**COURT REPORTERS BOARD**
**OF CALIFORNIA**
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# COURT REPORTERS BOARD OF CALIFORNIA
# MINUTES OF OPEN SESSION
# OCTOBER 30, 2015

CALL TO ORDER

Ms. Davina Hurt, Chair, called the meeting to order at 9:32 a.m. at the San Diego State Building, 1350 Front Street, Sixth Floor, Eshleman Auditorium, San Diego, California.

ROLL CALL

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| Board Members Present: | Davina Hurt, Public Member, Chair<br>Rosalie Kramm, Licensee Member, Vice Chair<br>Elizabeth Lasensky, Public Member<br>Toni O'Neill, Licensee Member |
| Board Members Absent: | John K. Liu, Public Member |
| Staff Members Present: | Yvonne K. Fenner, Executive Officer<br>Fred Chan-You, Staff Counsel<br>Angelique Scott, Staff Counsel<br>Paula Bruning, Executive Analyst |

A quorum was established, and the meeting continued.

I. MINUTES OF THE JUNE 26, 2015 MEETING

Ms. Lasensky requested that the word "falls" be changed to "fall" on the first line of page 2 of the minutes. She also requested the addition of the word "Office" after "Governor's" on page 9 of the minutes.

Ms. Hurt requested replacement of the word "that" with "the" on the second line of the third paragraph under "Review of Action Plan" on page 7 of the minutes.

Ms. O'Neill moved to approve the minutes as amended. Second by Ms. Lasensky. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED.**

II. DISCUSSION REGARDING SOUTHERN CALIFORNIA STIPULATION
CCP 2025.550

Ms. Hurt referred to the robust list of supporting materials provided in the Board agenda packet and reminded the Board that the discussion of this item needed to be framed around consumer harm. She informed the public members of the audience that the Board had not made any conclusions and looked forward to hearing their comments. Ms. Hurt invited the first speaker to the public comment table.

Charlotte Mathias, certified shorthand reporter, approached the Board and thanked them and staff for the opportunity to speak. Ms. Mathias indicated that she is a Northern California reporter who believes the Southern California stipulation (So Cal stip) may be spreading to Northern California.

Ms. Mathias asserted that as the guardian of the record, her job is to follow the California Code of Civil Procedures (CCP) 2025.550 (Code). She is not allowed to be an employee of the attorney or share her opinion on the demeanor or validity of the attorney or witness. She is also not allowed to have a financial interest in who should prevail in the matter she is reporting. She added that she is required to protect marked exhibits and the transcript against loss, destruction, or tampering, retain her notes for eight years, and be subject to disciplinary action by the Board. She asserted that the So Cal stip leaves the reporter vulnerable to adverse action by the Board for not following the duties set forth by the Code.

Ms. Mathias referred to and quoted page 22 of the Board agenda packet where she attached as her Exhibit A the mission of the Board. She then quoted CCP 2025.550(a), indicating that the reporter shall seal the transcript and the noticing attorney shall store and protect it. If the original transcript is unsealed, it may be susceptible to tampering.

Ms. Mathias quoted Merriam-Webster's definition of "shall," stating that when used in laws, regulations, or directives, it expresses what is mandatory. She referred to the additional handouts she distributed at the meeting (see Attachment 1), including an article from Bryan Garner, editor of the 9th edition of Black's Law Dictionary. Mr. Garner was responsible for replacing "shall" with "must" in the applicable Federal Rules of Civil Procedure.

The handouts also included a comparison of CCP 2025 and Federal Rule 30. Ms. Mathias stated that the Code requires the reporter to notify all parties attending the deposition when the original transcript is available for reading, correcting, and signing. She added that Rule 30 does not allow for the So Cal stip in Federal cases.

She offered that occasionally following a proceeding, she inquires with Southern California attorneys about the function of the So Cal stip. Some attorneys respond that they do not know what it is but were told to enter into it before leaving the office. Other attorneys think it is to save witnesses from traveling long distances to review and correct the original transcript. She stated that since witnesses may now review the attorney's copy of the transcript and send changes to the court reporter, traveling is no longer an issue.

Ms. Mathias stated that the "usual stip" is vague and does not specify from which duties the report is being relieved. She indicated that the relieved duties could include typing, certifying, and sealing the transcript, notifying the deponent the transcript is ready, and sending the deponent's changes to anyone ordering a copy later.

She shared examples of how the consumer can be negatively affected by the So Cal stip. She indicated that Bill Cosby is suing the court reporting firm for releasing the transcripts in his case; however, if the So Cal stip was used, Mr. Cosby may have found it difficult to pursue the litigation.

Ms. Mathias revealed that the So Cal stip may also prevent added defendants from accessing deposition transcripts taken prior to them becoming parties to the action. She questioned what the result would be if the plaintiff fired his attorney who had been sent the original transcript, now nowhere to be found.

She shared an experience of an attorney who entered into the So Cal stip on a matter that was set in Sacramento County. Unfortunately, the judge rejected the unsealed originals and required the witnesses travel from Los Angeles to Sacramento, the cost of which was paid by the attorney.

Ms. Mathias proclaimed that the consumer is not being protected under the So Cal stip. Since the attorneys in litigation do not always get along, the impartial court reporter is needed to protect the record. She also indicated that medical records are often a part of the record and, therefore, protected by HIPPA regulations. By sealing the original, the medical records are protected from unauthorized access.

She stated that Northern California courts wanted sealed original transcripts, which results in no harm to the consumer. She added that Southern California courts continue to accept sealed original transcripts from Northern California court reporters. She said that the So Cal stip causes a division in the state because the Code is not being followed by all reporters.

She referred to an article of Caligrams published when Rick Black was the executive officer of the Board, which can be found on pages 46 and 47 of the Board agenda packet. She quoted the article, stating that the Board's legal counsel advises that the original must be sent to the noticing party as specified. She further referred to excerpts from court cases and arbitrations, which were also included in the Board agenda packet.

Ms. Mathias commented on the recommended Board action on page 18 of the Board agenda packet, wherein staff indicated that the So Cal stip would be a matter for a judge to consider. She indicated that Presiding Judge Marigonda of the Santa Cruz County Superior Court stated that an unsealed deposition transcript that may have been damaged or is missing pages or exhibits can create a significant problem for litigants and judges. A letter from Judge Marigonda may be found on page 48 of the Board agenda packet.

She reiterated that no one is harmed or inconvenienced by sealing the original transcript. However, the attorney or potential expert witness may be harmed by an unsealed transcript when filed in Northern California.

She concluded by stating that potential for consumer harm is evident and requested the Board require all certified court reporters to follow the Code set forth in CCP 2025. She further required that the Board publish its support of adherence to the Code in the California Bar Journal. She alternatively requested the Board hold town hall meetings to explore the issue with all stakeholders and educate the Bar and court reporters in California.

Rich Alossi, president of Deposition Reporters Association of California (CalDRA) thanked the Board for its time and constant work to fight for California consumers. He quoted the Board's vision statement. He then stated that relevant sections of the Code were written with the express intent to protect the integrity and sanctity of the original transcript by outlining the way it is to be handled. He added that the practice of the So Cal stip may have been intended to allow speedy review by the witness without the need to travel to the office of the deposition officer, however, alternatives now exist that allow the deponent to review a certified or electronic copy.

Consequences of alterations to the transcript outside of the control of the court reporter include unbinding or unsealing for unacceptable purposes. He referred to the exhibits included in the Board agenda packet which outline situations where the sanctity and security of the original transcript have been compromised. He then referred to and quoted from the letter from Presiding Judge Marigonda on page 48 of the Board agenda packet.

Mr. Alossi then posed two questions to the Board, which were included in the CalDRA letter dated October 14, 2015, also found on page 56 of the Board agenda packet. The first question is whether a licensee may be relieved of her obligations to comply with CCP 2025.520, 2025.540, and 2025.550 by attorney stipulation. The second question is whether the Board would investigate a complaint about a licensee violating these code sections if the attorneys had stipulated to relieve the reporter of her duties.

CalDRA maintains that a licensee may not be relieved of his or her obligations of the Code since the parties to the stipulation are not the only parties with an interest in the protection of the record. He stated that CalDRA disagrees with staff recommendation and requested the Board interpret and apply the law.

Brooke Ryan, president of California Court Reporters Association (CCRA), spoke to the staff recommendations provided in the Board agenda packet, specifically the need for a judge to consider the matter in court. She stated that the recommendation is not a response since the issue would not be brought before a judge unless an action was filed.

She referred to the Board's 2012 statement regarding statutory rates for court transcripts, stating that the Board took a position of enforcement on the Government Code 69950, apologizing for the financial hardship it may cause. She indicated that CCP 2025.550 requires the court reporter to follow specific duties for delivering the transcript, and she questioned why the Board would enforce one law, but not the other. She stated that in several issues of the CRB Today newsletters and the MTFS video, the Board has shown no reluctance in opining which practices will or might violate the MTFS (Minimum Transcript Format Standards).

Ms. Ryan asserted that the attorneys who use the So Cal stip are asking the deposition reporter to violate state law under the implicit threat that they will deny the reporter future business if he or she does not agree to it. She questioned on what basis would there be an opinion in favor of the So Cal stip as suggested in the staff recommendation.

Marla Sharp, licensed court reporter, distributed copies of her written comments (see Attachment 2). In summary, she restated the problem of the So Cal stip as being that the original transcript is released to opposing counsel in an unsealed condition, leaving it vulnerable to loss, manipulation, and tampering. She stated that the practice is allowing a

biased party with a motive for a specific outcome to be in control of the transcript, which puts the consumer in a dangerous situation.

Ms. Sharp reiterated the comments made by previous speakers regarding the process of delivering the transcript under the So Cal stip versus the Code. She stated that the So Cal stip continues to exist because it is a way for attorneys to avoid paying for a copy. However, the original then becomes a working copy which is commonly unbound for scanning and copying. The result of this tampering and manipulation voids the court reporter's certificate attesting to its accuracy and completeness. She asserted that consumers and judges do not know what is happening to the unsealed original transcript and that only sealed transcripts can be trusted as intact and accurate. She added that under the So Cal stip, the court reporter is no longer responsible for handling corrections submitted by the deponent, therefore, the changes are not kept with the sealed original.

She asked the Board to officially opine that court reporters should follow the Code to protect the original transcript in an effort to avoid potential consumer harm. She thanked the Board for taking the time to hear the concerns on the matter.

