TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 84-304
of	:	NOVEMBER 7, 1984
JOHN K. VAN DE KAMP Attorney General	:	
RONALD M. WEISKOPF Deputy Attorney General	:	

THE HONORABLE ROBERT G. BEVERLY, MEMBER OF THE SENATE, requested an opinion on the following question:

Who is responsible for the cost of the original transcript of a deposition where the parties do not stipulate to forego its transcription?

CONCLUSION

As a general matter, where parties to an action do not stipulate to forego the transcription of oral testimony at a deposition, the party who noticed and took the deposition is responsible for the cost of transcription and preparation of the original transcript. When such a cost allocation would be unfair the court may order a different allocation.

ANALYSIS

In 1957 the Legislature enacted new provisions in the Code of Civil Procedure relating to depositions and discovery (Stats. 1957, ch. 1904, § 3, at 3326) patterned largely after the Federal Rules of Civil Procedure (28 U.S.C.A., Fed. Rules Civ. Proc. [FRCP], rules 26-37). Under them the California litigant is now provided five discovery devices: depositions, interrogatories to a party, requests for inspection, motions for medical examinations, and requests for admissions. (Code Civ. Proc., §§ 2016-2036.5; cf. Hogan, *Modern California Discovery* (3rd ed. 1972) §§ 1.04, 2.01.) We deal herein with the first, the deposition, which is defined as: "*a written statement*, under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine" (§ 2004).[1] It is who pays for that statement's coming to be written that is the concern of this opinion.

Section 2019, subdivision (a) provides:

> "Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes."

Speaking generally in brief overview, the deposition process is as follows: depositions are written statements under oath (§ 2004) which may be taken upon notice to all parties, by any party to an action for discovery and/or use at trial (§ 2016(a)). After the deponent is sworn (§ 2019(c)), his or her testimony *must be* "recorded stenographically *and transcribed*" unless otherwise agreed (*ibid.*), by "the officer *employed* by the person noticing the deposition" (§ 2019(e)(2)). All parties are notified of the availability of the deposition and of the changes made by the deponent (§ 2019(f)(2)) and "upon request and payment of a reasonable charge therefor," all parties and the deponent are entitled to a *certified copy thereof*. (*Ibid.*)

---

[1] Hogan notes that "insofar as this statute confers upon the adverse party not only the right to put questions to the deponent, but also 'to attend' the examination itself, it is accurate only as to the most common method of taking a deposition under the Discovery Act, namely, the deposition upon oral examination." (*Modern California Discovery*, *supra*, at 26 (§ 2.01).) Depositions upon oral examination proceed under section 2016, depositions upon interrogatories, under section 2020. The latter is quite a different discovery device from "written interrogatories to a party" that takes place pursuant to section 2030 since the questioning process involves both parties and not only the propounding party. Since 1970, the federal rules have avoided the confusion by speaking of the one as "depositions upon written questions" (FRCP 31) and the other as "written interrogatories to a party" (FRCP 33). (See Note of Advisory Committee on Rules, foll. 28 U.S.C.A., FRCP 31.)

Our concern arises for the following reasons: There are many depositions taken in which nothing useful is discovered (cf. 1970 Advisory Committee Note to Amended FRCP 30(c)) and a transcription would be useless to the parties. Section 2019, *supra*, contemplates that possibility by providing that "the testimony shall be taken stenographically and transcribed *unless the parties agree otherwise*." Thus where the parties agree to forego transcription of the stenographic notes there is no problem. A problem does arise however where the deposing/noticing party feels a transcript would be of no use but another party to the action (or the deponent) does and would like the copy to which he or she is entitled under section 2019, subdivision (f)(2). Since a copy can obviously neither be made nor perforce provided without an original from which to make it, and since the charge for a copy is usually but a fraction of what is charged for an original (Hogan, *Modern California Discovery*, *supra*, at 116; DeMeo, *Cal. Deposition & Discovery Practice*, at ¶ 5.16(4) and Wright & Miller, *Fed. Practice & Procedure* at Civ. § 2117, 431 & 431, fn. 76, all citing *Burke* v. *Central-Illinois Securities Corp.* (D. Del. 1949) 9 FRD 426 (originals @ $1400; copies @ $250; cf. our understanding ex. Polk Court Reporters, Los Angeles (cost of a copy might = 1/3 cost of original & 1), the question arises as to just who is to pay for transcribing the stenographic record of the oral testimony and preparing the original transcript in such circumstances, the deposing/noticing party who does not want it or another who immediately does?[2] In other words, may the deposing/noticing party be compelled to pay the cost of transcribing when he or she does not want a transcript? The code is silent on the issue, and so its resolution is not that "straight-forward."

