

INTRODUCTION

The National Court Reporters Association (“NCRA”) is a 23,000-member nonprofit organization representing the judicial reporting and captioning professions. Members include official court reporters, deposition reporters, broadcast captioners, providers of real-time communication access services for deaf and hard-of-hearing people, and others who capture and convert the spoken word into information bases and readable formats. NCRA’s total national membership includes 9,591 deposition reporters. NCRA has 2,429 total members in California of which 1,487 are deposition reporters. NCRA is submitting this brief in support of the Respondents since the outcome of this appeal may have a substantial impact on NCRA’s California members.

The Court of Appeals has asked NCRA to respond to the following questions in this proceeding:

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 in a pending action 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?

NCRA respectfully submits that the answer to the first question is “no” for the reasons discussed below. In light of this answer, no response is required to the second question.

NCRA is concerned, however, about statements that the expedite fees and perhaps even the copy charges in this case were “unconscionable” because no substantial extra effort was required to produce expedited copies for the Appellant after the transcript was prepared. NCRA would like to explain why this is an unfair characterization of the complex business model under which most court reporters seek to share costs of their services between the parties in an equitable manner.

DISCUSSION

Section I. Section 2025.510(c) Does Not Authorize a Trial Court to Order a Deposition Officer to Provide a Transcript for a Reasonable Fee.

Section 2025.510(c) of the California Code of Civil Procedure states that, “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.” Section 2025.320(b) states in turn that services and products offered to one party “shall be offered to all parties or their attorneys” and “made available at the same time to all parties or their attorneys.”

NCRA believes that the plain and simple meaning of these code sections is that the deposition officer not only must provide copies of the transcript to the noticing party, but also to all other parties and the deponent upon request. In addition, Section 2025.320(b) puts an affirmative duty on the deposition officer to not offer or provide services to one party unless such services are also offered to the other parties and are made available at the same time.

Neither of these provisions indicates that a trial court has any authority to establish the prices at which such services and products should be provided and there appears to be no legal basis for implying any such authority. These code sections merely regulate the practice under which transcripts must be offered and delivered, but do not regulate the pricing of deposition reporting services or the transcript products that are provided. NCRA believes that the authorities cited by the Respondent and other amici curiae briefs in support of the Respondent (which will not be repeated) clearly demonstrate that there is no basis under California law to imply that a trial court has such authority.

To NCRA's knowledge, the overwhelming majority of states follow this same methodology for regulating the practice of providing transcripts and deposition reporting services. That is, states regulate the practices that must be followed by court reporters in terms of offering equal services and acting impartially. In contrast, NCRA knows of no states that set the price of the deposition transcript by statute or rule, or that give such authority to set the price to the court. The closest exception is Texas, where there is a rule established by the Texas Supreme Court that requires court reporters to charge a non-noticing party no more than a fixed percentage of the per page cost of the original and first copy of a transcript. However, even in Texas, the courts do not have the authority to determine the actual prices that can be charged.

Finally, this approach of regulating the practice of providing the transcript without regulating price mirrors how the NCRA Code of Profession Ethics (the "NCRA Code") regulates NCRA members. Court reporters who are members of NCRA are required under Provision 1 of the NCRA Code to "be fair and impartial toward each participant in

all aspects of reported proceedings, and always offer to provide comparable services to all parties in a proceeding.” The rationale for requiring a reporter to offer comparable services to all parties, as explained by NCRA’s Committee on Professional Ethics in Public Advisory Opinion No. 22, is that failure to do so compromises the reporter’s duty of impartiality. The Court should note that NCRA never regulates how a member of NCRA prices those services, as pricing is determined by the free market and is a contractual matter between the court reporter and the attorney and/or party.

Therefore, NCRA is in agreement with the Respondent’s Brief, including its reliance on section 2025.570, subdivision (a), which states that a transcript must be provided upon request “on payment of a reasonable fee set by the deposition officer.” There is no authority or precedent of which NCRA is aware that would authorize a trial court to establish a new price. If a litigant has a dispute over the pricing or business practices of a particular court reporter, then there is the opportunity to seek relief in other ways, such as filing a breach of contract or unfair business practices claim, or filing a complaint with the California Court Reporters Board.

Section II. General Information Regarding Court Reporting Billing Practices

Although not specifically questioned by the Court of Appeals, NCRA is concerned about the trial court’s comment that the respondent’s fee was “unconscionable” because no substantial extra effort was required to produce copies for the Appellant after the original transcript was prepared. NCRA believes that the Court would benefit from an explanation of the traditional business model that determines how costs for deposition transcripts are shared between the parties.