Ms. Hurt called for further speakers. Hearing none, she invited Board members to make comments and ask questions. As a point of transparency, Ms. Kramm shared that she, as a deposition reporter and firm owner, has lived with the So Cal stip for 25 years. Ms. Hurt asked Ms. Mathias to clarify the statement in her August 7, 2015 letter that the matter is "an issue of enforcement by the Board." Since enforcement infers jurisdiction over someone, she asked what the enforcing rights are and what mechanism is adequate to enforce those rights. Ms. Mathias indicated that she may have used the wrong term; however, she is under the jurisdiction of the Board to remain neutral or otherwise be fined.

Ms. Mathias continued by saying many attorneys are treating the court reporter like a secretary, making requests and demands such as leaving blank spaces in the transcript to be filled in at a later time. Others refuse to be interrupted and tell the court reporter to get what he or she can, which is no better of a service than can be offered by a tape recorder. Since the court reporter is an impartial person, the transcript can be used as evidence. She likened an unsealed transcript to any other unsealed evidence which may have been tampered with. She reported that Placer County is very strict about only allowing original documents into their court system.

Ms. Hurt inquired if the behavior Ms. Mathias is interested in changing is that of the attorneys. Ms. Mathias responded that the attorneys need to be educated about the Code. They expect the court reporter to know the Code; however, when the attorney does not like the Code, they want to stipulate it away. She stated that she does not want to be fined for malpractice.

Ms. O'Neill reported that she owned a Southern California deposition agency for eight years and is sympathetic to the issue. She said she is hearing the underlying issue is that court reporters have not been able to resolve the issue and now want the Board to take on the legal community. Ms. Mathias responded that the Board that was in existence at the time the So Cal stip began but did not take a strong enough stand to enforce the Code. She said it should have been treated the same way as an enforcement matter involving overcharging for court or losing stenographic notes. She indicated that the length of time the law violations have been occurring should not influence whether or not they should be

stopped. She said many attorneys do not even know what they are agreeing to when the stipulate away the reporter's duties.

Ms. Lasensky stated that a community member, she was confused as to why there were not more statements from judges if the matter is disruptive to the court. Ms. Mathias responded that it is disruptive everywhere but Southern California. Ms. O'Neill inquired if there had been any complaints filed, which is usually the starting point for enforcement actions.

Ms. Mathias stated that she has been threatened by Southern California attorneys that they will file a complaint against her when she explains that she follows the Code. She offers to give them the phone number for the Board office, but to her knowledge no one has made a complaint against her license. She added that Southern California judges are not complaining, but Northern California judges will not take unsealed transcripts or certified copies. She stated that the Board oversees the whole state, not just the northern half or southern half.

Mr. Alossi stated that CalDRA is looking to the Board to answer whether or not a court reporter may be relieved by stipulation of his or her obligation to comply with the Code. He did not believe that anyone was asking the Board to file any action against the Bar, a particular attorney, or any licensed court reporter at this point.

Ms. Hurt quoted from a CalDRA document with a question of the So Cal stip being proper, stating, "If reporters don't interject regarding the stipulation in a deposition it's because we're in no position to education attorneys on the law, are ethically bound not to comment on the proceedings in any way, and that we certainly don't want to jeopardize working relationships by being labeled as a troublemaker because we refuse to accommodate the wishes of the parties." Ms. Hurt then asked if the Board would then be the troublemakers going after the Bar. Mr. Alossi responded that it is the uniformity of the matter, and he believed the material she referenced was something CalDRA heard from individuals not wanting to be the lone Southern California reporter who follows the law. However, if the court reporter had something from the Board stating they must follow the Code, they would be able to show it to the attorneys. Ms. Hurt asked if CalDRA had taken their concerns before the Bar on behalf of court reporters. Mr. Alossi answered that approaching the Board was a first step. He believed the Board had stated that the attorneys may stipulate to whatever they want, and CalDRA agrees; however, it does not apply to the court reporter's duties. He suggested that the process requires multiple steps, the next being education of the attorneys and Bar associations.

Ms. Kramm complimented the summarization provided by Mr. Alossi and Ms. Sharp. She stated that at the end of depositions she informs attorneys that there are courtrooms, particularly in Northern California, that will not accept an unsealed original. Many times the attorneys believe the So Cal stip is the Code, and, after hearing the vulnerability of the original transcript, they will go by Code. Educating attorneys and judges about what happens to the original under the So Cal stip is paramount. Mr. Alossi agreed that education is important, but did not agree that the court reporter is able to interpret the law. He reiterated the question put before the Board by CalDRA regarding whether or not a licensee can be relieved of his or her obligation to comply with the Code.

Ms. O'Neill confirmed that judges accept certified copies of transcripts in Southern California courts. In her experience as an official in Riverside County, attorneys or judges commonly read the deposition into the record if the witness can no longer be called to court. As a former firm owner in the 1980's, she remembered when the language in the law was changed to "shall," and the reporters in her area thought the stipulation would go away. However, that never happened because attorneys said they could do what they wanted. She added that there just hasn't been any ramification where the consumer was negatively impacted. Deposition reporters can tell attorneys that they follow the Code just as reporters do in Northern California without the Board saying it's the law. However, she understands why the reporters are hesitant to do so.

Mr. Alossi stated that there has not been a mechanism in place to eliminate the So Cal stipulation. He believes there would need to be a process in place for following the Code to become the norm across the state. He asserted that the Board has jurisdiction to state what the reporters must do, just as they do with other statutes, rules, and regulations.

Ed Howard, representing CalDRA, stated that he frequently appears before the Bar as a representative of a public interest group. He stated that if CalDRA were to appear before the Bar without the Board's response to their questions, nothing would happen. He stated that the Code in question is the Board's statute, and the Board is charged with interpreting it. The Board has final say on the statute.

Ms. Hurt indicated that the plain language of the Code does not leave a question for interpretation. Mr. Howard stated that the So Cal stip has become a custom that is inconsistent with the plain language of the Code, resulting in a misunderstanding about what it means. He asserted that the Board is the only entity that is charged with resolving the misapplication of the statute. Before the Bar renders an opinion that would end the So Cal stip, they are going to want to know that the Board agrees with them about what the statute means.

Mr. Chan-You asked which specific position CalDRA is requesting the Board to take. Mr. Alossi again pointed the Board to page 56 of the Board agenda packet where two questions were posed. Ms. Hurt asked Mr. Chan-You if the Board has the authority to create an unwritten exception to the statutory code. Mr. Chan-You responded that he does not believe it does. The law is the law. Ms. Hurt inquired what regulatory process the Board would have to undertake to write an exception to the Code. Mr. Chan-You answered that if the Board were to issue a position stating that the waiver of the obligation under the Code were to be considered to be unprofessional conduct, he would recommend going through the regulatory process to include that in the language as unprofessional conduct. Ms. Fenner clarified that the Code in question is a statute so would require a legislative change, not a regulatory change.

Ms. Hurt asked Ms. Fenner if the court or any other party stated that the So Cal stip is a violation of the statutory code. Ms. Fenner said she is not aware of any place that it has been addressed. Ms. Hurt inquired as to how many times the Board has disciplined a licensee for following the So Cal stip. Ms. Fenner responded that there has never been a licensee disciplined for following the So Cal stip.

Ms. Kramm stated that approximately 20 years ago, CCRA sponsored legislative language which changed the Code to allow the court reporter to send a certified copy to the witness

to review and allow the witness to send changes back on an errata sheet so that the witness did not have to travel to the court reporter's office. The court reporter was still obligated to seal the original and send it to the noticing attorney. Unfortunately, it did not change the practice of attorneys using the So Cal stip, some of who believe the So Cal stip is the Code.

Ms. Hurt expressed that reaching an exact answer on a situation that has been 40 years in the making seemed improbable. In the end, the attorneys' behavior, knowledge, and understanding of the law are what really need to be changed. Mr. Alossi disagreed, stating that CalDRA is seeking to change the behavior of the licensees. Ms. Hurt asserted that the Board's reemphasizing the statute is not going to change the practice. However, educating stakeholders about the situation will make the practice change. She inquired what stakeholders should be at the table to discuss the custom CalDRA believes should be eradicated. Mr. Alossi responded that there are over 180,000 licensed attorneys and 6,200 active licensed court reporters in California. He asked the Board to issue a guideline as to what the law states before the education portion begins. Ms. Hurt informed Mr. Alossi that the Board had heard his request and again asked what stakeholders, if any, should be included in the discussion. Mr. Alossi indicated that the licensed court reporters are the most affected. He did not believe that it would appropriate to include the Bar at this point until there is a solid resolution of this issue at the Board's level. Ms. Hurt asked if a town hall meeting including the Bar were to be formed, if CalDRA would participate. Mr. Alossi answered that the issue is of great interest to the association, but again asked for clarification of the law. Ms. Hurt asked what part of the plain language of the law needed clarification. Mr. Alossi repeated question 1 from his letter in the Board agenda packet.

Ms. Fenner stated that the question that has been repeated is really asking whether or not the attorneys can stipulate. The Board does not have the ability to answer that question. Mr. Alossi asserted that the question is whether or not the licensee may be relieved of his or her duties under the Code.

Ms. Scott indicated there is a distinction between the questions. Whether or not attorneys may stipulate is a moot point. She believed the question being asked by CalDRA is what is the obligation and/or the duty of the court reporter at that time if the parties stipulate. CCP 2025.520 states the specific duties of the court reporter, but the law uses "unless" language where the court reporter may not have a specific obligation if there is an agreement by the parties. The language states, "unless the deponent and parties agree on the record that the reading, correcting, and signing of the transcript of the testimony will be waived..." At that point it is clear that the court reporter is being relieved of certain duties. The only thing that precedes the "unless" language would be sending the written notice to the deponent and all parties attending the deposition when the original transcript is available for reading and correcting. Therefore, the question is what are the court reporter's duties once they are relieved, and the language in the Code states they can be relieved of these specific obligations.

Ms. Fenner stated that complaints that were received related to the So Cal stip have been situations where the reporter honored the stipulation. The reporter would have been cited had they not followed the stipulation.

Mr. Alossi stated that the court reporter cannot be a party to the stipulation, nor can they be. Beyond the two or three parties in the room, other stakeholders exist, including the

judge and jury that are also not parties to the stipulation. He stated that attorneys can stipulate to whatever they like as long as it's not in the court reporter's purview.

Ms. O'Neill stated that even in court attorneys stipulate. The judge steps in if they cannot agree to the stipulation.

Ms. Hurt asked what the consumer harm is with the "unless" language. Mr. Alossi stated that the specific duties that the court reporter may be relieved of are outlined in CCP 2025.520. Any other duties not specified in the Code cannot be relieved. Mr. Chan-You asked if CalDRA wants the Board to clarify that the court reporter cannot waive his or her obligations under CCP 2025.540 and 2025.550. Mr. Alossi responded that he wants clarification that the licensee may not be relieved of those duties under the Code.