California case law sheds little light on the subject. But for one case that antedated the adoption of the Discovery Act in 1957, and held (construing former § 2021, repealed Jan. 1, 1958) that an adverse party could *not* compel the party taking a deposition to make necessary arrangements including paying the reporter to have it transcribed (*Fejer* v. *Paonessa* (1951) 104 Cal.App.2d 190, 195, there is a dearth of California judicial authority on whether the cost of original transcription must be paid by the party who took a deposition. Under such circumstances guidance can usually be found in federal cases that might construe a corresponding federal rule, for "where, as here, there is no controlling

[2] is somewhat different from a situation about which inquiry was also made as to just who would pay for an original transcript when all the parties at first agreed to waive transcription but a non-deposing party later decides that a copy is needed. The deposing party should not have the Damocles sword of paying for an original transcript held endlessly over his or her head. Under subdivision (c) of section 2016 the mandatory requirement that deposition testimony be transcribed is vacated when the parties agree to forego transcription and we believe the deposing party should then be relieved of any obligation he or she might have in that regard. A desire thereafter by another party to have a copy takes place, as it were, in a "whole new ballgame" and he or she would have to pay for the original as well.

California authority . . . and the California rule is identical to the corresponding federal rule, federal cases construing the rule are particularly persuasive authority." (*Danzig* v. *Superior Court* (1978) 87 Cal.App.3d 604, 610, citing *Southern California Edison Co.* v. *Superior Court* (1972) 7 Cal.3d 832, 839; see also 66 Ops.Cal.Atty.Gen. 272 (1983).)

Such a federal rule exists, or at least existed until amended in 1970 to address this very problem. The language of section 2019(c) that the "testimony shall be taken stenographically and transcribed unless the parties agree otherwise" was taken verbatim from the original version of FRCP, rule 30(c).[3] Unfortunately though, the federal cases construing the rule did not agree on a consistent interpretation of it with respect to our problem:

> "The federal courts failed to develop a consensus as to whether the deposition-taker could be compelled to pay the cost of having the testimony transcribed. One court gave the deposition-taker the option of avoiding the cost of transcription [*Odum* v. *Willard Stores, Inc.* (D.D.C. 1941) 1 FRD 680]; another court regarded it as the deposing party's obligation to incur this cost [*Burke* v. *Central-Illinois Secur. Corp.* (D. Del. 1949) Corp. 9 FRD 426; see also *Saper* v. *Long* (S.D. N.Y. 1951) 17 FRD 491]; and a third felt that the matter should be left to the trial judge's discretion [*Dall* v. *Pearson* (D.D.C. 1963) 34 FRD 511]. These divergent approaches were reviewed in *Kolosci* v. *Lindquist* [N.D. Ind. 1969) 47 FRD 319], and yet a fourth viewpoint emerged: the one taking the deposition *normally* should pay to have it transcribed if the other parties insist, but in 'extraordinary circumstances' a trial judge would have the discretion to relieve the party taking the deposition from this burden. Two examples of such extraordinary circumstances were given: (1) 'a prolonged and harassing cross-examination designed to build up the cost of the deposition;' and (2) the situation 'where a deposition turned out to be of no value to any of the litigants but opposing counsel insists on it being transcribed and filed nevertheless, just to build up costs.' [47 FRD at 32.] Oddly enough, no mention was made of situations

[3] In 1970, FRCP rule 30(c) was amended so that, as here pertinent, it reads: "The testimony shall be taken stenographically . . . . If requested by one of the parties, the testimony shall be transcribed." Hogan notes that "[a]lthough the words themselves do not clearly reveal it, this change was made to give the trial court discretion with respect to who shall pay the cost of the requested transcription." (*Modern California Discovery*, *supra*, at 117, citing Advisory Committee Notes to Amended FRCP 30(c): "The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription." (But see fn. 4, *post*.)

