otherwise is to delete by judicial fiat the phrase "*Notwithstanding subdivision (b) of Section 2025.320*" from binding law. Concededly, it is not readily apparent why copies should be treated differently than other deposition products or services where the even-handedness generally applying to "products and services" is concerned. It is binding code nevertheless.³

The answer to the Court's first question is therefore "no" because the statute the question asks about (section 2025.510(c)) provides that copies of depositions are not governed by the requirement of even-handedness seen in section 2025.320(b). Thus that statute cannot be read to ensure some sort of equity between the parties where copies are concerned because that statute

³ Official reporters are allowed to charge for expedited copies. That authority also derives from a statute specifically addressing copies, an indication that the Legislature does elect to address copies distinctly. (Government Code section 69951)

says that copies are exempted from the law requiring such even treatment.

All that remains of section 2025.510(c), then, is the portion that states that a party “may obtain a copy of the transcript” at “the expense of that party[.]”

Nothing in this language hints of any normative limit to that expense that would support the judicial infusion of a “reasonableness” limit, decreed by judges, into it by interpretation. The word and hence the concept of “reasonableness” simply is not in the statute.

Second, assuming that this Court decides that the even-handedness between parties required by section 2025.320(b) must be applicable to copies (notwithstanding section 2025.510(c)’s use of the word “Notwithstanding”), the answer to the first question is still “no.” The answer is still “no” because the Court’s first question asks about whether the trial court has the unrestrained discretion to decree a “reasonable” fee of its own selection instead of asking whether the trial court has the power to order that the *same* fees be charged to all parties, whatever those fees may be.

Assuming *arguendo* that section 2025.320(b) governs, it only requires that “products and services” be “offered” to the parties or be “available” to them all.

The statute is one that on its face seeks to ensure an absence of bias as between litigants. It does not embrace the different issue of whether the prices charged are equally affordable to every litigant.

It is certainly true, at some theoretical level, that far higher prices charged to one party and not the other could in practicality violate the requirement that services be “offered” or “available at the same time ...to all the parties”. (Section 2025.320(b)) However, there is apparently no evidentiary showing by the appellant of hardship or unfair pricing that would establish the factual predicate for such a claim here. Even if there was, though, at most the implied judicial remedy in such a circumstance pursuant to section 2025.320(b) would be to order *that the same prices be charged to all the parties*.

A trial court seeking to enforce the even-handedness required by section 2025.320(b) need not delegate to itself the exercise quasi-legislative-like, price-regulatory powers – powers to be used without statutory grounding or guidance of any kind – to fix “reasonable prices.” This far broader remedy cannot be sustained by or inferred from a statute that simply mandates even-handed treatment.

Phrased differently, the statute demands even-handed treatment between the parties where *offering* and making *available* products and services are concerned. The statute cannot fairly be strained to read to authorize a kind of implied and progressive rate schedule of affordability for each individual party based on each judge's idiosyncratic view of what is and is not "reasonable" either per se or measured in light of the precise financial means of each party. Instead, if a remedy is implied under section 2025.320(b) it is the power to order that the fees charged by one party be exactly charged to the other. In which case, here, it would be the defendant – not the appealing plaintiff – with the claim.

Third, that the Legislature sought to permit the prices for deposition products and services to be set by negotiation without government parameters is supported by legislative history and other statutes.

Prior to 1981, the prices for deposition products and services were indeed 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 (i.e., Los Angeles County) 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 public⁴ 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 fees deposition officers had to pay the Court Reporters Board and used the increase to create the Transcript Reimbursement Fund. The Fund pays for deposition products and services for indigent litigants and deposition officers are required to provide such services at fixed rates. (*See* Business & Professions Code sections 8030.2 and 8030.4).

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 were also the ones who had to pay to establish and maintain the Transcript

⁴ Prior law required deposition officers to be notary publics. (*See*, e.g., Government Code section 8211.5 (repealed).)

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 a court decreed which rates are “reasonable” and fix those rates by judicially enforcing the court’s notion of “reasonableness,” the court would be reviving that which the Legislature has repealed; namely, government pricing. And it would be reviving government price regulation even though the obligation of deposition officers to pay for the Fund would endure.

Manifestly, having the “reasonableness” of the fees charged by deposition officers determined by a court is inconsistent with the Legislature’s (i) repeal of fixed prices for those fees; and (ii) creation of the Fund. The Legislature knew what it was doing in this instance and enacted a comprehensive scheme to implement its intent. For the Court to set prices is to repeal the express will of the Legislature.