Ms. Fenner asked if the Board finds that the reporter may not be relieved of her duties, but the attorneys continue to stipulate, how that will affect the end result. Mr. Alossi replied that a statewide education campaign would be launched including printable documents of the Code and opinion to show the parties present about what they must or must not do.

Ms. Hurt asked Ms. Kramm if she ever felt that she was not able to express to the attorneys what the So Cal stip included. Ms. Kramm responded that she offers it as a suggestion, but many do not want to hear it. She believes that a newer reporter would be pressured to honor the stipulation to not lose business.

Ms. Sharp indicated that even if formal complaints are not filed, it does not mean that consumer harm is not happening. She stated that pages go missing from transcripts because attorneys dismantle the original to scan or copy it.

Ms. Lasensky asked if the statute were changed to remove the "unless" language, how would that affect the court reporter facing an attorney wanting to use the So Cal stip. Ms. Sharp stated that court reporters haven't had anything that says the duties of the court reporter cannot be stipulated away to protect the original transcript. An opinion from the Board stating that court reporters should follow the Code may be adequate to fend off the stipulation.

Ms. Hurt asked who the audience considered to be the consumers that need to be protected. She also inquired if attorneys would be included as consumers. Mr. Alossi agreed that attorneys would be consumers, as well as the judge, jury, litigants, parties, and witnesses. Ms. Sharp responded that anybody that has an interest in the outcome of the case would be a consumer.

Ms. O'Neill indicated that many possible scenarios were brought before the Board, but nothing case specific. She expressed that the role of the Board is not to prejudge how a complaint is handled, but staff investigates each complaint on an individual basis.

Ms. Hurt stated that some attorneys, who are consumers, feel that the So Cal stip works for their client. This aspect increases the complexity of the issue.

Ms. Kramm expressed her sympathy to the issue and suggested that court reporters educate attorneys about CCP 2025. She does not believe it is a good idea for court reporters to tell attorneys they could lose their license for following the So Cal stip.

Mr. Alossi asked the Board to state what the court reporters must do. Mr. Chan-You asked why the court reporters would be unable to show a copy of CCP 2025 to the attorneys. Mr. Alossi stated that the common practice is so widespread that it is even taught in court reporting school. He indicated that specific cases highlighting consumer harm were included in the attachments submitted by CalDRA. Mr. Chan-You asked how an opinion from the Board would sway an attorney more than the law. Mr. Alossi stated that attorneys are authoritative figures telling the court reporters that they must honor the stipulation, and without guidance from the Board, the court reporter is left in an ambiguous situation.

Ms. Hurt suggested that bringing stakeholders together to express concerns over the matter would be an easier way to change the practice. Ms. Kramm proposed that the court reporters continue to educate the attorneys that the law is clear and that the Board agrees. Mr. Alossi asserted that it would be appropriate for the Board to issue a statement as to what must be done under the law.

Ms. O'Neill expressed that as a court reporter, she wants to follow the law; however, she cannot argue with an attorney. If at the end of a deposition she tells an attorney that she needs to follow the law, the attorney may say they can stipulate to anything. She questioned if court reporters will be filing the complaints against each other for not following the Code. Ms. O'Neill stated that she understands what result is being sought and is very empathetic to it; however, asking the Board to issue an opinion or reiterate that it is the law is a simplistic view of how to solve the matter. She indicated that more groundwork needs to be laid.

Ms. Hurt then questioned whether taking a position on the Code would create a witch hunt of court reporters filing complaints against each other. She indicated that further review of all dimensions surrounding the change to the long-term practice was needed.

Ms. Lasensky stated that the presenters did a great job on laying out the issue and helping her understand the problem; however, she did not see the historical documentation of complaints that would create the background needed to make a decision. Mr. Alossi stated that court reporters are not attorneys and he would consider it inappropriate for a court reporter to tell an attorney what the law is or is not. However, under the jurisdiction of the Board, the court reporters need an opinion to hold up as to what they must do. He recognized that there is 40 years of practice history. He stated that if the practice were to be allowed under the law, there would be a practice in place under the codes for that to happen.

Ms. O'Neill posed a question to staff counsel, inquiring whether the Board can issue a statement stating that licensed court reporters must follow the Code and cannot follow stipulations entered into by attorneys. Mr. Chan-You clarified her question to be whether or not issuing the requested opinion is telling attorneys that what they are doing is illegal. Ms. Scott responded that the Board could make that statement; however, it may not be legally sound or factual so it is not recommended. This Board is delegated with enforcing the Business & Professions Code (BPC), Shorthand Reporters Act (Act), and should use caution when making specific interpretations of other codes, including the CCP. The Board does have the power to make a determination when another code specifies the duties for its licensees and to establish whether or not failure to follow the other codes constitutes a violation of the Act. The Board has already indicated that court reporters are required to

abide by the CCP, so it appears the request is for a more assertive statement to bolster the court reporters to say they are now going to stand by the Code.

Ms. Scott added that before taking her position as staff counsel, she practiced in both Northern and Southern California. There were occasions where she used the So Cal stip, not knowing what it meant. She indicated that she would be concerned with the vagueness of the request before the Board and would suggest more specificity. As an attorney, if she were to be told by a court reporter that they cannot follow a stipulation, she would have to research the duties the court reporter states they have to follow and then decide whether she wanted to conform or continue with old practices. In addition, she questioned the weight an attorney would place on a statement issued by the Board to restate existing law.

Mr. Alossi stated that an e-mail can be sent to the attorney in advance including the duties and obligations of the court reporter under the Code. Ms. Scott asked if he is requesting a position statement or a regulatory change. Mr. Alossi responded that he is not requesting any updates to the regulations or codes. He indicated that it would be appropriate for those seeking to relieve court reporters of their duties under the Code to go through the regulatory or legislative process. Mr. Chan-You asked if it was accurate to say that the request was essentially for the Board to restate the law on a piece of paper. Ms. Sharp answered that the request is to protect the consumers by saying court reporters should go by the Code to protect the original transcript. Mr. Alossi added that he is requesting the Board to lay out the duties under the Code as to what court reporters must do.

Ms. O'Neill expressed that she would be thrilled if the So Cal stip was reversed, but it is not that simple. Ms. Sharp stated that she does not expect everyone to agree, but she wants the Board behind the court reporters to protect the original transcript.

Ms. Hurt reiterated that there are many consumers, including attorneys and clients that have their own list of pros and cons about the So Cal stip. She called for any other questions for the public.

Ms. Scott proposed Ms. Hurt's earlier suggestion of holding a public meeting forum to further vet out the three specific statutes regarding the obligations of the court reporters with all stakeholders.

Mr. Alossi restated his request for a statement on the current law. He believed that if the law were to be deviated from, there would need to a legislative change. He did not agree that a town hall forum would be appropriate.

Ms. Hurt stated that she needs further analysis of the matter and evaluation of the impact to the consumers. She asked the Board if they wanted to explore the possibility of convening a town hall meeting or potentially speak with staff counsel further and bring it back to a Board meeting.

Ms. Kramm expressed a desire to find a solution that makes sense and has enough power to be effective. The solution would also need to be something the attorneys comprehend on a level that they choose to cooperate. She suggested a proper response to the issue is more important than a quick response, looking to have a resolution to benefit the consumer, the attorney, and the court reporter. Ms. O'Neill and Ms. Hurt agreed. Ms. Lasensky agreed that the Board is not ready to develop language or an action plan.

Ms. O'Neill added that more needs to be in place, including an educational component, before rolling out a statement. She stated that the Southern California court reporters may otherwise find themselves in a dire situation. She also asserted that there would be deposition agencies and court reporters who do not care what the Board says, which may result in complaints by other court reporters. Ms. Lasensky agreed, adding that issuing a decision prematurely may result in both court reporters and the Board being exposed to more damage.

Ms. Hurt asked if the Board had a proposed action, with a possibility that staff be directed to explore who are all the stakeholders and begin discussions with them. She has heard from some attorneys that they find the So Cal stip beneficial, so she is interested in hearing from all sides. Ms. Kramm suggested that a town hall meeting including the industry associations, the Board, attorney representatives, and judge representatives be scheduled to vet out the ramifications of stipulating away the original transcript. She also considered finding complaints and stories of consumer harm to be a possible benefit to the discussion. She also wishes to be educated by staff counsel as to what the court reporter is actually able to do out in the field at the end of the deposition. By encompassing all these factors, she hopes that a solution and a way of educating the consumer will be developed, giving the court reporters tools in the field.

Ms. Hurt reiterated her desire to have all stakeholders at the table to fully understand the ramifications of responding to the request. Ms. Kramm agreed, stating that the Board needs to know what it can do legally and what power attorneys and judges have in order to help the court reporters. Both agreed that they wish to strengthen the court reporter and educate the stakeholders.

Mr. Alossi requested to see any past legal opinions, indicating that Rick Black, former executive officer for the Board, stated in 1996 that there was a legal opinion at the Board. He believed that this was the second time the issue was brought to the attention of the Board. Ms. Fenner clarified that legal opinions to the Board are attorney-client documents, not public documents. The opinion referred to by Mr. Alossi was being researched by staff counsel due to some issues, so staff would be reporting back on its findings at a later date.

Ms. Kramm moved to direct staff to organize a town hall meeting to discuss the ramifications of the So Cal stip and potential waiver of court reporters obligations under that stip as to pertains to CCP 2025.520, 2025.540, and 2025.550. Second by Ms. Lasensky. Ms. Hurt called for public comment.

Mr. Alossi requested restatement of the motion. Ms. Mathias requested that staff include Northern California judges and attorneys in the town hall invitations.

A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED.**

The Board took a break at 11:27 p.m. and returned to open session at 11:45 a.m.

## III. REPORT OF THE EXECUTIVE OFFICER

### A. CRB Budget Report

Ms. Fenner invited questions regarding the budget. She referred to the year-end Budget Report for 2014-15 on page 68 of the Board agenda packet, as well as the first quarter report for 2015-16 on page 69. She discussed the Fund Condition of the Board on page 70 of the Board agenda packet, highlighting the projections for budget year 2016-17 at 4.4 Months in Reserve. When the operating expenses fall below six months, the TRF cannot be funded. Board staff will continue to work with the Legislative Counsel's Office and the various Legislative Committees, including Sunset Review, to raise the statutory license fee cap.

Ms. Hurt inquired if the Budget Change Proposals approved. Ms. Fenner confirmed that two were approved, including an augmentation to the Attorney General's line item for enforcement and an approval for ongoing examination development.

