



April 12, 2014

The Hon. Donald Wagner  
Assemblymember, 68<sup>th</sup> District  
State Capitol, Room 2158  
Sacramento, CA 95814

**RE: OPPOSITION TO AB 2006 (Wagner)**

Dear Assemblymember Wagner:

The Deposition Reporters Association of California (“DRA”) writes respectfully to oppose your AB 2006, a bill that foundationally confuses the role of court reporters in our judicial system by equating a simple videotape with a legally certified transcript.

**FOURTH EFFORT TO UNDERMINE THE LICENSED PROFESSION  
OF COURT REPORTING**

Your AB 2006 is your fourth legislative effort that, if enacted, would dramatically undermine; a profession that is overwhelmingly comprised of women because it offers flexible opportunities for working mothers to achieve professional stature at a reasonable pay.

The reason why all of your prior efforts have been unsuccessful is that neither the broader community of lawyers or their clients is agitating for your legislation. Likewise, no press or other investigation has revealed anything untoward about these licensed professionals (who are also officers of the court) that would prompt you making this profession one of your legislative priorities.

Indeed, while other licensed professions are too often in the news as the subjects of unwelcome scandal, court reporters’ reputations have been and are entirely unblemished by any such controversy.

Respectfully, your repeated efforts to legislate in a fashion that would undermine the integrity of a profession untouched by scandal, overwhelmingly comprised of small business people and working women, where the *status quo* has for decades existed without controversy, is confusing – even hurtful – to DRA’s many hard-working, licensee members.

For this reason, and the reasons set forth below, DRA must regrettably oppose AB 2006.

## **DEPOSITION REPORTERS ASSOCIATION OF CALIFORNIA**

DRA represents more licensed deposition court reporting professionals and firms 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 and firm owners 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, and New Mexico. DRA is a leading voice in Sacramento on legislative and regulatory matters affecting the profession and participates as *amicus curie* in litigation matters related to the profession.

## **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”).

A court reporter’s license, like a license to practice law, is a general license. That is, it legally permits (not necessarily qualifies) a reporter immediately to work in any

setting for which a licensed reporter is required, whether it be a complex medical malpractice deposition replete with scientific medical jargon and yelling lawyers, or a discovery motion in a simple breach of contract trial.

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.4<sup>th</sup> 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: court reporters are extensions of the judge, often working in a private setting.

Indeed, the California 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. The Court Reporters Board has the power not just to discipline individual licensees but also corporate entities that provide or arrange for court reporting services. Befitting the enormously difficult and exacting nature of the profession, passage rates for the court reporter's licensing exam are usually below those of the Bar Exam.

**Just as is the case with CPAs, lawyers, engineers, and other licensed professions, court reporters are not fungible.**

A common misperception is that court reporters simply and passively take dictation; that they are fungible. As any experienced 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 a 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 accurately be heard, understood, and reported. This must all be done under sometimes extraordinarily stressful circumstances, with emotional witnesses and sometimes furious attorneys jockeying for any advantage.

Moreover, court reporters don't just show up unprepared. Call, for example, a freelance deposition reporter on the weekend prior to a patent or trademark-related deposition 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, or creating a custom dictionary of key terms, 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.

As well, as trained professionals whose duty it is to ensure an accurate record, court reporters will interrupt testimony if it is inaudible or incomprehensible, mediate between yelling attorneys to ensure what they are saying is accurately transcribed. In other words, these licensed professionals will often be called upon to use their training and judgment to manage the deposition, to ensure the integrity of the record.

*It is a very hard, stressful, exacting, and important job.*

And, this is also the reason why lawyers sometimes receive good, accurate transcripts that also flow and are easily readable and why they sometimes do not receive good transcripts. Just as no two lawyers will write a brief in the same way, no two licensed reporters will organize (for example) a passionate colloquy between counsel the same way. The preparation; the management of the proceeding to ensure an accurate record, the decisions as to how the transcript will be organized; these factors all require professional judgment, preparation, experience, and intelligence, and the product lawyers obtain will vary – sometimes significantly -- depending on the reporter hired.