This Legislature-enacted approach may or may not be good policy in the eyes of the Court. But, respectfully, and of course, this is the Legislature's prerogative.

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.”)

As well, just last year, the Legislature enacted AB 1211 (Price), co-sponsored by DRA. This bill amended section 2025.510, adding a new subdivision (h). Had the Legislature been aware of any problems with unreasonable fees from any source it could have inserted an amendment into

this bill addressing them in the way contemplated by the Court's questions. However, the Legislature not only failed to do so, it addressed in this bill a different problem, one underscored by the appellant's utter refusal to pay until ordered by a court to do so and the subsequent decision to pursue this costly (for the non-party deposition firm anyway) appeal.

The Assembly Judiciary Committee analysis relates the reason for the amendment:

“In support of the bill the author states, ‘Freelance deposition reporting professionals sometimes have a difficult time collecting from the attorneys who have ordered their services and instructed them when and where to show up. After services have been provided at a deposition -- and the transcript even used in court by the attorneys who ordered them -- some attorneys will nevertheless deny any responsibility to pay the professional, arguing that payment was really his client's responsibility all along. Of course, reporters almost never talk to or meet a lawyer's client, let alone receive deposition orders from them. As well, clients in many cases are themselves injured, impoverished, and unable to pay. Many deposition reporters are women and part-time independent contractors. The failure to get paid, delay in payment, and the cost of collection imposes a unique burden on them.’” (*Assembly Judiciary Committee Analysis of AB 1211* (Price), April 10, 2007)

AB 1211 was a “non-controversial” bill (*ibid*) and was passed by the Legislature unanimously.

Yet an additional indication of how far the Court must reach to conclude that it has the authority to remediate violations of section 2025.320(b) by price fixing can be inferred from the existence of the Court Reporters Board, established at Business & Professions Code section 8000 *et seq.* The Board has vast regulatory powers over reporters, including the power to impair or revoke their licenses and cite and fine reporters for violations of laws such as section 2025.320(b). Consumers of reporting services such as the appellant are free to complain to the Board and seek expert administrative intervention and discipline. (*See* Business & Professions Code section 8008(f))

Thus, there exists a statutory-created venue enacted by the Legislature for the appellant to air his grievances and seek remedial assistance for the violations of law he alleges. For the Court to assume for itself inherently subjective, price-regulatory authority over deposition officer products and services is simply a bridge too far (i) when the Legislature has repealed price regulation; (ii) when no statute expressly authorizes it; (iii) when the Legislature evidently knows how to pass laws expressly authorizing price regulation of reporting services when it does want such prices to be fixed by government (e.g., for official reporters); (iv) when such regulation is

unnecessary to ensure even-handedness; and (v) when Legislature-enacted administrative remedies for violations of law exist within the Board.

Respectfully, the mere and single mention of “reasonableness” in section 2520.570(a) cannot credibly serve as a sufficiently clear statutory authorization for judge-made rate-setting when measured against all of the foregoing authorities, especially since it at least arguably appears from the statute that the measure of “reasonableness” is not a trial judge’s notion of fairness but the “charge set by the deposition officer.”

Finally, section 2025.320(e) permits a party to object to a deposition officer before services are provided. This permitted the appellant to inquire about the deposition officers’ rates and prices for copies before the officer began work, and object if the appellant found them unacceptable or illegal. Here too there exists a remedy for appellant short of court conjured powers to fix “reasonable process.” And if a court finds that section 2025.320 has been violated, subdivision (f) provides that a fine may be imposed; once more, an express, legislatively authorized remedy exists to redress appellant’s grievances without the court exercising what are traditionally legislative or quasi-legislative functions.

Fourth, and as foreshadowed by the discussion immediately above, price regulation is usually a legislative and quasi-legislative matter because it is fraught with such policy-making questions as what rates of return are sufficient to encourage an ample supply of regulated entities (here, reporters); which costs should fairly be absorbed by the reporter as opposed to being passed on to customers; and what the remedies should be for a reporter who alleges that the rates set are unconstitutionally confiscatory under such authorities as *Federal Power Comm'n v. Hope Natural Gas Co.* (1944) 320 U.S. 591.⁵ Thus, "ratemaking is an essentially legislative act" *New Orleans Pub. Serv., Inc. v. New Orleans* (1989) 491 U.S. 350, 371.) *See also Prentis v. Atlantic Coast Line* (1908) 211 U.S. 210, 226 (the "establishment of a rate ... is an act legislative not judicial in kind"); *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292 ("in fixing rates, a regulatory commission exercises legislative functions ... and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions".)

