

Is The Southern California Deposition Stipulation Legal?

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Recently, the Court Reporters Board of California (“Board”) issued a legal opinion memorandum confirming that the Southern California stipulation whereby attorneys agree to waive the court reporter’s custodial duties is enforceable such that it would subject court reporters to disciplinary action unless the court reporter agreed to relinquish his or her statutory duties and failed to follow the stipulation. However, a court reporter who does not agree to waive his or her statutory duties cannot be disciplined for refusing to follow a stipulation to which he or she was not a party. The issue was originally raised by court reporters and related stakeholders to the Board in 1996 who submitted the matter to staff legal counsel from the Department of Consumers Affairs Legal Office for a decision. For reasons unknown, the opinion was not published until December 23, 2015.

The issue involves the practice of Southern California attorneys

who regularly stipulate at the close of deposition proceedings to “relieve the court reporter of his or her duties under the code.” This practice contrasts with Northern California practice where the deposition transcript is handled “per code” meaning the court reporter retains custody and control of the original certified transcript and is responsible for notifying the parties when the transcript is ready for review, correction and signature and for procuring same. In Southern California the parties agree the court reporter will send the transcript to the witness or the witness’ attorney who agrees to notify counsel of changes and signature and further agree that a certified copy may be used if the original is lost, misplaced, destroyed or otherwise not available.

According to the Board’s Memorandum of Decision, the origins of the Southern California stipulation are murky but date back to 1976. The purpose of the stipulation is to save the deponent the cost of having to purchase a certified copy of the transcript. Not mentioned in the opinion are the additional advantages of saving the deponent the inconvenience of having to make a trip to the court reporter’s office to review, correct, and sign the transcript as they would have to do if the transcript was being handled “per code.” Another advantage of the stipulation is it allows a witness the opportunity to

consult with counsel before making substantive changes to testimony which might not be necessary and might adversely affect the witness’ credibility.

The specific issue presented to the Board and referred for legal opinion was framed as follows: “If a court reporter does not adhere to a waiver of his or her duties by counsel at a deposition, can the board discipline that court reporter for unprofessional conduct?” Court reporters, like attorneys, are officers of the court referred to as “Deposition Officers” and play a critical role in legal proceedings due to their fundamental duty to produce a complete, accurate, and secure transcript. A court reporter has ethical duties codified in Business and Professions Code Section 8025 and the Code of Civil Procedure. These duties include impartiality, filing and retention of notes, notification, availability, delivery, execution, and certification of transcript and to comply with any legal provision substantially related to their duties. B&P § 8025(d). Accordingly, a court reporter can be disciplined for fraud, dishonesty, corruption, willful violation of a duty, gross negligence, incompetency or unprofessional conduct. B&P § 8025(d).

In analyzing the issue, the Board first looked to Code of Civil Procedure Section 2025.520 which proscribes the court reporter’s custodial duties:

If the deposition testimony is stenographically recorded, the deposition officer shall send written notice to the deponent and to all parties attending the deposition when the original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing, **unless the deponent and the attending parties agree on the record that the reading, correcting, and signing of the transcript will be waived** or that the reading, correcting, and signing of a transcript of the testimony will take place after the entire deposition has been concluded or at some other specific time. For 30 days following each such notice, unless the attending parties and the deponent agree on the record or otherwise in writing to a longer or shorter time period, the deponent may change the form or the substance of the answer to a question, and may either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it... (Emphasis added).

Next, the Board looked to the language of a much broader provision, former Code of Civil Procedure Section 2021, which essentially provided the parties may agree to take a deposition in any manner they agree upon:

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. (Emphasis Added).

Ultimately, the Board concluded the broad “in any manner” language of 2021 trumped even the “shall” language of Section 2025 because Section 2021 does not address whether or not the court reporter has a duty to follow the parties’ stipulation. Thus, the Board reasoned if a court reporter does not agree to waive his or her duties, a court reporter cannot be disciplined for not following the parties’ stipulation because there is no express provision and no way to meet the burden of proof by way of clear and convincing evidence. On the other hand, it would be unprofessional conduct if the court reporter agrees to waive his or her duties and does not follow the stipulation.

Section 2021 has since been repealed and the “in any manner” language relied on by the Board does not appear in the current Civil Discovery Act. See CCP § 2025.010 et. seq. Thus, the propriety of the Southern California deposition stipulation may still be the subject of further scrutiny. Typically, in Northern California court reporters will not agree to waive their statutory duties. As a matter of practice in Southern California, in order to bind the court reporter their

consent to waive custodial duties should be obtained and confirmed on the record. Otherwise, according to the Board’s reasoning the court reporter has no ethical or professional obligation to follow the terms of the stipulation.

It is also important to appreciate that court reporters have additional duties which should not be waived in a stipulation including: swearing the witness (CCP 2025.330(a)); to record the deposition by stenographic means (CCP 2025.510(a)); and to keep notes for not less than a year if a transcript is produced or not less than eight years if no transcript is produced (2025.510(e)). By waiving all duties a court reporter no longer has a duty to transcribe exactly what was said. Court reporters are human and make mistakes. Even minor typographical errors can have significant impact. Thus, rather than agreeing to waive all of the court reporter’s duties under the code, a practitioner in Southern California should limit the stipulation to “custodial” duties only. Alternatively, even a Southern California attorney is not required to waive the court reporter’s statutory duties and can for whatever reason insist that the transcript be handled “per code.”

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