Court reporters on average go through almost three years of schooling to become a court reporter, and in some states, such as California, must pass a licensing exam in order to work in the state. In addition, the court reporter must use their own funds to purchase the equipment, software, services, and supplies needed to stenographically record the proceedings as well as that needed to transcribe it. Many reporters spend years working on their speed at reporting the proceedings as well as becoming knowledgeable in technical testimony in many fields such as medicine and engineering. Indeed, most attorneys wish to hire those reporters who are experienced with reporting such technical information as well as reporters with the knowledge of the relevant state or federal rules of procedure.

Traditionally, attorneys typically charge an hourly fee for services they provide to clients. The amount of such fee is influenced by the attorney's years of experience, his or her education, and, finally, by what the market determines to be an appropriate rate in that community or area of practice. However, the situation is quite different for court reporters. Aside from an appearance fee that the noticing attorney generally pays, the sole income for the reporter comes from the sale of the original transcript and copies of that transcript, and various ancillary services. Many hours of research and transcription time are involved in preparing a transcript outside of the time when the court reporter actually sits with the parties during a deposition. Indeed, when a party requests additional services, such as an expedited copy, this requires the reporter to put aside another client's transcript or perhaps forego attending another deposition in order to meet the earlier deadline.

Traditionally, the amount charged to the noticing party is not intended to fully compensate the reporter for his or her time and expertise. Instead, most court reporters utilize a business model under which the non-noticing party is charged an amount which, when combined with the amount charged the noticing party, will provide fair compensation for the court reporter's efforts. In a particular case, a court reporter may do better or worse depending upon how many copies or ancillary services are ordered. On average, however, a court reporter independently sets his or her fees for copies and ancillary services in order to fairly and impartially share the costs of producing transcripts among all of the parties, and still earn a reasonable income from their profession.

There is nothing unreasonable or unfair about this business model. That is why all state rules as well as federal rules allow for such charges and allow for the market to determine the amount of such charges. This allows all parties to share in the reporter's costs and avoids one party paying for the others' transcripts, which would be neither impartial nor fair. In any case, the noticing attorney or other attorney is always free to negotiate this cost split, or to work out another arrangement that will provide fair compensation to the court reporter for the work he or she is being asked to undertake in a particular case.

Accordingly, it is unfair to argue, as Appellant has done, that charges for copies and associated services are automatically unconscionable because no substantial effort is required to make the second copy. Once again, the prices for copies and ancillary services are established by a court reporter using a business model that spreads the true cost of a deposition reporter's work between the parties taking into account the total

business of the court reporter or firm. If a reasonable amount can not be charged for copies and ancillary services, then the court reporter would need to charge more to the ordering party in order to receive fair compensation. Certainly there is nothing “unconscionable” about the very open and well settled business model of sharing the cost of transcript production between the parties, since it all evens out in the end.

Moreover, as indicated above, Appellant’s counsel was free at the beginning of the depositions to inquire about prices and to seek an alternative fee arrangement at that time, or to ask the Respondent’s counsel to employ a different court reporter. After the deposition was completed, the Appellant still had the right to challenge these charges by making a breach of contract or unfair business practices claim, or filing a complaint with the California Court Reporters Board.¹ The trial courts should not get involved in deposition court reporter business pricing arrangements and lack the authority to do so.

CONCLUSION

NCRA appreciates the opportunity afforded to it by the Court of Appeals to participate as amicus curiae in this proceeding. For the reasons discussed above, NCRA believes that a trial court does not have the authority to set prices or regulate the business practices of court reporters absent a specific statute or rule. In any event, careful consideration should be given to all of the factors that go into the pricing business models generally utilized by court reporting firms in order to share the cost of their services between the parties in a fair and impartial manner. It is not “unconscionable” for a court reporter to utilize a business model that is designed to share the cost of providing an

¹ It is important to note that the court reporting firm in this case followed the ethical practice of producing the transcript without requiring payment of the disputed expedite fee so that Appellant would not be prejudiced in any way over this business dispute. Accordingly, no argument can be made that the trial court needed to intervene in order to protect the Appellant. In a case like this, the parties should be left to their own to resolve their commercial business dispute in a fair and equitable manner.

accurate and timely transcript and ancillary services in an impartial and fair manner between the parties. Attorneys are quite capable of evaluating these arrangements, negotiating alternatives, or employing another court reporter in consultation with counsel for the other parties if they are dissatisfied.