



March 29, 2013

The Honorable Bob Wieckowski, Chair
Assembly Judiciary Committee
1020 N Street, Room 104
Sacramento, CA 95814

RE: AB 251 (Wagner)—OPPOSE

Dear Chair Wieckowski:

For the reasons discussed below, the Deposition Reporters Association of California must respectfully oppose AB 251 (Wagner).

Deposition Reporters Association of California

The Deposition Reporters Association of California (“DRA”)¹ represents more licensed deposition court reporting professionals than any organization in California and is the leading organization in the nation devoted solely to representing such professionals. DRA is a California affiliate of the National Court Reporters Association (NCRA).

DRA was founded in 1995 by freelance deposition reporters seeking to preserve the impartiality and independence of their profession. In the early nineteen nineties, certain deposition companies and firms began the practice of offering certain services or prices to one party in litigation but not to others. DRA was founded to combat such practices.

DRA worked with the NCRA to establish and fund Citizens for Impartial Justice, a nationwide organization that coordinated successful efforts across the country to preserve the impartiality of the deposition reporting profession. As a result, court rules or laws preserving the impartiality of freelance deposition professionals were passed in fourteen states including Hawaii, Texas, Minnesota, Utah, West Virginia, New Mexico,

Background: Court Reporters Are Highly Trained Professionals

The term “court reporter” broadly refers to two kinds of licensed professional: those licensees who are full-time employees of county courts and work in courtrooms, reporting and transcribing official proceedings (called “officials”) and those licensees who are hired by attorneys to report and transcribe depositions and other out-of-court proceedings (called “freelancers”).

¹ <http://www.caldra.org/>, <http://www.facebook.com/caldra>

The importance of this licensed profession to the reasoned and credible administration of justice is hard to overstate. This was judicially confirmed in 2011 in *Serrano v. Stefan Merli Plastering Co.* (2011) 52 Cal.4th 1018, 1021 where the Supreme Court held that court reporters who take depositions are “ministerial officers of the court,” meaning officers charged with non-discretionary, *inherently judicial* duties. This is why freelancers who report and transcribe depositions are empowered to swear in witnesses, and this is why the Code of Civil Procedure strictly regulates what they do: they are extensions of the judge working in a private setting.

Indeed, the Legislature’s Joint Committee on Boards, Commissions, & Consumer Protection correctly underscored the importance of this frequently taken-for-granted profession in 2005 when it wrote:

An accurate written record of who said what in court is essential if the outcome of a judicial proceeding is to be accepted by the litigants and the public as non-arbitrary, fair, and credible.

In criminal cases, for example, courts of appeal rely exclusively upon [] written briefs and a written transcript to adjudicate the lawfulness of what occurred at trial. A conviction – and thus in some instances the life or death of an accused – can stand or fall based entirely upon what a witness said, what a lawyer said, what a juror said, or what a judge said, as solely reflected in the written transcript.

In civil cases, millions of dollars, life-long careers, and the fate of whole business[] enterprises can hinge on what was said or what was not said in a deposition or at trial.

Moreover, the testimony in civil and criminal cases is often thick with technical jargon. A medical malpractice case where specialist experts from both sides contradict one another can involve complex technical medical terminology; criminal cases can involve scientific language related to DNA identification; anti-trust cases can involve diction from economic theory, and so on. No matter how obscure or technical, such jargon must to-the-word accurately be reflected in the written transcript.

Court reporters are highly trained professionals who transcribe the words spoken in a wide variety of official legal settings such as court hearings, trials, and other litigation-related proceedings such as depositions.

Court reporters are, like physicians, engineers, and accountants, licensed by and subject to discipline by a regulatory board in the Department of Consumer Affairs.

A common misperception is that court reporters simply and passively take dictation. As any serious litigator will tell you, and as a glance at the many and complex Code of Civil Procedure and Government Code sections dealing with court reporting confirms, that is very wrong. As officers of the court who administer oaths, as the custodians of the record during and after the deposition (when corrections are made by the witness) or hearing, court reporters are required to

ensure that the transcript is accurate, and that often means intervening in the proceeding to ensure that the words witnesses speak can be accurately heard, understood, and reported. This must all be done under sometimes extraordinarily stressful circumstances, with emotional witnesses and furious (and often screaming) attorneys jockeying for any advantage.

