As published in the November 20, 2013 issue of the Daily Journal

The 'bring your own transcript' approach to civil appeals

By John A. Taylor Jr.

Apart from filing a notice of appeal within the jurisdictional deadline, the most important step in getting an appeal off the ground is the designation of the record on appeal. In the designation, among other things, the party must specify which proceedings, if any, should be transcribed and transmitted to the Court of Appeal in the reporter's transcript. If the record on appeal isn't timely designated, the appeal will be dismissed.

Designating the record can be expensive for a civil litigant. For each trial proceeding designated, a deposit is required, which may be either a statutory amount ($650 per full day proceeding, or $325 per proceeding of three hours or less), or the amount of a written estimate obtained from the court reporter for each designated proceeding. (Alternatively, a "waiver of deposit" can be obtained from each of the court reporters by paying them directly whatever fee they propose for preparing their portion of the transcript. Using that procedure, however, waives not only the deposit, but also any protection from the courts should a reporter abscond with the fees.) For a mere two-week trial, in which pre-trial and post-trial proceedings will also need to be included in the appellate record, the deposit for the reporter's transcript can easily reach $10,000 or more.

For many years, Rule 8.130(b)(3) of the California Rules of Court has supposedly permitted appellants to avoid some or all of this expense by submitting a "certified transcript" of a proceeding instead of the required deposit. In other words, if you've already purchased a "daily" transcript from the reporter, the rule says you can submit that transcript instead of paying any deposit for that day's proceedings. Unfortunately, that right has existed only in theory.

Another rule – Rule 8.144 – requires that the version of the reporter's transcript transmitted to the Court of Appeal must be numbered consecutively and include indices and special covers for each of the transcript volumes. The drafters of these rules originally included a provision specifying who would have the responsibility for taking lodged transcripts, combining them with the transcripts of other designated proceedings, and consecutively paginating them collectively – but were ultimately unable to reach any consensus with the court reporting lobby on that issue. Thus, the rules went to press with a huge gap regarding who would perform that task and who would bear the cost of doing it.

In the absence of a rule holding anyone responsible for putting lodged transcripts into the proper format, the superior courts simply punted – and for more than a decade have generally refused to accept certified transcripts as a substitute for a deposit for certain proceedings. One unfortunate upshot has been that appellants who have already purchased daily transcripts have often been required to pay a second time for preparation of that same transcript for the record on appeal – an obviously unfair result.

In 2011, the Appellate Advisory Committee of the Judicial Council formed a "Rule 8.130 working group" to address various problems with the designation of reporter's transcripts. Among those problems, the working group was charged with proposing a solution to the long-existing problems with the procedures for lodging certified transcripts instead of making a deposit.

One approach the working group considered was to end the deposit procedure altogether, following the superior court trend of "privatizing" the court reporter system. This would let attorneys fend for themselves in dealing with reporters to obtain a reporter's transcript on appeal in the proper format, and eliminate the superior court's administrative costs related to holding deposits in trust until the reporter's transcript was completed by the reporter(s). Another proposal was to keep the existing deposit procedure, but repeal the option of submitting a certified transcript instead of a deposit for a designated proceeding. Ultimately, a compromise approach was adopted that partially retained the option of submitting certified transcripts instead of a deposit.

The revised rule takes an "all or nothing" approach, eliminating the option of submitting certified transcripts for some proceedings and making deposits for other proceedings. Instead, when the new rule takes effect Jan. 1, 2014, anyone wanting to avoid making a deposit will have to submit certified transcripts for *all* the designated proceedings, and the transcripts will have to already be formatted according to the requirements in Rule 8.144. Obviously, this procedure will work best in a small record appeal with only a few daily transcripts, as most litigants will not have the resources to repaginate and index a large number of separate certified transcripts.

As partial compensation for the loss of the theoretical ability to submit some transcripts while designating others, the new rule provides that a party who has already paid for a daily transcript for a particular proceeding can designate that proceeding and make a deposit that is much smaller than would otherwise be required – $160 instead of $650 for a full day; $80 instead of $325 for a partial day. A revised Judicial Council form (APP-003) will allow the appellant to check a box to identify a proceeding for which a certified transcript has been previously prepared, so that the reduced deposit amount applies to preparation of that transcript. (A similar revised form, APP-010, will be available for respondents designating additional proceedings.) If the Judicial Council forms aren't used, an asterisk can be placed before that proceeding in the party's custom-prepared designation.

The smaller deposit amount is intended to cover only the cost of reformatting the daily transcript to meet the requirements of Rule 8.144, rather than the cost of a full transcription. This new reduced deposit procedure should help avoid the problem of court reporters charging a second time for proceedings that have already been transcribed, and help ensure they limit their fees to the cost of repaginating the transcript and adding indices and covers. As noted in the Advisory Committee Comment to the revised rule, the "reduced deposit amount was established in recognition of the holding in *Hendrix v. Superior Court of San Bernardino County* (2011) 191 Cal.App.4th 889 that the statutory rate for an original transcript only applies to the first transcription of the reporter's notes."

Finally, to offset the administrative costs incurred by superior courts in having to continue holding deposits for the reporter's transcript in trust while the reporters (who generally are independent contractors) complete the reporter's transcript, the revised rule imposes a new flat fee of $50 regardless of the size of the designated record. This $50 applies only if the designating party chooses to deposit funds with the superior court; if the parties obtain a waiver of this deposit from the court reporter or submit a complete reporter's transcript instead of any deposit, the $50 fee should not be required.

John A. Taylor Jr. is a partner with the civil appellate law firm of Horvitz & Levy in Encino.