



1-1-2008

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### Recommended Citation

39 McGeorge L. Rev. 444

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# Chapter 115: Time to Pay the Typer\*

Daniel J. Boyle

## Code Section Affected

Code of Civil Procedure § 2025.510 (amended).  
AB 1211 (Price); 2007 STAT. Ch. 115.

## I. INTRODUCTION

Robert Browning concludes *The Pied Piper of Hamelin* with the admonition, “And, whether they pipe us free from rats or from mice, If we’ve promised them aught, let us keep our promise!”<sup>1</sup> When it comes to noticing depositions and requesting stenographic services, current law makes it clear that the attorney or requesting party is responsible to pay the typist, but some attorneys play a shell game and refer court reporters to their clients for satisfaction of their bills.<sup>2</sup> Concerned over the long delay in payment to persons who should not have to carry the cost of legal services, Chapter 115 takes Browning’s admonition a step further by requiring the attorney or party who requests the stenographic services to pay in a timely fashion.<sup>3</sup>

## II. LEGAL BACKGROUND

Because attorneys request depositions and their recording as part of the attorney-client relationship, jurisdictions are split on whether the attorney is acting in an agency capacity on behalf of his client or as a principal in his own business interests.<sup>4</sup> California is among the majority of states that delineate who is responsible for paying the fees for court reporting.<sup>5</sup> Under section 2025.510(b) of the California Code of Civil Procedure, the party noticing the deposition bears

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\* To “pay the piper” is “to bear the cost of something.” WEBSTER’S COLLEGIATE DICTIONARY 853 (10th ed. 1999).

1. ROBERT BROWNING, *THE PIED PIPER OF HAMELIN* 47 (London, Frederick Warne & Co. 1888), available at <http://www.indiana.edu/~librcsd/etext/piper/47.html>.

2. OFFICE OF ASSEMBLY MEMBER CURREN PRICE, AB 1211: TIMELY PAYMENT OF REASONABLE COURT REPORTER FEES, 2007-2008 SESS. (Cal. 2007) [hereinafter TIMELY PAYMENT] (concluding that unambiguous statutory language placing the burden of timely payment on the requesting attorney will give court reporters a fair chance in small claims court).

3. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115); see TIMELY PAYMENT, *supra* note 2 (explaining that many deposition reporters work freelance as part-time independent contractors and that delay or failure in payment poses a unique burden on them; nearly a third are not paid for three months or longer, and some are never reimbursed).

4. William J. Riley, *Prompt Payment of Court Reporters*, NEB. LAW., June 2001, at 6, 7 (stating that the trend is against those states that do not hold attorneys personally liable because they are contracting for a disclosed principal and have not personally agreed to be bound).

5. Peter Wacht, *Who’s Responsible for the Bill?*, J. CT. REPORTING, July-Aug. 2000, at 62, 62, 65 (stating that the article was based on responses to the survey, not a check of state regulations).

the cost of the deposition, absent a motion and court ruling based on good cause that another party should bear the cost.<sup>6</sup> California courts have found this statutory language to be a plain and simple expression of the principle of fairness, which could be paraphrased as, “you asked for it, you pay for it,” but in doing so introduced an ambiguity by using the phrase “demanding party” almost interchangeably.<sup>7</sup> As described in the Part IV below, Chapter 115 strives to clarify this ambiguity.

Ambiguity is the attorney’s bread and butter, sometimes leaving freelance deposition reporters, themselves not attorneys and often part-time contractors, with trouble collecting.<sup>8</sup> When attorneys fail to pay, the court reporter is left with two options: small claims court or an action for ethical violations against the non-paying attorney.<sup>9</sup> There are hurdles to jump under either approach.

A small claims action can be time consuming and costly.<sup>10</sup> An action for an ethical violation is similarly difficult to pursue because of the high standard of proof required.<sup>11</sup> In a formal opinion, the State Bar of California Standing Committee on Professional Responsibility and Conduct found that attorneys who fail to pay for contracted services have acted unethically but should only be disciplined when they intended not to pay at the time they contracted for the services.<sup>12</sup> The opinion concludes that to discipline the attorney, the contracted party must show dishonesty.<sup>13</sup> It borrows rules from other jurisdictions that

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6. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007). Both before and after the passage of Chapter 115, the noticing party had responsibility to pay for reporting fees. *Id.*

7. *See* Toshiba Am. Elec. Components, Inc. v. Super. Ct., 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532, 538 (6th Dist. 2004) (holding that California statutes governing depositions require the noticing party to pay the costs of transcription, and explaining that the principles of fairness behind these statutes place the burden of the expense of depositions on the demanding party).