> where the party taking the deposition simply does not have the wherewithal to do more than pay the reporter's fee for taking down the testimony in shorthand, but other courts have indicated that this is an appropriate matter for consideration. [See *Dall* v. *Pearson* (D.D.C. (1963) 34 FRD 511; *Odum* v. *Willard Stores, Inc.* (D.D.C. 1941) 1 FRD 680.]"

(Hogan, *Modern California Discovery*, *supra*, at 116-117; fns. embodied; see also *Caldwell* v. *Wheeler* (D. Utah 1981) 89 F.R.D. 145, 146-147; Wright & Miller, *Fed. Practice & Procedure*, *supra*, at Civ. § 2117, at 431-432 & 431, fn. 77 - 432, fn. 81; DeMeo, *Cal. Deposition & Discovery Practice*, *supra*, at ¶ 5.16(4); 4A Moore, *Federal Practice*, ¶ 30.59.)

As noted, rule 30(c) was amended in 1970 (see fn. 3, *ante*) and it now "shifts the initiative to the party seeking to have the transcription transcribed [*sic*] and filed." (DeMeo, *California Deposition & Discovery Practice*, *supra*; *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 147.) But even so, the basic question still remains in federal practice, in part because FRCP rule 30(f)(2) provides, as does section 2019(f)(2), that a deponent as well as a party is entitled to a copy at reasonable cost. (*Ibid.*; Wright & Miller, *Fed. Practice & Procedure*, *supra*, § 2119, at 433-434; cf. Hogan, *Modern California Discovery*, *supra*, at 117; but see fn. 5, *post*.)

The latest federal pronouncement on the subject, *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. 145, notes that "there is desirability in having a general rule for determining which party should pay for transcription of the original deposition in the event of a dispute" and it finds that both the equities of the situation and the "legitimate expectation in lawyers noticed to a deposition" to be that "the party scheduling it will pay for the transcription. (*Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 147.) Nevertheless, given the many situations which can arise (e.g., an unexpected prolonged cross-examination, an impecunious deposing party, unfair tactics of a non-deposing party to build up costs) that case, as well as the federal commentators, agree that the matter is best left with some flexibility so that, should they arise, their equities might be resolved by a trial court on a case-by-case basis. (*Caldwell* v. *Wheeler*, *supra*, at 148 ("exceptions in extenuating circumstances");[4] Hogan, *Modern California Discovery*, *supra*; DeMeo, *Cal. Deposition & Discovery*, *supra*, at 5.16-6; Wright & Miller, *Fed. Practice & Procedure*, *supra*; see also Note of the Advisory

[4] The court in *Caldwell* suggested that, consistent with the Advisory Committee Notes to the amendment of Rule 30(c) (see fn. 3, *ante*) "the fact that a noninstigating party requests transcription is relevant to the court's exercise of discretion. (89 F.R.D., *supra*, at 148.) Since California has not made a similar change to section 2019(c), to provide for transcription only if a party requests it, we do not believe that factor should be relevant in the exercise of a state court's discretion.

Committee on Rules, FRCP, foll. rule 30; see also *Kolosci* v. *Lindquist*, *supra*, 47 F.R.D. at 321 ("exception[s] in extraordinary cases"); and see L.R. 231-3, S.D. Cal.)

With this setting we return to our California statute. There we know that a transcription *must* be prepared unless the parties agree otherwise (§ 2019(c); cf. § 14 ("shall" is mandatory)) and that on payment of a reasonable charge therefor the officer taking the deposition *must* furnish a certified copy to any party or to the deponent. (§ 2019(f)(2); compare, FRCP 30(f)(2).) From this, Witkin for one acknowledges the suggestion that "by implication . . . the adverse party or deponent [is given] the right to require transcription of the original . . . at the expense of the [noticing/deposing] party." (Calif. Evidence (2d ed. 1966), § 963, at 898, citing Cont.Ed.Bar, *Civ. Proc. Before Trial*, at 693.)[5]

The suggestion is not uninviting. After all, it *is* the deposing party who starts the deposition process in motion by giving notice (§ 2019(a)), who sets up its time and place (*ibid.*), and who "employs" the stenographer (§ 2019(e)(3)). In short the "home court" is his. If his calculus of anticipated results fails, that should not preclude another party attending from securing a memorialization at a "reasonable charge" (§ 2019(f)(2)), i.e., a copy of the transcription without the necessity of having to pay a greater cost for an original. Having set the process in motion, the deposing party would bear that greater expenditure. (Cf. *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 145, 147-148.)