### B. Transcript Reimbursement Fund

Ms. Bruning reported information provided to her by Melissa Davis, TRF Pro Per Program Coordinator. She indicated that applications have been processed and approved that have been received through February 1, 2015. A total of 138 applications were approved for the 2015 funding. Staff was able to allocate $36,000 due to releasing previously allocated funds. She added that 55 applications were reviewed and awaiting the renewed funding for 2016, totaling approximately $28,000 in estimated costs.

Ms. Bruning stated that $51,000 for 81 invoices was paid out of the TRF Pro Bono Program so far for FY 2015-16. She currently has nearly $50,000 in applications pending review. A backlog is starting to compile as a result of the multiple Board and task force meetings staffed by Ms. Bruning. It is hoped that the backlog will quickly be resolved; however, with the loss of the half-time position for the Pro Per Program, it may be difficult.

### C. Exam

Ms. Fenner referred to the examination pass rates reflected on pages 72 through 77 of the Board agenda packet. Ms. Lasensky expressed that the statistics for the English examination were concerning to her. She noticed an ongoing problem, but realizes it not something the Board can resolve. Ms. Hurt also noticed the degenerated pass rates and asserted that there is an element missing at the public school level that is too difficult for candidates to gain in court reporting school.

Melissa Murray, student, inquired which style manual the Board follows for grading punctuation. Ms. Fenner responded that the grading policies are published on the Board's Web site. There is no style manual, but there are references used in the overall construction of the examination. Ms. Sharp indicated that she runs a Facebook page for punctuation for court reporters since there is a gap in knowledge in punctuation. She finds it difficult for students to study for the examination without a specific style manual to research. Ms. Fenner stated that the English test does not have punctuation

questions where the resources are conflicting. Ms. Murray inquired which style would be used to grade the dictation examination. Ms. Fenner answered that English grammar has straightforward rules. More sophisticated situations where multiple pieces of punctuation are possible are not counted wrong. Deductions for punctuation are only made when an absolute error is entered where some form of punctuation is needed and was not included, or punctuation was included that was not need. The dictation examination is developed from real life transcripts, but there are many ways they can be punctuated.

D. Enforcement

Ms. Fenner referred to the year-end 2014-15 and first quarter 2015-16 reporters provided in the Board agenda packet. She stated that complaints go up and down, but no trends have been noted.

E. School Updates

Ms. Fenner reported that the San Diego campus of Sage College has closed, dropping the number of recognized schools to 13.

She indicated that work has begun with a consultant to restart school onsite reviews, considered Phase II. The schools are required to submit specific written materials during Phase I, which Board staff would verify during regularly scheduled site visits every three to four years. The site visits include student interviews and records review. Budget challenges prohibited staff from continuing the reviews on a regular basis in recent years, but the Board is now in a position to resume the activity.

Ms. Fenner recently met with the CEO of the National Court Reporters Association (NCRA) as well as many of the court reporting schools in conjunction with the CCRA convention. NCRA is working to support school enrollment in an attempt to combat the upcoming shortage of licensed court reporters. Ms. Hurt recognized the potential workforce issue and mentioned its inclusion in the Sunset Review Report. Ms. Lasensky connected the problem with the previously mentioned pass rates for the English examination. Ms. Kramm stated that she speaks to many students and recently attended the Sage College graduation. She noted that online classes are becoming the new hope, for which she has heard of success stories from online graduates. She supports online students and programs with the closure of bricks and mortar schools.

F. CRB Today Newsletter, Fall 2015

Ms. Fenner reported that the Fall 2015 CRB Today newsletter was distributed and would be posted on the Board's Web site. Ms. Hurt and Ms. Lasensky complimented the publication.

G. Education/Outreach

Ms. Bruning shared that she had the opportunity to work with one of the larger nonprofit entities that frequently utilizes the TRF to develop and present an online training for the TRF application preparers in their various satellite offices. She stated that she plans to turn the training into a webinar, similar to the MTFS video, to be posted on the Board's

Web site. It is hoped that the video will assist with the applications being completed accurately, shortening the review process. Ms. Kramm stated that she sits on the board of the San Diego Volunteer Lawyer Program, and she can see where they would truly benefit from and appreciate the training.

Ms. Fenner reported that she attended the CalDRA fall seminar in Sacramento, where she participated on a legislative panel. She also attended the CCRA convention.

Ms. O'Neill reported that she also attended the CCRA convention where she had the opportunity to express the purpose of the Board and the difference between which activities the Board performs versus what Board staff performs. She also found that most court reporters do not understand that their renewal fees are due on the last day of their birth month and that the grace period is only on the late fee, not the license. She finds herself explaining the requirement whenever she has the chance. Further, attendance at conventions helps her get a feel for the issues and trends happening around the state. She sees a need for court reporters to keep up with technology.

Ms. Hurt agreed that the Board's outreach needs improvement. She hopes to resolve the revenue problems facing the Board to allow for more opportunities for outreach.

Ms. Ryan thanked Ms. Fenner and Ms. O'Neill for attending the CCRA convention and sharing their wealth of knowledge. She encouraged all Board members to attend.

H. Staffing

Ms. Fenner reported that the two-year limited term half-time analyst position for the TRF Pro Per Program has now ended. The loss will significantly change workload at the Board office as the Pro Per workload will be absorbed by existing staff.

I. BreEZe

Ms. Fenner stated that Release 2 of the BreEZe system is going live. The Board is part of Release 3. Migration of the legacy system for the Release 2 boards and bureaus will cause a shutdown of the systems periodically. Licensees are encouraged to renew early to avoid any delays.

## IV. STRATEGIC PLAN

### A. Approval of Best Practice Pointers

Ms. Hurt stated that she chaired the task force where six additional practice pointers were developed at its July 2015 meeting, bringing the total pointers thus far to 10. She thanked the members of the task force for their work. She indicated that the practice pointers are living documents than can be improved over time. She urged stakeholders to continue sending questions to the Board for inclusion in the newsletter and to be answered in the practice pointer format. Ms. Hurt reported that staff recommends the Board adopt the proposed practice pointers, number 5 through 10. She then invited discussion of the proposed practice pointers.

*Best Practice Pointer No. 5 – Confidential Depositions*

Mr. Chan-You expressed a concern that the practice pointer indicates attorneys can mark a deposition confidential. He indicated that a court order is needed to determine what portions are confidential. Ms. Fenner responded that attorneys often stipulate to depositions being confidential. Ms. Kramm stated that typically there is a protective order in place, which could be a court order, but the attorneys may agree by stipulation that something is "attorneys' eyes only" in entirety or in portions. Ms. Scott added that the stipulation alone does not deem the transcript confidential. The attorneys would then seek a protective order after the deposition. Ms. Fenner stated that the practice pointer would assist court reporters at the time of the deposition and is not inclusive of all legal ramifications.

Ms. Lasensky requested that the document be reflective of gender equality and use "s/he" anywhere the attorney is referred to. Ms. Hurt agreed.

Ms. Kramm suggested the word "should" be changed to "may" in the second paragraph under scenario two.

Ms. Lasensky moved to adopt Best Practice Pointer No. 5, Confidential Depositions, as amended. Second by Ms. Kramm. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

*Best Practice Pointer No. 6 – Court Transcripts Designated Confidential or Under Seal*

Ms. O'Neill stated that some proceedings are designated automatically confidential within statute, such as Marsden hearings. She would like to research and incorporate those proceedings the practice pointer. She would suggest keeping the caveat to refer to the most recent Rules of Court, which provides information for how the court reporter is supposed to handle confidential transcripts, but it does not specify which hearings are confidential. Ms. Fenner indicated that a list was not included for fear of not being all inclusive. Ms. O'Neill indicated there are some very common hearings that do not vary from court to court, and it could be worded in a way that the reader knows that it is not an all-inclusive list. She expressed that it could be very helpful for new reporters going into court. She added that the court she works for has a training manual with trigger words for the reporters to listen for. She volunteered to research the statute. Ms. Fenner offered to work with Ms. O'Neill to revise the practice pointer and bring it back to the Board at the next meeting.

Ms. Lasensky moved to table Best Practice Pointer No. 6, Court Transcripts Designated Confidential or Under Seal, so that Ms. O'Neill can work with staff to further clarify the practice pointer. Second by Ms. Kramm. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

*Best Practice Pointer No. 7 – Subcontractor Agreements*

Ms. O'Neill shared that she was very impressed by this practice pointer.

Ms. O'Neill moved to adopt Best Practice Pointer No. 7, Subcontractor Agreements. Second by Ms. Lasensky. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

*Best Practice Pointer No. 8 – Swearing in Witness Mid-Proceeding*

Mr. Chan-You shared concern that the practice pointer advises the court reporter to interrupt the witness and give the following instruction: "Do you solemnly state the testimony you've given and the testimony you're about to give is the truth, the whole truth and nothing but the truth." He indicated that Government Code (GOV) 11513(a) states, "Oral evidence shall be taken only on oath or affirmation." Further, Evidence Code 710 states, "Every witness before testifying shall take oath or make an affirmation or declaration in the form provided by law..." Considering these two codes, he indicated that any statements made before the oath is not considered testimony.

Ms. Fenner then asked if he was suggesting that the deposition would have to be restarted. He responded that his research led him to believe it would. Ms. Fenner proposed that the attorneys would need to object to and stipulate to the restarting of the deposition. She added that the practice pointer is an attempt to cure an issue where the witness was not sworn in at the proper time.

Ms. Lasensky asked if there was a different way of wording the suggested oath. Mr. Chan-You reported that he gathered that the first part of the deposition taken before the oath was given is not considered testimony so the amended oath may not have any type of legal effect. Ms. Scott suggested resolving the problem with the amendment by removing the first occurrence of the word "testimony" and replacing it by saying, "do you solemnly state that the statement you've given and the testimony you're about to give..." Mr. Chan-You recommended the Board table the practice pointer in order for him to do further research on this issue.

Ms. Hurt asked Mr. Chan-You if the change suggested by Ms. Scott would make the amended oath legally appropriate. He expressed concerns that the oath would in essence be considered meaningless.

Ms. Fenner stated that the practice pointer is not attempting to advise anyone on a point law, but merely to facilitate and correct a problem at a deposition, as well as point out to the attorney the shortfall so they may take whatever action they feel is appropriate. Upon further review, Mr. Chan-You agreed that changing the first occurrence of the word "testimony" to "statements" would negate his concern.

Ms. Lasensky suggested changing "is" to "are" on the third line from the bottom.

Ms. Hurt suggested the addition of a comma after "Occasionally" in the first sentence.

Ms. Kramm moved to adopt Best Practice Pointer No. 8, Swearing in Witness Mid-Proceeding, as amended. Second by Ms. O'Neill. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

*Best Practice Pointer No. 9 – Leaving Rough Draft for Jury Readback*

Ms. Kramm stated that the practice pointer is very good.