Moreover, court reporters don't just show up unprepared. Call a court reporter on the weekend prior to a patent or trademark-related deposition or trial and you will discover it is commonplace for them to be busy reading the underlying patents or pleadings to familiarize themselves with the jargon and what the jargon means, all to better ensure the accuracy of transcribed testimony. This mastery of context is how the best reporters will know whether one technical chemical compound (for example) is uttered over its similar sounding cousin.

Audio Recording Has Been Rejected Time and Time Again by the Legislature Because It Is Inferior To A Licensed Professional.

Deposition reporters like those represented by DRA know that audio recording has not caught on in the private sector for the same reason it is unworthy of being considered as any kind of adequate substitute for court reporters for the public sector. It is *inferior to a licensed professional*, and those in the free market are not selecting it over licensed professionals for that reason.

Why? Because only a person knows whether they are getting it all down when the lawyers yell at each other, when the witness is sobbing, or a child is whispering. And, only a licensed person can be trained and held ethically accountable for their impartiality and competence. Only a professional human being feels pride in a job well done or is trained and required to interrupt the proceedings when he or she can't make out testimony or argument.

Indeed, lawyers in the private market know that the instances of electronic reporting snafus are many, with devastating consequences for them and their clients. Here is an excerpt from a 2012 case in New York involving a prisoner and a "technical error with the hearing tape." The court observed that:

"[t]he petitioner's transcriber documented numerous and lengthy gaps in the hearing tape, which rendered much of the transcript unintelligible. Based upon the foregoing, the Court found that the condition of the transcript was such that it, indeed, precluded meaningful review of the disciplinary determination."

Here is another 2012 excerpt from a case involving assault, from Kentucky:

"Subsequently, due to failure of the courtroom recording equipment, the trial court entered a summary of the trial proceedings[.]"

And, another 2012 case, from Louisiana:

"During presentation of the testimony of Ted Higginbotham and Dr. Glenda Richardson, the court's recording equipment malfunctioned. Thus, none of Ted

Higginbotham's testimony was transcribed and only part of Richardson's testimony was transcribed.”

Audio Recording Makes No Sense In Any Setting Where Appeals Are Common. Family Law Is Such A Setting.

Plus, audio recording makes no sense fiscally. Under this bill, new and costly equipment will have to be bought, warehoused, repaired, serviced, monitored and maintained either by new court employees trained to use them or by outside contractors. There will be a cost to this and it will be substantial.

Moreover, family-law matters are highly emotional and frequently the subject of appeals. Appellate courts do not listen to audio tapes. They work off of transcripts. This means that even if audio recording machines are procured for family law courts *transcripts will still need to be prepared anyway* in some significant number of cases. Either the litigants will have to pay for this, undermining one point of the bill, or the counties will, undermining another. Either way, this means the cost of audio recording as an alternative to re-hiring licensed professionals is uniquely high in the family-law setting.

Finally, court reporters can make transcripts available immediately for the next day of the trial and can even provide realtime transcription -- simultaneous translation of their stenographic notes displayed on computer monitors for the judge and all attorneys present, a remarkable and valuable service not available from any electronic or digital recording system. In contrast, transcribing audio recordings requires someone somewhere to listen to the tape all over again in order to transcribe it, something more efficiently done by a court reporter once, at the time of the proceeding.

Conclusion.

Just as nobody would propose that public defenders be replaced by paralegals, the answer to the denial of justice afforded to family law litigants by misguided court reporter layoffs is not for family-law litigants to be relegated to second-class status, burdened by a technology consistently rejected by those in the private sector. The answer is to provide these litigants in court with access to the same licensed professionals their lawyers likely used outside the courtroom, in a deposition; namely, a licensed court reporter.

For all these reasons, we ask that you vote no on AB 251 (Wagner).

Respectfully,



Antonia Pulone,
DRA Legislative Chair

Vicki Saber,
DRA President

cc: Honorable Members of the Assembly Judiciary Committee, Honorable Don Wagner