HansonBridgett

MEMORANDUM

TO: Deposition Reporters' Association

FROM: Adam Hofmann and Josephine Mason, Hanson Bridgett LLP

RE: Code of Civil Procedure § 2016.030 – Stipulations Regarding Deposition Procedures

DATE: February 15, 2018

The Deposition Reporters' Association ("DRA" or the "Association") requested Hanson Bridgett LLP's guidance regarding what is often called the "SoCal Stipulation" or "Usual Stipulations" and the interplay between Section 2016.030 of the California Code of Civil Procedure,[1] which governs stipulations to modify discovery procedures, including depositions, and the standard rules governing the preparation, custody, and use of deposition transcripts.

Please note that this Memorandum is informational only and may not be relied upon as legal advice, including by witnesses and litigants who may appear before the Association's members in deposition proceedings. Every situation is different, and counsel, litigants, and witnesses are advised to seek the advice of their independent counsel should they have questions.

SUMMARY

No statute specifically addresses the legality of lawyers assuming the responsibilities assigned to of deposition officers pursuant to Code of Civil Procedure section 2025.520(e), which in pertinent part provides that "the deposition officer" is responsible for indicating changes made to a transcript and notifying the parties who attended the deposition of such changes For the reasons discussed below, because current law addressing whether lawyers may stipulate to performing these duties is uncertain, the wisest course for litigators is to allow the deposition officer to perform the functions assigned to her by the Code of Civil Procedure.

[1] Unless otherwise specified, all statutory citations are to the Code of Civil Procedure.

BACKGROUND

Before 2005, Section 2021 allowed parties to modify discovery procedures by stipulation.

> Unless the court orders otherwise, the parties may by written stipulation (a) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions, and (b) modify the procedures provided by this article for other methods of discovery.

In 2004, however, the Legislature repealed Section 2021 and replaced it with new Section 2016.030, effective January 1, 2005. Section 2016.030 provides:

> Unless the court orders otherwise, the parties may by written stipulation modify the procedures provided by this title for any method of discovery permitted under Section 2019.010.[2]

Unlike former Section 2021, Section 2016.030 does not refer to depositions by name. Nonetheless, it extends to all approved methods of discovery, including oral and written depositions, by virtue its reference to the Civil Discovery Act and Section 2019.010.[3]

The following will consider each of the questions below.

DISCUSSION

1. Is a stipulation that is made orally, but transcribed, identical to a written stipulation under section 2016.030 such that when section 2016.030 specifies that a stipulation must be made in writing an oral transcription will nevertheless suffice to meet the writing requirement of the statute?

   Brief Answer: **There is no clear answer based on existing authority, and argument can be made either way. Given the uncertainty and the holdings of the most closely analogous cases, however, the best approach would assume that recorded oral stipulations will not suffice under Section 2016.030.**

[2] § 2016.030.

[3] See § 2016.030.

As noted, stipulations to modify discovery procedures must be "written."[4] No case law appears to resolve whether a stipulation entered orally in a recorded deposition suffices. As a result, it is necessary to consider cases interpreting analogous statutes and rules of statutory construction.

Case law holds that an oral agreement made during a deposition and reduced to writing by a certified shorthand reporter does not constitute a "stipulat[ion], in a writing signed by the parties. . . ."[5] Those cases were considering the sufficiency of a stipulated settlement agreement for purposes of the expedited enforcement procedures established by Section 664.6. Arguably, that statute's requirement that the stipulation be "signed by the parties" makes the cases inapplicable to Section 2016.030's requirement for a mere "written stipulation." However, another court also held that an offer of judgment made orally at a deposition did not constitute "an offer in writing" for purposes of yet another statute, § 998, which—like Section 2016.030—does not have a signature requirement.[6]

On the other hand, the practice of stipulating to modified deposition procedures long predates enactment of Section 2016.030 and may derive from common practice under the Federal Rules of Civil Procedure. Having enacted Section 2016.030 without addressing this practice may suggest that the Legislature did not intend to abrogate it. Further, the definition of a "writing" in the Evidence Code is broad enough to include a deposition transcript.[7] The Civil Discovery Act incorporates by reference this definition of a "writing."[8] Although the term "written stipulation" is not identical to the term "writing," the terms are similar and thus may be interpreted similarly. And, the Evidence Code includes pictures and sound recordings as "writings." Thus, aforementioned case law notwithstanding, it is possible that a court would conclude that the term "written stipulation" in Section 2016.030 is narrower than the Evidence Code's very broad definition of a "writing," but no authority appears to establish or describe a difference between the two terms here.

Given the uncertainty and the cases interpreting Sections 664.6 and 998, it remains advisable to make any stipulations in writing in advance of a deposition.[9]

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[4] § 2016.030.

[5] *City of Fresno v. Maroot* (1987) 189 Cal.App.3d 755; *Datatronic Sys. Corp. v. Speron, Inc.* (1986) 176 Cal.App.3d 1168, 1174.

[6] *Saba v. Crater* (1998) 62 Cal.App.4th 150, 153.