Ms. O'Neill suggested the addition of "or in accordance with local practices" to the end of the sentence. Ms. Scott asked if there would be any issue if no local practices exist and suggested starting the sentence with "Absent court practice." Ms. Fenner suggested that adding "if they exist" to the end of Ms. O'Neill's suggested change.

Ms. Fenner restated the amended language, as follows: "If a reporter is not available for the entirety of a trial, a rough draft of the reported testimony in electronic format should be left with the reporter on standby for jury readback in accordance with local practices, if they exist."

Ms. Hurt questioned if leaving "electronic format" as the sole format was adequate. She suggested that adding the word "hard copy" as an optional format may be beneficial. The Board agreed.

Ms. Lasensky moved to adopt Best Practice Pointer No. 9, Leaving Rough Draft for Jury Readback, as amended. Second by Ms. Kramm. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

*Best Practice Pointer No. 10 – Reporter Conduct in the Jury Room*

Ms. O'Neill shared that when entering the jury room, she gives a preamble to the jury to let them know they can ask her to repeat something or slow down. However, if they hear something they would like to discuss, she asks that they stop her so she may leave the room. She suggested that similar language be added to the practice pointer to aid the court reporters.

Ms. Kramm stated that the additional language suggested by Ms. O'Neill would be incredibly helpful for new and pro tem reporters and recommended that the practice pointer be tabled for further research. Ms. Kramm moved to table Best Practice Pointer No. 6, Court Transcripts Designated Confidential or Under Seal, so that Ms. O'Neill can work with staff to further clarify the practice pointer. Second by Ms. Lasensky. Ms. Hurt called for public comment.

Steve Kosmata stated that readback also takes place in open court, so he suggested adding that facet to the practice pointer as well. Ms. Fenner indicated that this particular practice pointer was specific to readback in the jury room and suggested that Mr. Kosmata would be a great resource for creating a separate practice pointer for readback in open court.

Keren Guevara stated that there is a jury instruction given to the jurors when they are in the jury room informing them to not speak to the court reporter. Ms. O'Neill verified that they do receive instructions, but added that they are provided with many directions and may not have understood the instruction.

A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

B. Update on Action Plan Accomplishments

Ms. Fenner referred to the CRB Action Plan in the Board agenda packet and indicated that updates had been made in the status column. She offered to answer any questions.

VIII. CLOSED SESSION (out of order)

The Board then moved to Agenda Item VIII, Closed Session at 12:39 p.m. The Board took a break at 12:59 p.m. before returning to open session.

Upon returning to open session at 1:36 p.m., Ms. Hurt indicated that there was nothing to report from closed session. The Board then moved to Agenda Item V, Legislation.

V. LEGISLATION

A. Update on licensee fee cap increase

Ms. Fenner reiterated that staff has been working with the Senate Business, Professions and Economic Development Committee, who is in turn working with the Office of Legislative Counsel. She stated that she is encouraged that, at the very least, it is being actively looked at on behalf of the Board, and she hoped to have more to report as the Board goes into the sunset review process.

B. Status of bills relevant to the Board

Ms. Fenner stated that the report is informational and the Board was not being asked to take a position on any of the industry-related bills.

AB 804

Ms. Fenner reported that AB 804 (Hernandez) pertaining to continuing education was vetoed by the Governor.

AB 1197

Ms. Fenner related that AB 1197 (Bonilla) was signed into law on September 28, 2015.

SB 270

Ms. Fenner indicated that the language for SB 270 (Mendoza) was being worked on by the author's office, which is not yet public. It will be coming back to the Board when the language is finalized.
Ms. Hurt stated that letters of support were sent regarding all three of the aforementioned bills before the last Board meeting.

Mr. Alossi stated that with the enrollment of AB 1197, CalDRA is kicking off the educational phase of their campaign.

VI. STATUS OF SCOPE OF PRACTICE REGULATION
Title 16, California Code of Regulations, section 2403(b)(3)

Ms. Fenner reported that the regulation was sent to the Department of Consumer Affairs for review, then it will sent to Business, Consumer Services and Housing Agency before going to the Office of Administrative Law.

VII. BURD v. BARKLEY COURT REPORTERS, INC.
Consideration of request for amicus curiae brief on behalf of Plaintiff

Ms. Hurt summarized the request and stated that Board staff recommended a full discussion of the repercussions as it relates to consumers. She then invited public comment.

Jim Patterson, plaintiff's attorney in the case, approached the Board. He indicated that his client, Tara Burd, was charged $600 for a 30-minute transcript. A case was filed based on the belief that the charges were in excess of the statutory rates provided in GOV 66950. Extensive research was done considering the Board's position, which has been consistent since 1999. Due to the layoffs in court and the influx of freelance reporters appearing in court, the Board issued a memo in May 2012 stating that the code applied to all reporters in court, both official and pro tem reporters (see May 14, 2012 letter on pages 101 and 102 of the Board agenda packet).

After filing the case, Defendant Barkley Court Reporters filed a motion for judgment of the pleadings, taking the position that the case failed as a matter of law because the government code limitations do not apply to private reporters appointed by the court.

Mr. Patterson requested the Board maintain its position that the statutory rates apply to pro tem reporters for a number of policy reasons, including protection of the consumer. He asserted that if private court reporters were allowed to charge the market rate as they do in depositions, it would lead to the undesirable result of giving wealthier litigants an advantage over litigants of less means. As an official transcript of a government hearing, there has always been protection provided, which is why the limits were originally put in place.

Ms. Patterson referred to the Spring 2012 CRB Today newsletter where Ms. O'Neill stated there can be no hint of impropriety regarding the reliability of the official record. In these days of belt tightening and declining resources, it's easy to cut one corner too many. But it's important to never compromise one's belief system in difficult times.

He indicated that he is not aware of any prior cases where a court reporting agency was challenged for trying to circumvent the statutory fee. In opposition of the judgment of the pleadings, the plaintiff requested that the Court take judicial notice of the materials issued by the Board. After doing so, CalDRA filed an amicus brief supporting the defendant, taking the position that the statutory fees do not apply to private reporters. He stated that in its brief, CalDRA "accuses the Board of failing to cite or consider the pivotal statutes, acknowledge the applicable constitutional law, cite any indicia of legislative intent that might support its conclusions and fail to weigh the consequences of its interpretations."

CalDRA also asked the Court to not give any deference or weight to the Board's prior position, actions, or memorandums.

Mr. Patterson requested the Board file an amicus brief making it clear to the judge that the Board's position has been and continues to be that the statutory rates apply to official reporters and private pro tem reporters, providing equal access to justice. He stated that it also encourages public policy of openness in government proceedings and a written record that is beneficial to the litigants and the courts.

Ms. Kramm asked if the Board would like to hear a representative of Barkley Court Reporters before asking any questions. Ms. Hurt agreed that would be beneficial in that the Board may get the answers to their questions during the defendant's testimony.

Mr. Howard, representing CalDRA, confirmed that the association filed an amicus brief on behalf of the defendant and provided two reasons. First, he questioned if the Legislature intended to impose the same price caps that were imposed on official court reporters, who were full-time salaried employees, on freelance pro tem reporters who depend on the transcript fees for their entire compensation. He asserted that the Board's interpretation of the statutory code is incorrect because it fails to cite or examine a pivotal statute.

Mr. Howard continued, stating that the two critical statutes that serve as the basis of the Board's opinion are GOV 69950 and 69954, which set the price caps, but do not specify either official or pro tem. The Board did not consider in the May 2012 letter GOV 69947, which states "Except in counties where a statute provides otherwise, the official reporters shall receive for his services the fees prescribed in this article." Mr. Howard indicated that this statute specifies official reporters, but does not mention pro tem reporters. He asserted that if the Government Code wants something to apply to both official reporters and pro tem reporters, it mentions both.

Mr. Howard requested that the Board read both the plaintiff's and the defendant's briefs to have all the information from both sides of the case before making a decision on the plaintiff's request.

Mr. Howard stated that application of the fee caps to pro tem reporters would be terrible for consumers. He provided a hypothetical example of a Los Angeles area freelance court reporter being retained to report a motion for summary judgment. In the scenario, the hearing is 45 minutes long, with a transcript of roughly 30 pages. If GOV 69950 were applied, the pro tem would charge about $3.00 page, equaling $90.00 for the 45-minute job. When parking and gas are taken into consideration, this reporter may only gross $40.50 for the job. If the reporter had to drive two hours roundtrip, spend a couple hours at the courthouse, and then prepare the transcript, that might equate to $6.23 per hour. He asserted that consumers would be unable to find reliable and competent freelance reporters to take this kind of job for what equates to less than minimum wage, resulting in the consumer not getting the record.

He stated that official reporters, who earn a full-time salary, have also complained that the price caps are too low. Applying the caps to freelance reporters is wrong on the law and disastrous public policy.

Mr. Howard informed the Board that in other instances where it was asked to provide an amicus brief, the Board's decision was to wait until there was a court of appeal decision on the question of the first impression, and he believed the same would apply to this situation.

Mr. Patterson stated that the problem is that consumers are unable to afford the higher transcript rates, which is why the fee caps exist. He added that most major reporting agencies abide by the statute. Pro tem reporters can charge a daily fee, which is not capped, as well as get travel cost reimbursements. He reported that the Government Code is inconsistent, using official reporters and pro tem reporters together in some places and not in others.

Ms. O'Neill asked Mr. Patterson if the $600 charged to his client included per diem or only pages of the transcript. Mr. Patterson did not have a copy of the bill, but believed there may have been a per diem included, which is not regulated. He added that if a wealthy litigant hires the court reporter and pays the per diem, the litigant of lesser means may be able to afford to buy a copy of the transcript.

Ms. Kramm inquired if the plaintiff hired the court reporting firm and checked their rates before the hearing. Mr. Patterson confirmed that the plaintiff did hire the court reporting firm, but did not believe she knew what the rates were going to be. He asserted that the plaintiff may have assumed the statutory rates would be charged. He shared that the reporters he has been using for years follow the statutory rates, and they are competent.

Ms. O'Neill expressed that she thought the plaintiff was requesting support from the Board regarding court reporters charging the statutory fee for court transcripts; however, the Board cannot take a position on the per diem, and the two appeared comingled. Mr. Howard agreed. Mr. Patterson disagreed, stating the plaintiff is not requesting a position on the per diem and that the case is solely limited to the statutory rate, specifically the copy costs.