8. DEPOSITION REPORTERS ASS’N & CAL. CT. REPORTERS ASS’N, TIMELY PAYMENT OF REASONABLE COURT REPORTER FEES 1 (2007) [hereinafter REPORTER FEES] (on file with the *McGeorge Law Review*) (documenting the co-sponsors’ reasons and analysis in support of AB 1211 in a fact sheet).

9. *See id.* (commenting that the non-lawyer reporters are up against attorneys in small claims court); *see also* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 3 (May 29, 2007).

The author and sponsors also point out that filing a complaint with State of California is an inadequate remedy because current disciplinary actions only apply to intentional misconduct by the attorney. Therefore, attempting to prove that the attorney intended to evade payment for deposition services would be difficult for deposition reporting professionals.

*Id.*

10. On average, just over a third of the small claims in California during fiscal year 2005-2006 took over seventy days to dispose. JUD. COUNCIL OF CAL., 2007 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 1996-1997 THROUGH 2005-2006, at 113 (2007), <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf> (on file with the *McGeorge Law Review*). The costs for small claims court include minor filing fees, plus lost time and expenses for preparation and appearance. *See* California Courts Self-Help Center, Small Claims Basics, Jan. 12, 2007, <http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm#paytofile> (on file with the *McGeorge Law Review*) (explaining procedures and fees associated with filing small claims).

11. *See* Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 1979-48 (2007), available at 1979 WL 15840 (relying in part on *Alkow v. State Bar*, 38 Cal. 2d 257 (1952), where an attorney is only found dishonest if he did not intend to pay when he requested the reporter’s services).

12. *Id.*

13. *Id.*

require a showing that the attorney did not intend to pay for the service at the time he contracted the reporter, but allows that finding to be inferred from “lengthy and unexplained passage of time without payment . . . or from unexplained repeated instances of nonpayment or unreasonably delayed payment.”<sup>14</sup> The Committee continued by stating that there are two other circumstances in which it may be inferred that the attorney did not intend to pay the fees at the time he incurred the obligation: first,

where the attorney failed to advise the reporter in writing at the time the services were contracted that he would not be responsible for payment and then seeks to excuse nonpayment on the basis his client is solely responsible for the fees, and [second] . . . failure to respond to communications from the reporter regarding nonpayment of the fees.<sup>15</sup>

Chapter 115 is an attempt to combat the hardships court reporters face in collecting fees.<sup>16</sup>

### III. CHAPTER 115

Chapter 115 amends section 2025.510 of the California Code of Civil Procedure by clarifying that the “requesting attorney or party appearing in propria persona<sup>17</sup> shall timely pay the deposition officer or the entity providing the services of the deposition officer for the transcription or copy of the transcription . . . , and any other deposition products or services that are requested either orally or in writing.”<sup>18</sup>

This rule does not apply when payment responsibility is otherwise provided by law or if the deposition officer or entity providing the service receives written notice at the time of the deposition as to who will be responsible for payment.<sup>19</sup> Chapter 115 was carefully drawn not to interfere with a party’s freedom of contract; thus, the parties are still free to allocate payment responsibilities by separate agreement.<sup>20</sup>

Finally, Chapter 115 clarifies the types of products and services that can be charged by a court reporting professional. Specifically, “deposition product or

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14. *Id.* (citing opinions in Massachusetts and Minnesota, both of which require a showing of intention at the time the services are contracted, Massachusetts allowing an inference from circumstances such as delay in payment).

15. *Id.* (adopting the logic used in Massachusetts and Minnesota).

16. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007) (describing the obstacles and practical problems facing deposition reporting professionals).

17. *See* BLACK’S LAW DICTIONARY 796 (7th ed. 1999) (defining in propria persona as “in one’s own person”).

18. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115).

19. *Id.* § 2025.510(h)(2) (amended by Chapter 115).