---

[5] As for *a deponent* being able to force the deposing party to have (and pay for) a transcript prepared, it would seem that section 2016, subdivision (c), would not impose that obligation where both parties agree to forego transcription. "Despite the fact that the deponent has an obvious interest in the content of his own sworn testimony, it does not seem fair that he should be able to insist upon a transcription which no one else wants and be required to pay only the cost of a copy." (1 Field, McKusick & Wroth, *Maine Civil Practice* (2d ed. 1970) at 492, quoted in Wright & Miller, *Fed. Practice & Procedure*, *supra*, § 2119, at 434.) "Concern [as was expressed in *Burke* v. *Central-Illinois Sec. Corp.*, *supra*, 9 FRD at 428-429] that the witness needs the transcript to refute impeachment at the trial seems misplaced if no party has a transcript with which to impeach him." (Wright & Miller, *Fed. Practice & Procedure*, *supra*.)

Thus Wright finds it the better view that:

> "Rule 30(f)(2) ought to be construed as allowing the deponent a copy upon payment of reasonable charges only if the original has been transcribed. If it has not, a 'reasonable charge' for the deponent to pay for this copy would include the cost of the original transcription."

(*Ibid.* quoting 1 Field, McKusick & Wroth, *Maine Civil Practice*, *supra*; see also 4A Moore, *Fed. Practice*, *supra*, 30.59 [fn. 11], 30.63[5].) We are of a similar persuasion with respect to a proper interpretation of section 2019, subdivision (f)(2).

But we do not believe the rule should be so absolutely stated. In California, as in federal courts, the possible equities in the deposition situation are manifold and we do not think a "hard and fast" fixing of who should pay for an original would be particularly just. The impecunious deposing party, the recalcitrant witness, the harassing adversary, the unexpected prolonged cross- examination called for or not, are matters "familiar to all trial lawyers" (DeMeo, *Cal. Depositions & Discovery Practice*, *supra*, at 5.16-7) and any rule should accommodate them. (Cf. *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 148 (but see fn. 4, *ante*); *Kolosci* v. *Lindquist*, *supra*, 47 FRD 319, 321.) In addition, what might be considered standard practice as to who would pay for an original transcript in particular extenuating circumstances in one locality may not be the accepted practice in another. Furthermore, as Moore once stated:

> ". . . It is clear that in many cases depositions are taken solely for discovery purposes, with no intention that they be used at the trial. To compel the examining party to assume the burden, often a heavy one, of having the depositions transcribed at the demand of the adverse party or the deponent may effectively deter many parties from taking advantage of the provisions of the Rules for depositions upon oral examination. . . . [T]hat the examining party may recover back his expenses in form of taxable costs is small comfort, . . . (as) the examining party may not win the case."

(*Federal Practice*, as quoted in DeMeo, *Cal. Deposition & Discovery Practice*, *supra*, ¶ 5.16(4), at 5.16-5.)

We understand that it is nigh universal practice for the party who instigates the taking of a deposition to pay for having it transcribed (cf. *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 147; Wright & Miller, *Fed. Practice & Procedure*, *supra*, § 2117, at 430) and we well imagine that in the great majority of situations that that is the party who should do so. But extenuating situations can and will arise when that would be unfair and a court should have flexible authority to deal with them appropriately, e.g., "to order only a portion of the deposition transcribed, or order that the expense of transcription be borne by one party or the other or divided between them as justice might require." (Moore, *Federal Practice*, as quoted in DeMeo, *supra*; accord, *Caldwell* v. *Wheeler*, *supra*, 89 F.R.D. at 148; *Kolosci* v. *Lindquist*, *supra*, 47 F.R.D. at 321; but see fn. 4, *ante*.)

We therefore conclude that as a general matter, where the parties to an action do not stipulate to forego transcription, the party noticing a deposition would have the duty to have it transcribed and be responsible for the cost of preparing the original transcript. Should a situation require otherwise, however, an appropriate fashioning of costs may be tailored by a court to the circumstances.

*****