Ms. Kramm commented that the request appeared to be merely a restatement of the law, which does not hold much power. Mr. Patterson stated that the Board has the ability under the Business and Professions Code to enforce the Government Code. Ms. Scott disagreed, stating that there is no such authority for the Board to enforce the Government Code. The Board has the authority to enforce the Business and Professions Code, but can also consider licensees' conduct regarding violations in another area, such as a violation of the Government Code or the CCP.

Ms. Lasensky asked about the actual bill or invoice for the service. Mr. Patterson said there is a bill, but at this point, it's just a total number. The invoice will come out in discovery. The defendant does not deny that the charges exceed the statutory rate; they are saying that the rates do not apply to their reporters as pro tem reporters.

Ms. Hurt inquired of Mr. Chan-You what the process would be if the Board wanted to write a declaration for the plaintiff as an alternative to an amicus brief. Mr. Chan-You responded that it would be similar to the May 2012 memorandum from the Board. Ms. Scott asked for clarification on what is being sought by issuing a declaration, whether it is a position statement or something else. Mr. Patterson responded that the plaintiff is seeking a declaration that connects the reasons why the Board took the position in its May 2012 letter that the statutory rates apply to both official reporters and pro tem reporters. Although the

court was provided a copy of the May 2012 letter, the defendant argued that the Board failed to consider all applicable statutes. He would like a statement including the history of the Board's position and how the budget cuts made in the court system affected the way court reporters are hired. The Board is being requested to defend its position.

Mr. Howard restated that the Board did not take GOV 69947 into consideration when it issued the May 2012 memorandum, since GOV 69950 and 69954 do not mention official reporters or pro tem reporters, but GOV 69947 specifies "official reporter." He added that GOV 69941 and GOV 69944 mention both official and pro tem reporters. He asserted that when the code wants to include both types of reporters, it mentions both types of reporters.

Ms. Hurt asked if counsel had the legislative history. Mr. Howard replied that he did not, but the plain language of the statute does not group official and pro tem reporters together as the May 2012 letter does. He suggested the Board read the other pleadings and request that staff counsel do the same before coming to a decision.

Mr. Patterson stated that the statute uses "official reporter" and "pro tem reporter" interchangeably. He argued that by definition, an official reporter includes an official pro tem reporter.

Ms. Hurt asked the Board if they had any additional questions. Ms. Lasensky asked Mr. Howard if it was apparent to him that the statute was missing when the Board issued the May 2012 letter. Mr. Howard responded that he had reviewed the statutes cited in the letter but did not see if there were other statutes missing.

Ms. O'Neill stated that the Board's position all along has been that official and pro tem reporters are subjected to the same codes. She stated that in her court, pro tem reporters must charge the statutory rate. She did not feel comfortable issuing an amicus brief, but would support issuing a declaration to restate the Board's policy.

Ms. Hurt inquired with staff counsel who would write its position paper. Mr. Chan-You stated that staff would prepare it similarly to the May 2012 letter. She then asked for details on the process for filing an amicus brief. Mr. Chan-You explained that he would draft the brief and the Governor's Office Action Request that would be sent to the Governor's Office. If approved, it would then go to the Attorney General's Office for review, who would then write it on behalf of the Board if they approve it.

Ms. O'Neill inquired if the May 2012 letter was reviewed by staff counsel before being issued. Ms. Fenner confirmed it was.

Mr. Patterson stated that the May 2012 letter refers to a December 1999 letter, which he did not have. He said it appears that was the first time the Board took the position that the statutory rates applied to both official and pro tem reporters. He asked the Board to take into consideration the fact that the Legislature has not corrected the Board for the position it has taken since 1999. Case law says that you can take into consideration how long something has been a public opinion without any sort of response from the Legislature.

Ms. Fenner reported that the December 1999 letter was issued under former Executive Officer Rick Black and was essentially the same as the May 2012 letter. Mr. Howard pointed out that the December 1999 letter also failed to mention GOV 69947 and asked if

the Board had adopted its position with that particular statute in mind. Ms. Fenner responded that she did not know what all was considered when the original letter was issued.

Ms. Scott clarified that the Board is being asked to either issue a declaration to defend its position or file an amicus brief on the case that is now in litigation. If the Board is considering filing an amicus brief, she suggested the Board be provided a copy of the initial complaint, the response, etc.

Ms. Hurt stated that there was a lack of information for making a decision. She asked the Board if anyone wanted to a make a motion, suggestion, or recommendation on how staff should move forward, if at all.

Mr. Howard volunteered to provide to the Board copies of all the relevant pleadings.

Ms. Lasensky asked about the time frame for which a response was needed. Mr. Howard indicated the case was continued to January 10.

Mr. Howard compared the discussion regarding the case to the discussion held earlier in the day regarding the So Cal stip. He asserted that if the Board did not believe it needed to restate the law in one case, why did it in the other.

Mr. Kosmata, an official reporter, stated that the recession brought budget cuts that led to layoffs of official court reporters. The statute has not yet caught up to what happened in the state and may be lacking in some places. He, too, would like to see the statutory rates raised. The court pays him to preserve the record, which he is happy to do; however, transcript production is separate from that, and he has costs involved with producing the transcripts. He stated that hiring a scopist and a proofreader take up half the fee he is able to charge.

Ms. Kramm asserted that the words official, pro tem, pro tempore, and official pro tem have become blurred since the recession and layoffs. The names are interchangeable. Otherwise, a freelance reporter in court plays by a different set of rules than the official reporter. Ms. Hurt asked if the Board wanted to underline that the law applies to both. Ms. Kramm responded that she did not believe the Board has the right to say what the law is, but would suggest there was a reason that the Board took the position it did when it issued the May 2012 letter.

Mr. Chan-You stated that the Board has four possible actions. The first was to defend the Board's position via an amicus brief or position paper. Second, the Board could direct staff and staff counsel to review its position to determine whether or not it's legally sound. The third option was request more information from the litigants. And finally, the Board could take no action at all.
Ms. Fenner suggested the Board frame its decision in the sense of its overarching concern of consumer protection. Ms. Hurt questioned whether the consumer is protected if the Board takes no action and if it is the Board's duty to protect this consumer. Ms. Lasensky and Ms. Kramm agreed that the Board is charged with protecting consumers of court reporting services.

Mr. Patterson informed the Board that the suit is a class action case; therefore, it is on behalf of all other similar situated consumers who are charged more than the statutory rate. The Board indicated that it did not previously have this information. Mr. Patterson stated that since the case came before the Board at the last minute, he was unsure of what information the Board would need. He offered to send the documents to the members, noting the substantial volume of materials.

Mr. Howard commented that CalDRA is not asking the Board to do nothing, but to review the entire record before making a decision.

Ms. Hurt stated that a class action suit is a pretty important thing to weigh in on, especially considering the consumer protection aspect. The Board agreed it needed additional information before making a decision. Noting the fact that the Board meets infrequently, she questioned how it could be effective moving forward. Ms. Fenner responded that the earliest the Board would be able to meet would be December, taking into account the lead time needed to prepare for and notice the meeting, which does not allow much time before the case goes back to court in January.

Ms. O'Neill expressed that the first step for her would be to ensure the Board did not miss anything in the statute since that allegation has been raised. Ms. Hurt agreed and asked for a motion to explore all the relevant statutory code that affects the Board's position.

Ms. Fenner then asked if the Board was directing staff to discontinue enforcing its position on the code until it decides which direction it wishes to go. Ms. Hurt stated that, for the record, she was not saying that these codes do not apply. The Board concurred. Ms. Hurt continued, stating that the Board received a request to make a declaration, which requires more exploration of all the laws that are associated.

Mr. Patterson stated that the plaintiff is just looking for the Board to reaffirm its position as a result of the amicus brief filed by CalDRA. He added that the Board was not being asked to change its position, but to confirm it continues to be the same position.

Ms. Fenner asserted that the absence of a specific code in the letter did not mean that it was not considered. There were many codes considered, but not specifically named if they were not relevant to the point of the position.

Ms. O'Neill asked if the plaintiff was merely looking to have the May 2012 letter updated with a new 2015 date to confirm the Board has retained its position. Mr. Patterson confirmed that as correct.

Mr. Alossi asserted that the Board did not have enough information about the case, including details pertaining to the charges of the invoice the plaintiff was charged for. He recommended the Board not go down the path of a declaration or amicus brief.

Ms. Lasenksy commented that updating the date of the letter would confirm the Board's position has remained unchanged and would not be taking a position on the case.

Ms. Hurt inquired as to the impetus of the May 2012 letter. Ms. Fenner indicated that the court layoffs caused the Board to start getting complaints on overcharging.

Ms. Kramm stated that in 2012, CalDRA sponsored seminars and invited the members of the Board to inform the California court reporters that the statutory rules and rates apply to the freelance reporters going to court as pro tem reporters. The industry associations created a town hall meeting to help educate reporters about what they could and could not charge in court in the various counties. Ms. Fenner added that it was very controversial, and some firm owners declared that the statutory rates did not apply to them.

Ms. Hurt expressed that she believed it would be a good idea to write a 2015 position paper.

Ms. Scott shared concern that simply updating a position statement not associated with the litigation versus an amicus brief would not be sufficient notice to the public for individuals to come comment regarding the position. She quoted from the May 2012 letter, highlighting that the Board confirmed that it had not changed its position since 1999, and that if the Board determines a court reporter has charged more than the statutes allow, it may take disciplinary action again the court reporter's license in addition to requiring a refund to the consumer. The letter does not specify the amount to be charged, but says to follow the statute. She then asked if the Board intended to reissue the letter that just says to follow the statute. She asserted that based on her legal opinion, the statutes are not clear about what can and cannot be charged. It is also apparent that the law has not caught up with the recent time. She believed it was good that the matter was going before the court to make the determination of what pro tem reporters should charge. Ms. Scott stated that to reiterate what is in the May 2012 letter would not be taking a position. It merely says: Here is the law; follow the law.

Ms. O'Neill reiterated that she was not ready to take a position and agreed it would be up to a judge to decide. She wrestled with the option of reissuing the same letter with a new date just to restate the law. Ms. O'Neill moved to reprint the May 14, 2012 letter it in its exact same form and change the date to a 2015 date. Second by Ms. Kramm. Ms. Hurt called for public comment.

Mr. Alossi urged the Board to take into account on this particular case that there may have been charges that the code is silent on, such as expedite fees, so as to not prejudice the case in one direction. Ms. Kramm recommended the Board not begin a discussion on other fees due to the complexity of the matter already at hand.

Mr. Patterson indicated that he was in agreement with Mr. Kosmata that the statutory fees should be raised. He stated that he depends on court reporters for his livelihood and would be in favor of legislation that changes the statutory rates.

Mr. Alossi opposed the Board reissuing the letter if there were no changes to be made to it.