20. *Id.* § 2025.510(h)(3) (amended by Chapter 115).

service” is any product or service qualified as shorthand reporting under section 8017 of the Business and Professions Code.<sup>21</sup>

#### IV. ANALYSIS OF CHAPTER 115

Deposition reporters do not deserve comparison to the Pied Piper. They have never been known as a group to whisk the children of non-paying lawyers into oblivion, however deserved. Instead, reporters themselves are the victims. A more apt literary reference to describe their dilemma would be to compare it to a Catch 22,<sup>22</sup> where the “noticing party” attorney reroutes any attempt at invoicing to the “demanding party” client.<sup>23</sup> The client is often unaware of the mechanics of the legal proceedings and refers the court reporter back to the noticing attorney, as provided for under the statute.<sup>24</sup>

How were attorneys able to justify their actions? Prior to enactment of Chapter 115, the law required the party noticing the deposition to bear the cost of transcription.<sup>25</sup> In *Toshiba American Electronic Components, Inc. v. Superior Court*, the California Court of Appeals in the Sixth District addressed a case involving extraordinary expenses to comply with discovery demands and placed the burden of payment on the “demanding party.”<sup>26</sup> Since then, the ambiguity in

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21. *Id.* § 2025.510(i) (amended by Chapter 115); *see also* CAL. BUS. & PROF. CODE § 8017 (West 2007) (“The practice of shorthand reporting is defined as the making, by means of written symbols or abbreviations in shorthand or machine shorthand writing, of a verbatim record of any oral court proceeding, deposition, court ordered hearing or arbitration, or proceeding before any grand jury, referee, or court commissioner and the accurate transcription thereof.”).

22. Deposition reporters in small claims court trying to prove their right to payment from an unethical attorney, who noticed the deposition, finds themselves in the position of the old woman in war torn Rome responding to the famous novel’s protagonist, Yossarian:

“What right did they have?”

“Catch-22. . . . Catch-22 says they have a right to do anything we can’t stop them from doing. . . .”

“Didn’t they show it to you?” Yossarian demanded . . . .

“They don’t have to show us Catch-22,” the old woman answered. “The law says they don’t have to.”

“What law says they don’t have to?”

“Catch-22.”

JOSEPH HELLER, *CATCH-22*, at 407-08 (Simon & Schuster 2004) (1955).

23. *See Toshiba Am. Elec. Components, Inc. v. Super. Ct.*, 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532, 538-39 (6th Dist. 2004) (using the language “demanding party” to clarify responsibility for payment).

24. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007). In one instance, a judge ruled on behalf of the court reporter after a Sacramento attorney tried to convince the court that he should not have to pay because his client had not paid him, or, in the alternate, because he only wanted a copy of an exhibit mentioned in the deposition, not a copy of the deposition itself. REPORTER FEES, *supra* note 8, at 3. Losing the case, the attorney transmitted the following message in his cover letter transmittal of the check: “Enclosed find my check for \$125.38. You have just made an enemy for life and I will do everything in my power to ruin you. I hope it was worth it to you. Contemptuously yours, [name omitted].” *Id.*

25. CAL. CIV. PROC. CODE § 2025.510(b) (West 2007); *see* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (May 22, 2007) (explaining the background and changes to existing law to address the stated need for the bill).

26. *Toshiba*, 124 Cal. App. 4th at 769, 21 Cal. Rptr. at 538-39.

language between “noticing” party and “demanding” party has allowed attorneys to claim their client was in fact the party who demanded the transcription.<sup>27</sup> Deposition reporters often have no contact with the client, and the client often is not in a position to pay.<sup>28</sup> Some attorneys play a shell game, either because they took the risk of payment from their client or especially when they risked winning the case under a contingency agreement.<sup>29</sup> When the results of the case are negative, the attorney tries to shift the payment risk to the court reporter.<sup>30</sup>

How much should one have to pay to collect on a relatively minor debt? The court reporters could add to their expense by bringing the non-paying attorney to small claims court where they would face a professional adversary trained to win cases.<sup>31</sup> They could also bring the non-paying attorney before the State Bar of California for unethical conduct, but the court reporters would prevail only if they could prove dishonesty, measured by the attorney’s intention not to pay when he or she ordered the services.<sup>32</sup>

Deposition reporters do not prepare their transcriptions on a contingency fee basis and should not bear the risk of a client’s non-payment, nor of the case outcome.<sup>33</sup> When a deposing party requests a reporter’s presence at the deposition, the request itself is arguably an explicit contract between the attorney making the request and the reporter.<sup>34</sup> Even without an explicit agreement, alternative contract principles such as promissory estoppel and quantum meruit support the court reporter’s right to reimbursement by the attorney.<sup>35</sup> Despite their weak premises for non-payment, some attorneys have attempted to shift responsibility to their client.<sup>36</sup> The clarifications in Chapter 115 were designed to put an end to these games.<sup>37</sup>

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27. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007).