[7] See Evid. Code., § 250.

[8] § 2016.020.

[9] See, e.g., 2 Witkin, Cal. Evid. 5th § 39 (2012 & Supp. June 2017).

If such a stipulation can be made orally at a deposition, notwithstanding the statutory language in section 2016.030 specifying "in writing," can it be binding on nonstipulating parties who were not present at the deposition when the stipulation was orally made and have not later become parties to the stipulation, when a stipulating party seeks to admit the original transcript at trial? Said differently, is a nonstipulating party bound by the stipulation such that the nonstipulating party could not lawfully object to an effort to admit the transcript? (NOTE: this does not ask whether the objection would be granted.)

Brief Answer: **A party will not normally be bound by a stipulation to which he or she did not agree, but a party may be deemed to have stipulated by passive acquiescence if he or she had the opportunity to attend the deposition, knew a stipulation would be offered, but chose not to attend the deposition.**

"A stipulation is an agreement between counsel respecting business before the court[,] . . . and like any other agreement or contract, it is essential that the parties or their counsel agree to its terms."[10] Thus, a party will not normally be bound by a stipulation to which it did not agree.[11] This would suggest that a party who does not attend a deposition is not bound by stipulations entered on the deposition record.

However, it is possible that a party will be deemed to agree to a stipulation if the party "passively acquiesces" to it.[12] If the party had sufficient notice of a deposition, and had notice that a stipulation was to be proposed and then failed to object[13] or chose not to attend that party may be deemed to have waived the right to object to stipulations made at that deposition, as long as the stipulations were otherwise lawful.[14]

For these reasons, the best view is that a stipulation entered into in a deposition where not all parties are present would not be read to bind non-attending parties and stipulations to modify deposition procedures create a risk of uncertainty in the eventual admission of the transcript if entered while a party was absent or if there is any chance of parties joining a case after the deposition occurs.

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[10] *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 142.

[11] See *ibid.*

[12] See *ibid.*

[13] See § 2025.620.

[14] See Palmer, supra, at p. 142; § 2025.620.

2. Pursuant to section 2025.520(e), "the deposition officer" is responsible for indicating changes made to a transcript and notifying the parties who attended the deposition of such changes. If, pursuant to a stipulation that relieves the deposition officer of those duties, an attorney assumes them and the attorney fails to notify all the parties who attended the deposition of such changes notwithstanding that the stipulation among the parties required the attorney to provide such notice, what, if any, are the possible consequences? (An exhaustive list is not requested, just some examples, if any.) For example, may the party who was not notified object to an effort to admit the transcript? If the changes only come to the attention of the party after the transcript has been admitted is it possibly grounds for a new trial or mistrial if the transcript was admitted and relied upon by the trier of fact in rendering a decision?

   Brief Answer: **A party's failure to comply with the terms of a stipulation to modify deposition procedures would likely render the resulting transcript subject to objection.**

Under those circumstances, if an attorney fails to notify the parties who attended the deposition of any changes to the deponent's testimony, it would violate the parties' stipulation, which is tantamount to a binding contract.[15] It would also arguably violate the Civil Discovery Act to the extent that the attorney failed to carry out the duties he or she voluntarily undertook that would normally be the responsibility of the deposition officer. Thus, such a stipulation whereby a lawyer assumes the role of a neutral "deposition officer" imposes duties of impartiality on the attorney that the attorney must scrupulously abide, which some may claim is an awkward fit with the attorney's duty of undivided loyalty to their client.[16]

It is possible that an opposing party could, if the party believed the attorney acted partially, object to the admission of the transcript, move for evidentiary or terminating sanctions, or move for a new trial or mistrial. A new trial motion may be made on several grounds, including "irregularity of the proceedings" preventing a fair trial, accident or surprise, and newly discovered evidence.[17] A mistrial may be declared on similar grounds if the error is too serious to be corrected.[18] Depending on its severity and intent, the omission could also expose the attorney to more serious sanctions or other disciplinary action.

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[15] See *Winograd v. Am. Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632, as modified (Jan. 7, 1999); 1 Witkin, Cal. Proc. 5th Attys § 263 (2008 & Supp. March 2017).

[16] *Cf. Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, 396 (reflecting on attorneys' duty of undivided loyalty to clients).

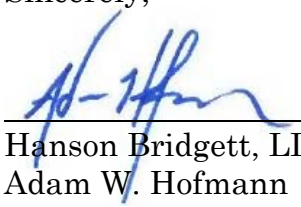
[17] § 657.

[18] See 7 Witkin, Cal. Proc. 5th Trial §§ 167, 210 (2008 & Supp. March 2017).

On the other hand, for an inadvertent or minor omission, a court would likely consider whether it was material and prejudicial, whether the opposing party had an opportunity to cross-examine the witness on this topic, and whether the deponent could be redeposed or recalled to the stand to explain the changes in his or testimony.

If the Association has further questions regarding these topics, please do not hesitate to contact our office.

Sincerely,



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