Mr. Chan-You asserted that the reissuance of the letter was not noticed on the agenda. Ms. Fenner responded that the Board has not been limited in the past as to what it has to list for possible action. Ms. Scott added that the subject matter placed on the agenda was pertaining to the Burd v. Barkley case and not reevaluation of the May 2012 letter.

Ms. Hurt stated that the plaintiff's attorney contacted the Board to inquire about the letter and confirmed the Board's position, for which the Board is willing to write the updated date. Ms. Fenner stated that the Board's agenda indicated that action may be taken on any item

on the agenda, and it would be impossible to anticipate which items the Board will act on or all possible solutions they may develop.

Ms. Scott stated that there is not a problem acting on the items listed on the agenda, but a question as to making a decision on something that is not clearly articulated or not specifically noticed. Ms. Fenner stated that the letter would be reissued at the request of the particular litigation. Ms. Hurt added that they requested either an amicus brief or a declaration.

Mr. Chan-You and Ms. Scott suggested the motion be revised to reflect that the Board is reissuing the letter in relation to the Bud vs. Barkley matter.

At the request of the Board, Ms. Bruning restated the motion currently on the table.

By amendment, Ms. O'Neill moved to reprint the May 14, 2012 letter in its exact same form and change the date to a 2015 date in response to the request by counsel in the Burd v. Barkley matter. Second by Ms. Kramm.

Ms. Hurt called for public comment.

Mr. Alossi requested the Board include some mention of fees that may be charged outside the purview of the codes to not prejudice the case. Ms. Fenner stated that such a modification would change the motion.

A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

Mr. Patterson thanked the Board.

The Board heard Agenda Item VIII, Closed Session, prior to Agenda Item V, Legislation.

## VIII. CLOSED SESSION

(taken out of order, see page 19)

## IX. APPROVAL OF SUNSET REVIEW REPORT TO LEGISLATURE

Ms. Hurt stated that although staff participates in gathering information, the Sunset Review Report is the Board's report. She indicated that she and Ms. O'Neill conducted a Sunset Review Task Force meeting in August with staff and members of the public in attendance. The task force reviewed documents and accepted many topics and policies that should be included in the review. She added that the draft report presented in the Board agenda packet is the work of many people. She indicated that staff would be making live edits to the document as revisions were provided by the Board during the discussion. Throughout the discussion, the Board provided punctuation and grammar corrections, which are reflected in the final draft presented to the Joint Sunset Review Committee.

Ms. Hurt inquired if the Board found that any policy issues were missing from the document, such as workforce issues or fee increases. Ms. O'Neill expressed that every issue was included and well-covered.

Ms. Kramm recommended the addition of a second paragraph to Section 1, Item 4 regarding non-licensee-owned court reporting firms. As a result, the licensees are looking to the Board more than ever since they cannot go to their agency for guidance, making the development of best practice pointers increasingly important.

In reference to Section 7, Item 55, regarding online practice issues, Ms. Kramm reported that companies are marketing one-way webcam depositions to attorneys in California cases, among others. The individual taking the record may be in any state and may not be a court reporter, let alone a California licensee, leaving no oversight of the reporters. Language was developed to add the issue to this section.

Ms. Fenner updated the Additional Board Response for Issue 5 to reflect that AB 804 had been vetoed.

Ms. Kramm suggested that the practice of cost-shifting mentioned in Section 5, Item 37, is akin to giving a large gift as mentioned in the paragraphs preceding that concern.

Mr. Chan-You suggested the Board update the status of AB 1197, as described in Section 1, Item 3, to reflect that the bill was chaptered.

Ms. Hurt complimented the additions and called for public comment. Mr. Kosmata also praised the Board for a job well done.

Ms. Lasensky moved to adopt the Sunset Review Report as amended and to give the executive officer authority to make non-substantive corrections to the final report. Second by Ms. Kramm. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

X. DRA PETITION REGARDING VOLUNTARY CONTINUING EDUCATION

Request to revise Board disciplinary guidelines or modify professional standards of practice

Ms. Hurt prefaced the conversation stating that the Board believed that mandatory continuing education would be optimal; however, it would consider alternatives considering the veto of the continuing education bill.

Mr. Alossi requested that the Board adopt staff recommended action to add continuing education as a mitigating factor in its Disciplinary Guidelines.

Mr. Chan-You requested that the petitioner articulate the necessity for the regulatory changes. Ms. Bruning responded that the Disciplinary Guidelines are a policy, not a regulation.

Ms. Hurt inquired where CalDRA envisioned individuals going to attend the continuing education classes. Mr. Alossi anticipated that CalDRA would see an increase in voluntary attendance at association events. Ms. Hurt asked if the continuing education should be specific to any particular areas, such as law and ethics versus yoga for court reporters. Mr. Alossi indicated that CalDRA surveys their members frequently to find where the need is, such as technology, punctuation, and working in court. He envisioned the Board reviewing which courses the licensee took in connection with the violation being reviewed.

Ms. Hurt reported that the State Bar requires continuing education for which there are licensed groups that provide the education. Mr. Alossi indicated that due to the low volume of court reporters in the state, there is limited demand for outside groups to provide continuing education for court reporters.

Ms. O'Neill and Ms. Hurt suggested the Board narrow the continuing education to areas of laws and ethics.

Ms. Lasensky asked how the reporters would acquire the classes and how enforcement staff would obtain proof of completion. Ms. Fenner responded that continuing education classes are already offered. The Board already provides a copy of the Disciplinary Guidelines to the licensee, which details the mitigating factors. The burden would then be on the licensee to provide proof of their continuing education history.

Ms. Hurt asked for an explanation on the difference between revising the Disciplinary Guidelines versus revising the Professional Standards of Practice (Standards). Ms. Fenner responded that amending the Disciplinary Guidelines would only require policy approval by the Board and publication on the Board's Web site. Changes to the Standards would require a regulatory change which is a lengthy process. She did not see any additional enforcement or value by revising the Standards.

Ms. Scott indicated that the Board is faced with responding to the petition, which it could accept or deny, or accept in part and deny in part. Additionally, although the Disciplinary Guidelines are policy, they are contained within the California Code of Regulations 2472, with a guideline revision date of February 1, 1989. The regulation is what gives the Board its authority to enforce the guidelines. To change the Disciplinary Guidelines, the Board would be required to go through the regulatory process, including the public comment period. She stated that a Section 100 change would not be appropriate. It may appear that the Board would merely change the revision date of the Disciplinary Guidelines annotated in the regulation; however, substantive changes would be made to the document within the regulation and require a full regulatory package. She added that the Board previously updated the Disciplinary Guidelines in 2013 but did not yet update the regulation.

Ms. Scott reiterated that the Board needs to respond to the petition and could accept the modification to the Disciplinary Guidelines, but due to noticing requirements may not be able to move forward with the regulatory change.

Ms. O'Neill moved to accept the petition regarding revision of the Disciplinary Guidelines to include continuing education as a mitigating factor.

Ms. Scott stated that the Board could not consider changing the current language, but could consider denying the petition taking into consideration that they are going to adopt the language to go into the current Disciplinary Guidelines once the regulation is brought before the Board for adoption.

Ms. Hurt asked is CalDRA would consider rescinding its petition. Mr. Alossi agreed to do so in anticipation that it will resubmitted when the Board is able to address in an appropriate manner. Ms. O'Neill withdrew her motion.

XI. CERTIFICATE OF APPRECIATION FOR MELISSA DAVIS

Ms. Hurt stated that during the limited time she had to work with Ms. Davis, she noted her positive spirit, camaraderie, and volume of work completed. She commented that she would be truly missed.

Ms. Fenner added that Ms. Davis played an important role in diminishing the backlog for the TRF Pro Per Program. She also worked diligently to recover unused funding to assist additional litigants. She was also an incredible team player, an asset that will be missed.

Ms. Kramm wished Ms. Davis well and volunteered to give her a recommendation for future endeavors.

Ms. Hurt quoted the Certificate of Appreciation found on page 131 of the Board agenda packet.

Ms. Lasensky moved to adopt the Certificate of Appreciation for Melissa Davis. Second by Ms. O'Neill. Ms. Hurt called for public comment. No comments were offered. A vote was conducted by roll call. For: All present. Opposed: None. Mr. Liu was absent. **MOTION CARRIED**.

XII. FUTURE MEETING DATES

Ms. Hurt asked the Board if they wanted to meet again before the end of the calendar year, noting that the overwhelming task of the Sunset Review Report was adopted, causing no need to meet again on that item.

Ms. O'Neill stated that she would be willing to meet if something urgent arose, but did not see the need to set a date yet. Ms. Hurt agreed.

Ms. Fenner indicated that the only thing she currently had to put before the Board for the next meeting was the Disciplinary Guidelines, but that did not incite any urgency.

The Board agreed to meet after the new year in 2016. Ms. Fenner stated that she would poll the Board members once there was enough to form another meeting, most likely in the spring.

XIII. PUBLIC COMMENT

No comments were offered.

XIV. ADJOURNMENT

Ms. Hurt adjourned the meeting at 4:14 p.m.

DAVINA HURT, Board Chair — DATE 4.13.16

YVONNE K. FENNER, Executive Officer — DATE 4/25/16

ABA JOURNAL

BRYAN GARNER ON WORDS

# Shall We Abandon Shall?

By Bryan A. Garner
Aug 1, 2012, 07:20 am CDT

*Photo by Terri Glanger*

**In March 1968** I was a fourth-grader at Rex Reeves Elementary School in Canyon, Texas, a small college town in the Panhandle. My teacher, the beloved Mrs. Pearcy, had a not-beloved student teacher, Mrs. Phillips, who was seeking her teacher certification. Mrs. Phillips, I realized early on, was not partial to me.

One day—it was the ides of March—Mrs. Pearcy announced to the class that Mrs. Phillips would be leading us in a lesson. There was a professor of education in the back of the room, Mrs. Pearcy explained, to observe Mrs. Phillips—who soon took her place at the front of the classroom.

"Children," Mrs. Phillips said, "today I am going to teach you about contractions." This struck me as a little silly. We had learned all about contractions in the third grade. "Can anyone name a contraction?"

My hand shot into the air.

"Bryan."

"*Shan't.*"

"Umm, no. That's not a word."

"It is, Mrs. Phillips! It's a contraction of *shall not.*"

"No, that's not a word. Can anyone name a contraction? Craig."

"*Won't.*"

"Good, Craig."

Other pupils started chiming in:

"*Can't! Isn't! Doesn't! Shouldn't! Wouldn't! Aren't!*"

"Good, children, good! Those are all contractions—and real words." She glanced disapprovingly at me with that last remark. I went silent for the rest of that class. I felt flushed. I remember the moment as if it were yesterday.