28. Letter from Sandra Bunch VanderPol, President, Cal. Ct. Reporters Ass’n, to Assembly Member Curren D. Price, Jr., Cal. State Assembly (Mar. 26, 2007) (on file with the *McGeorge Law Review*).

29. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (Apr. 10, 2007).

30. See *id.* (“In too many instances, a lawyer either innocently, or not so innocently, using the language of current law as a pretext, will after-the-fact deny payment, directing the deposition reporter to try and collect from his client—a person deposition officer may never have met, may not even know.”); REPORTER FEES, *supra* note 8, at 2-3 (providing examples of non-payment by attorneys).

31. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (May 22, 2007).

32. See Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 1979-48 (2007), available at 1979 WL 15840 (citing opinions in Massachusetts and Minnesota, both of which require a showing of intention at the time the service are contracted).

33. See ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 2 (Apr. 10, 2007) (explaining that it is the attorney who takes the payment risk for his or her clients and that the cost of collection would be a unique burden to place on deposition reporters).

34. A contract is loosely defined as a “set of promises.” BLACK’S LAW DICTIONARY 322 (6th ed. 1990).

35. Promissory estoppel allows a court to enforce a promise to prevent an injustice for compensation if the other party was induced to perform through reliance on the promise. BLACK’S LAW DICTIONARY 1093 (5th ed. 1979). Quantum meruit is an equitable doctrine that allows a person to recover the “reasonable value of services” performed. *Id.* at 1119.

36. In another anecdote where the attorney refused payment to the court reporter after the client did not pay the attorney, the reporter won in small claims and the attorney appealed. REPORTER FEES, *supra* note 8, at 2. At the appeal hearing, the judge ruled for the reporter instantly, “which caused the debtor to go ballistic,

The sponsors and supporters of Chapter 115 believe it will improve the reporters' chances in small claims court by clarifying that the attorney who requests the deposition is responsible for payment of the transcript,<sup>38</sup> proponents also wanted to clarify the definition of the products and services provided by court reporting professionals.<sup>39</sup> Chapter 115 was narrowly drafted to close loopholes in the prior statutory language without interfering with anyone's contract rights, including agreements between the attorney and the client.<sup>40</sup>

## V. CONCLUSION

A minority of attorneys created the need for Chapter 115.<sup>41</sup> After gaining the benefit of legal services, they denied payment responsibility by passing the proverbial buck to their clients.<sup>42</sup> Court reporters had to bear the expense of fighting for payment in small claims court.<sup>43</sup> If the court reporter chose instead to challenge the attorney on ethical grounds, the reporter had to prove the attorney intended to defraud the reporter when the attorney ordered the service.<sup>44</sup> Chapter 115 closes the language loopholes between "noticing party" and "demanding party" by stating clearly that the responsibility for timely payment falls on the "requesting attorney or party appearing in propria persona."<sup>45</sup> Now, once the deposition transcript is ordered and delivered, there is no ambiguity as to who is responsible to pay the typer. The next battleground is likely to be over when that payment is "timely."

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verbally attacking the judge like nothing [the reporter had] ever seen, saying the judge obviously wasn't basing her ruling on the facts of the case." *Id.*

37. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 5 (May 22, 2007) ("The author and sponsors assert that AB1211 will clarify who is responsible for the timely payment of deposition services—the requesting attorney and/or persons representing themselves.").

38. REPORTER FEES, *supra* note 8, at 1 ("[W]hat is required to permit the deposition reporting professional a fair chance at small claims collections is unambiguous statutory language codifying that an attorney is responsible for paying for the transcript that he orders.").

39. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1211, at 6 (May 22, 2007).

40. Letter from Assembly Member Curren D. Price, Jr., Cal. State Assembly, to Arnold Schwarzenegger, Cal. State Governor (July 9, 2007) (on file with the *McGeorge Law Review*).

41. The measure had no opposition and was supported by the California Court Reporters Association and the Deposition Reporters Association on behalf of their members to "clarify the process for ordering and paying for transcripts." Letter from Sandra Bunch VanderPol, President, Cal. Ct. Reporters Ass'n, to Arnold Schwarzenegger, Cal. State Governor (Mar. 26, 2007) (on file with the *McGeorge Law Review*). Both the Senate and the House passed the bill unanimously. *Id.*

42. *Id.*

43. *Id.*

44. See Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1979-48 (2007), available at 1979 WL 15840 (adopting and citing the logic used in Massachusetts and Minnesota, both of which require a showing of intention at the time the service are contracted).

45. CAL. CIV. PROC. CODE § 2025.510(h)(1) (amended by Chapter 115).

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