⁵ This raises the interesting question of whether the judge who fixed the price would also adjudicate any claims that the price he fixed was unconstitutionally confiscatory.

As demonstrated by such cases as the landmark (and lengthy) *20th Century Insurance Co. v. Garamendi* (1994) 8 Cal.4th 216, responsible and thoughtful rate regulation can involve a myriad of complex policy questions that to a large part are based on factual records evaluated by the subjective eye of the beholding regulator. (“But the ‘finding’ of such ‘facts’ does indeed belong to the quasi-legislative function. That is the case when, as here, the administrative agency's task ‘was to receive and consider economic and social data, as well as opinion and argument, covering large numbers of people and wide sectors of the economy; to select a series of positions aimed at the statutory objectives but shaped by discretion and policy; finally, to express its selection in rules regulating the future conduct of relatively broad classes of persons.’”, *Id.* at 279, quoting *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 586. *Accord: Federal Power Comm’n v. Hope Natural Gas Co.* (1944) 320 U.S. 591, 602 (“[The] rate-making function ... involves the making of ‘pragmatic adjustments.’”))

And because rate-making is steeped in so many policy questions it is always grounded in policies enacted by the policy-making branches of government. (*See, e.g., id.* at 603 (“[T]he rate-making process ... i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and consumer interests.”))

Relatedly, as the 20th Century case discusses, there is no single way to determine “reasonable” prices. (*20th Century Insurance Co. v. Garamendi*, 8 Cal.4th at 257-58) One method is simply to impose a uniform price cap that suppresses prices no matter the individual circumstances of the regulated entity; however, such a regime is subject to tough judicial scrutiny. (*Calfarm v. Deukmejian* (1988) 48 Cal.3d 805, 817 (“any law which sets prices may prove confiscatory in practice”))

Another – the method preferred by commentators and the method adopted by the Public Utilities Commission and the Department of Insurance – is to examine the parts of each company’s rates (overhead, profit), test them against the regulator’s notion of reasonableness, and allow some portion to be passed onto customers, thus ensuring consistency and predictability for regulated entities and tailor-made constitutionality. *20th Century Insurance Co. v. Garamendi*, 8 Cal.4th at 257 (“The regulations,’ explained the administrative law judge, ‘avoid the administrative gridlock that would result from readjudicating over and over hundreds of issues that affect multiple insurers in lengthy hearings that would yield inconsistent results-if they ever yielded any result at all.’ ‘The regulations employ generic determinations and a detailed formula designed to ensure manageability and consistent treatment of insurers and insureds.’ ‘At the same time, the regulations incorporate multiple company-specific factors into the rollback

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

In its quest to determine a “reasonable fee,” which method would the trial court and each subsequent trial court use? Measured against what evidentiary record? Would it use “multiple company specific factors”? How would price caps be determined to be “reasonable?” Would they be indexed to inflation to prevent creeping unconstitutionality?

It is virtually unimaginable for a court to engage in such deliberations absent the clearest of statutory commands to do so. That having judges resolve such myriad and subjective policy questions is inconsistent with sound principles of judicial decision-making is precisely why courts uniformly strive to defer to these policy determinations when they are made by legislatures and regulators. (*Id.* at 272.)

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B. If the answer to question No. 1 is yes, does a trial court ordering a deposition officer to provide a copy of a deposition transcript to a party in a pending action have the authority to determine the amount of a reasonable fee payable by that party to the deposition officer?

Because we answer “no” to the first question, DRA need not address this second question beyond making a final, concluding observation:

Respectfully, to resolve the appeal, the Court need not address either of its questions. The appellant here was treated identically to the defendant in the underlying case with but one exception: the appellant *was overall charged less* than the other party.

For this reason, section 2025.320(b)’s requirements of even-handedness between the parties has been satisfied even assuming the statute applies; indeed, it is difficult to imagine how it could be more satisfied from the appellant’s perspective. Any discussion as to what the available judicial remedies might be to address a violation that has not occurred in this case

would be *dicta*, made worse by the fact that the reporters were not even clearly parties to this or the underlying action.

CONCLUSION

For the foregoing reasons, the relief sought by the appellant should respectfully be denied.

Respectfully submitted:

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