In the corner of the room, I knew, was a huge dictionary—as it turns out, *Webster's Third New International Dictionary*, published in 1961. As soon as class was over, I went to the corner and looked up *shan't*. There it was: "**shan't.** *Contr.* Shall not." I heaved the huge tome off its stand and cheerfully approached Mrs. Phillips to give her the good news.

She was talking to the professor, so I stood by quietly. When they finished speaking, I said: "Look, Mrs. Phillips! It is a word! *Shan't* is right here in the dictionary!"

She turned from me and waved her hand behind her back, as if to shoo me away.

"But it's right here. ..." My enthusiasm melted as she turned back to me and said sternly: "Bryan Garner, that's not a word. I'm not looking at that. Put the dictionary away and go play. It's recess now." So ended one of the most important lessons of my life—the one that would ignite my interest in lexicography. It was also the beginning of my recognition of an anti-intellectual strain in my hometown.

## WHAT YOU'RE REALLY SAYING

**In retrospective fairness,** Mrs. Phillips had a point: No American says *shan't*. I had heard a television character use it—the very English Mr. French in the 1960s series *Family Affair*.

Nor do Americans use the positive form, *shall*, except in two expressions: *We shall overcome* and *Shall we ...* ? Otherwise, this modal verb isn't really a part of normal American English.

Which brings us to legal English, where *shall* is ubiquitous in contracts, statutes, ordinances, rules and regulations. In the ordinary contract, almost every sentence contains a *shall*. The U.S. Constitution is chock-full of *shalls*.

In law school, we learn that *shall* is "mandatory" and *may* is "permissive." There are even statutes enshrining this idea. If you don't look closely at *shall* and its semantic content, those statutory provisions seem to make sense.

But let's do look more closely. What about laws stating that "No person shall ... ?" If *shall* means "has a duty to" or "is required to," we have a problem. We're negating a command to do something: You're not required to do it (but, by implication, you may if you like).

That's plainly not the meaning. What is meant is to prohibit altogether—to disallow. Hence it should be "No person may ... ." That is, no person is allowed to do this.

Confronted with a "No person shall" provision, courts routinely hold that *shall* means *may*. In every English-speaking jurisdiction that I know of—don't be so shocked—*shall* has been held to mean *may*. As Justice Ruth Bader Ginsburg remarked in a majority opinion: "though *shall* generally means *must*, legal writers sometimes use, or misuse, *shall* to mean *should, will* or even *may*."

In the ninth edition of *Black's Law Dictionary*, I list five meanings for *shall*:

**shall**, vb. (bef. 12c) 1. Has a duty to; more broadly, is required to "the requester *shall* send notice" "notice *shall* be sent". This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) "all claimants *shall* request mediation". 3. May "no person *shall* enter the building without first signing the roster". When a negative word such as *not* or *no* precedes *shall* (as in the example in angled bracket), the word *shall* often means *may*. What is being negated is permission, not a requirement. 4. Will (as a future tense verb) "the corporation *shall* then have a period of 30 days to object". 5. Is entitled to "the secretary *shall* be reimbursed for all expenses". Only sense 1 is acceptable under strict standards of drafting.

In short, *shall* is a chameleon-hued word.

For teachers of legal drafting, there are two main pedagogical approaches today for teaching lawyers and aspiring lawyers about this word: (1) restrict *shall* to meaning either "has a duty to" or "is required to" (meaning that 40 to 80 percent of the *shalls* in existing forms will be replaced); or (2) eliminate *shall* altogether on grounds that lawyers as a group cannot realistically master the semantic subtleties of the word (meaning that 100 percent of *shalls* get dropped).

When I acted as style consultant to the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure, beginning in the 1990s, the federal judges for whom I worked experimented with the first option, but settled on the second. Hence when I revised the full sets of civil, appellate and criminal federal rules, the *shall*s were dropped. Rule 10(b) of the Federal Rules of Civil Procedure read like this:

"All averments of claim or defense *shall* be made in numbered paragraphs, the contents of each of which *shall* be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials *shall* be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

Now it reads like this:

"A party *must* state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—*must* be stated in a separate count or defense."

## IF YOU *MUST* BE BOSSY

**With one exception,** *shall* has now been purged from all four major sets of federal rules, including evidence.

What is the exception? With Federal Rule of Civil Procedure 56—the summary judgment rule—the advisory committee confronted warring factions on whether a federal judge *must* or *may* award summary judgment upon finding the requisite elements. Initially, the rule was promulgated with a *may*. But so much rancor ensued that the committee retreated to *shall*. It issued a note saying, more or less, "We're not sure whether this rule is mandatory or permissive, so we're reverting to the ambiguous *shall*. Let the courts figure it out."

What about contracts? Isn't *must* a bit bossy-sounding in the context of a private agreement? Yes, it is—unless it's a take-it-or-leave-it consumer contract. If it's an ordinary bilateral agreement, *will* is perfectly adequate. "The parties agree as follows," the lead-in says, and then: "Jones will do this. Smith will do that."

The advantage of *will* is that nobody—nobody—misuses this word in any of the myriad ways in which lawyers misuse *shall*. Nobody writes *will* instead of *may* or *should* or *is entitled to*. In American English, *will* is the ordinary verb of promise.

Reflect on how we, as a profession, landed in this semantic snarl of *shalls* in our documents. Here's how I reconstruct it. If you grew up in this country, you grew up without *shall* as part of your working vocabulary. You encountered *shall* in some of your reading, but you never used it. You did well in school and ultimately enrolled in law school, where you were bombarded by *shalls* in statutes and contracts. You intuited that *shall* is "the drafting verb" that makes legal instruments precise.

In fact, it does the opposite. In most legal instruments, *shall* violates the presumption of consistency: Words are presumed to have a consistent meaning in clause after clause, page after page. Which is why *shall* is among the most heavily litigated words in the English language (with hopelessly inconsistent court holdings).

My own practice is to delete *shall* in all legal instruments and to replace it with a clearer word more characteristic of American English: *must, will, is, may* or the phrase *is entitled to*. This approach might well please Mrs. Phillips, but shall we consider that factor relevant at all? No we shan't.

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# COMPARISON OF CCP 2025.550 AND RULE 30

| Code of Civil Procedure 2025 | Federal Rule 30 |
| --- | --- |
| The certified transcript of a deposition **shall** not be filed with the court. Instead, the deposition officer **shall** securely seal that transcript in an envelope or package endorsed with the title of the action and marked: "Deposition of (here insert name of deponent)," and **shall** promptly transmit it to the attorney for the party who noticed the deposition. This attorney **shall** store it under conditions that will protect it against loss, destruction, or tampering. | The officer **must** certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate **must** accompany the record of the deposition. Unless the court orders otherwise, the officer **must** seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and **must** promptly send it to the attorney who arranged for the transcript or recording. The attorney **must** store it under conditions that will protect it against loss, destruction, tampering, or deterioration. |

**Marla Sharp**
RPR, CLR, CCRR, CSR 11924

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October 30, 2015

Court Reporters Board
Department of Consumer Affairs
2535 Capitol Oaks Drive, Suite 230
Sacramento, CA 95833

Re: SoCal stip

**THE PROBLEM:** The problem facing the consumer is that the original transcript is being released to opposing counsel in an unsealed condition, making it vulnerable to loss, manipulation, and tampering due to the SoCal stip. This practice is putting the consumer in harm's way by allowing attorneys to stipulate away the protection of the original transcript under the code and giving it to a biased party with a motive for a specific outcome to the case.

**WHAT'S HAPPENING:** Instead of the original transcript being securely sealed in an envelope and sent to the noticing attorney to be protected from loss, manipulation, and tampering, as required per CCP 2025.550(a) and (b), it's being sent to opposing counsel under the guise of not having to burden the witness with driving to the reporter's office to read and sign. In fact, the CCP specifically provides the witness the option of reading a copy of the transcript and submitting any corrections or changes by mail; but, unfortunately, SoCal attorneys, in general, are either unaware of this language in the code or choose to ignore it.

**WHAT SHOULD BE HAPPENING:** The witness could be sent a PDF, preferably a nonprintable PDF that expires in 30 days, along with an errata sheet. And the original should be sealed and sent to the noticing attorney for protection, as CCP 2025.550(a) requires.

**QUID PRO QUO:** The stip has continued to exist because it's simply a way for attorneys to avoid paying for a copy. The parties conspire to not follow the code for the quid pro quo practice of "You get the originals in my depos; I'll get them in yours."

**WHY IT'S DANGEROUS:** When the unsealed original is sent to the witness's attorney, that original transcript then becomes their working copy to do with as they wish. Rather than buy a copy or PDF from the agency, they simply unbind it so it can be scanned into their system and/or copied, which makes it vulnerable to loss, manipulation, and tampering. That's when pages can get lost. Unbinding the original also voids the reporter's certificate attesting to its accuracy and completeness. With change of counsel and counsel providing copies to each other, it's possible that the unsealed, unbound, manipulated "original" ends up being the only remaining copy.

There's no way for consumers or judges to know this is what's happening. When an original isn't sealed, they don't know that a transcript has been unbound and put back together. They don't know if transcript or exhibit pages are missing or if testimony has been changed. But if the judges receive the sealed transcript from the noticing attorney, they know it's intact and accurate.

**The sealed original is the official record against which all copies can be compared.**

Unsealing and releasing the original also means the reporter is no longer able to comply with 2025.520(e), "*The deposition officer shall also notify in writing the parties attending the deposition of any changes which the deponent timely made in person,*" since we are no longer responsible for handling any corrections submitted by the deponent. Therefore, the deponent's changes are no longer kept with the sealed original transcript, making them also vulnerable to loss, manipulation, and tampering.

**PROPOSED SOLUTION:** I would ask the board to officially opine that, due to the potential harm to consumers, reporters should follow CCP 2025 as to the original transcript because the original must be protected. This will give reporters the clear instruction that they must follow the code rather than the stipulation.

The point of creating a legal requirement for the sealed original was to ensure the integrity of the transcript as produced by an unbiased officer of the court. To now instead leave the unsealed original in the hands of biased litigants who have a financial stake in the outcome of a case, I propose, is irresponsible and reckless. CCP 2025.550 was drafted with a very clear and critical purpose, and that was to protect the original transcript, which, in turn, protects all parties involved.

Allowing reporters to follow the stip instead of the code is essentially putting California consumers in harm's way.

**Protecting the original = protecting the consumer.**

Thank you so much for taking the time to hear reporters' concerns on this matter. We are the guardians of the record, and we take our position in the judicial process very seriously.

Respectfully,

Marla Sharp
RPR, CLR, CCRR, CSR 11924