Knowing this, deposition firm owners view it as their core function to match their reporters to jobs based upon which reporter will do the best job for their client. Firm owners thus assign reporters based upon the substantive complexity of the case; the proclivities of the attorneys; the demands of the case in terms of managing the proceeding; the overall strengths or weaknesses of the reporter (both personal and professional); workload and work habits and reliable personal availability.

Firm owners likewise supervise and mentor their reporters, answering questions and providing guidance about law and practice before, during, and after proceedings.

### **Deposition Transcripts Are Routinely Admissible Because They Are The Work Of These Professionals**

It is not intuitive that transcripts of what individuals say in depositions are admissible in court. Typically, writings reflecting out-of-court statements made by witnesses would be insufficiently reliable to be admitted as evidence and would rightly be deemed to be inadmissible hearsay.

But, depositions are not out-of-court statements because depositions are not out-of-court proceedings. What makes what is said in a deposition a statement in a judicial proceeding is that they are reported not by an interested party or even a lay neutral one but by what the California codes sometimes call “officers” – as in an officer of the court – and certified reporters performing a ministerial, inherently judicial function, accountable to a licensing board for the transcription of the proceeding nearly up to and until it is introduced into evidence.

This is why the many court rules and statutes governing the licensure of certified reporters in California exist -- to ensure the inherent reliability of what would otherwise be inadmissible hearsay.

And, this is why the state regulation of certified deposition reporting is critical to the functioning of California's judiciary. Depositions are a way for the court to obtain reliable testimony to be used in a judicial proceeding without having to consume hearing time in an actual courtroom.

Thus, California law ensures that the officer who conducted and the certified reporter who personally reported the deposition is accountable for ensuring the testimony is not tampered with. To this end, California establishes a chain of custody for transcripts and copies where a certified and licensed professional is accountable for what happens to the transcript and fully admissible certified copies of it.

Without this chain, without a licensee and officer of the court ensuring that the transcript and copies have not been altered, ***these written words on a page may be too unreliable to be admitted in court*** without additional checks on the veracity of the documents and their foundation; expensive and time-consuming checks made unnecessary because the licensed reporter is as a licensee personally accountable to laws that impose strict standards governing what happens to a reporter's work product before, during, and after the deposition.

There is almost never litigation about whether what is transcribed accurately reflects what was said in a deposition. The current system is so trustworthy, it is taken for granted.

### **AB 2006**

In contrast, in an era when videotapes may be easily and inexpensively altered electronically and where literally anybody can videotape a deposition no matter their qualifications or background, your bill appears to provide that a videotape made with no safeguards by anyone no matter their background may be introduced in lieu of and on the same terms as a certified transcript or copy, prepared under tight regulation by an officer of the court and licensee. AB 2006 does this by providing that a videotape of a deposition may be used in the same fashion as a transcript. (“[U]se a deposition” means to use a transcript or a video recording of the deposition testimony...”)

This opens a gaping and entirely unneeded hole in the reliability and trustworthiness of what is admissible in court.

For these reasons, DRA respectfully opposes AB 2006.

More broadly, we observe that, even though (for example), expanding the scope of what paralegals may lawfully do would certainly save litigants money (the asserted motive for your court reporter-related measures), we see no such spate of bills authored by you that would reduce the cost of litigation by reducing the tasks that must be done only by lawyers. It appears as though your concern for the cost of litigation focuses almost exclusively on the reporting profession; one, as mentioned, untouched by controversy or scandal, comprised overwhelmingly of women.

With a candor befitting respect: the incredibly hard-working small business-person court reporters who are DRA's members deserve better. For these reasons, DRA also respectfully urges you, in a State with so many pressing issues of vital concern to Californians and your constituents, to turn your attention and considerable talents to legislative priorities other than diminishing the tasks that must be done by the licensed profession of court reporting. .

Sincerely:

A handwritten signature in black ink, appearing to read 'Ed Howard', written over a light yellow rectangular highlight.

Ed Howard, Howard Advocacy, Inc.  
On behalf of DRA

cc: Hon. Members of the Assembly Judiciary Committee