



June 15, 2019

The Honorable Lorena Gonzalez, Chair
Assemblymember, 80th District
State Capitol, Room 2114
Sacramento, CA 95814

Re: **Request for Clarifying Amendment To AB 5 (Gonzalez) Related to Freelance Court Reporting**

Dear Assemblymember Gonzalez:

On behalf of the Deposition Reporters Association of California (CalDRA), and our approximately 1,000 freelance court reporting members, we write to respectfully request a modest clarification to AB 5 to preserve the freelance nature of our part of the court reporting profession.

About CalDRA and Freelance Court Reporting.

As the Court Reporters Board of California correctly observes, “[j]udicial court reporters work either in courtrooms as official reporters *or in the private sector as freelance reporters who provide deposition services as well as reporting civil proceedings in court and arbitrations.*”¹

Moreover, an overwhelming majority of licensed court reporters in California are women. Our officers and board members are all women. Since CalDRA’s founding more than 20 years ago, we have had only three male board members and two male Presidents.

Unless a court reporter is an official court reporter employed full time by a court, the vast likelihood is that the reporter is a freelancer and independent contractor. There simply is not a private sector of court reporting known to us anywhere in the State that to any significant degree formally employs freelancers, and that has always been the case.

¹ https://www.courtreportersboard.ca.gov/about-us/sunset_2018_2019.pdf (Emphasis added) See also, Assembly Business & Professions 2019 analysis of AB 1525 (Low) “Court reporters work in courtrooms as official reporters or in the private sector as freelance reporters who provide deposition services.”

The reason? Unlike in so many other jobs and professions where employers have moved to so-called independent contracting as simply a way of skirting employment, that is not true in freelance court reporting. If and when lawyers will schedule depositions (for example) is entirely unpredictable and, thus, the flow of business is almost entirely impossible to forecast. In such a setting, when a business has no idea on any given day how much or little business it will get, it makes little sense for a business to incur the consistent overhead of formal employment. Likewise, because the only way to monetize paying someone a full-time salary when there may be days and days of no work is to pay that person less, formal employment from a freelancer's perspective is a less attractive and less lucrative option.

Thus, many people who seek licensure as a court reporter were in part attracted to the profession because of the option of being able, as a well-paid licensee, to *not* be an employee; to enjoy the good pay, independence, and flexibility of the independently contracting freelancing option. For working women without college degrees and who are often the primary caregivers of small children, the flexibility of freelance reporting – of being able to work at the times, places, and at the frequency of their choosing -- is especially critical.

We would be remiss, however, if we did not mention our official brothers and sisters who choose careers as employees of the courts. CalDRA has consistently urged the Governor and the Legislature to re-populate our civil courts with full-time, employed, and licensed court reporters. Doing so not only benefits reporters who elect to be employees but lawyers, litigants, judges, and the administration of justice. The profession has long embraced both aspects of the profession, freelance and official, and should in part do so by re-hiring our official brothers and sisters in civil courtrooms throughout the State. It is the right thing to do.

The Importance of Court Reporters as a Part of The Legal Profession.

Court reporting is part of the legal profession already exempted in AB 5. Indeed, the importance of court reporting to the reasoned and credible administration of law and justice is hard to overstate. This was judicially confirmed in California 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. The California Legislature's Joint Committee on Boards, Commissions, & Consumer Protection correctly elaborated on the importance of this women-dominated, 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.

As the Senate Business & Professions Committee has rightly observed:

The ultimate consumer of the transcript is the litigant, and their need to have transcripts that are lawful, honestly and accurately prepared is the same regardless of the corporate form of the entity that arranged for the proceeding.²

Requested Amendment to AB 5.

By generally recognizing that the legal profession, which includes court reporting, is best suited to the *Borello* test, AB 5 comes quite close to offering us the exemption we seek already. In pertinent part, AB 5 provides, with emphases supplied:

*(c) (1) This section and the holding in Dynamex Operations West, Inc. v. Superior Court (2018) 4 Cal.5th 903, do not apply to a contract for professional service and instead the employment relationship shall be governed by the test adopted by the California Supreme Court in the case of S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, if the hiring entity demonstrates that **all of the following factors** are satisfied:*

(A) The individual maintains a business location, which may include the individual's residence, that is separate from the hiring entity.

(B) If work is performed more than six months after the effective date of this section, the individual has a business license, in addition to any required professional licenses or permits for the individual to practice in their profession.

(C) The individual has the ability to use their own employees in the completion of the work, where reasonable, and has the authority to hire and fire other persons who assist in providing the services. Nothing in this section requires an individual to hire an employee.

(D) The individual has the ability to engage in other contracts for services than with the hiring entity.

(E) Both the individual and the hiring entity have the ability to negotiate compensation for the services performed.

(F) Outside of project completion dates and reasonable business hours, the individual has the ability to set their own hours.

(G) For services that do not reasonably have to be performed at a specific location, the individual can determine where to perform the services under the contract.

(H) The individual is customarily engaged in the same type of work performed under the contract with another hiring entity or holds themselves out to other potential customers as available to perform the same type of work.

(I) The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

² Senate Business, Professions & Economic Development Committee, Background Paper for the Court Reporters Board (2011-2012 Regular Session) March 12, 2012

Freelance court reporters satisfy all of the requirements listed above, (c)(1)(A) through (I). To the extent that some freelance reporters have not yet obtained a business license, such licenses are easy to obtain.

(2) For purposes of this subdivision:

(A) An “individual” includes an individual providing services through a sole proprietorship or other business entity.

(B) (i) “Professional services” means services that either:

*(I) **Require an active license from the State of California and involve the practice of one of the following recognized professions: law, dentistry, architecture, engineering, or accounting.***

Licensed court reporting is technically a part of the legal profession but it is not commonly thought of as such. The natural inference from the inclusion of the word “law” means only those licensed as attorneys, notwithstanding that, as licensees of a board within the Department of Consumer Affairs (like the mentioned dentists, architects, engineers, and CPAs), court reporters also have a law-related license “from the State of California.”

The other option for meeting the definition of “professional services” is:

*(II) **Require possession of an advanced degree that customarily involves a prolonged course of specialized intellectual instruction and study in the field of marketing or the administration of human resources from an accredited university, college, or professional school, as distinguished from a general academic education.***

But, court reporting is not “in the field of marketing or the administration of human resources.” Moreover, like many professional educational programs, some court reporting programs do not issue formal “degrees,” “advanced” or otherwise. One completes a court reporting program successfully, must qualify to take the California Certified Shorthand Reporter exam, and then must pass that licensure exam; an exam far more rigorous, and with a far lower passage rate, than the State Bar Exam.

Amendment Options.

CalDRA respectfully requests one of the following amendments:

*(I) **Require an active license from the State of California and involve the practice of one of the following recognized professions: law, dentistry, architecture, engineering, certified shorthand reporting, or accounting.***

Or:

*(II) Require possession of an advanced degree **or completion of a program** that customarily involves a prolonged course of specialized intellectual instruction and study in the field of marketing, **a licensed profession that permits the licensee to administer oaths**, or the administration of human resources from an accredited university, college, or professional school, as distinguished from a general academic education.*

Conclusion.

Thank you, in advance, for your assistance in preserving the freelance part of court reporting that has long afforded women an upwardly mobile and flexible path into an honored profession.

Sincerely,

A handwritten signature in cursive script that reads "Antonia Pulone". The signature is written in black ink and is positioned above the typed name.

Antonia Pulone, Legislative Chair, CSR 3926, on behalf of the 2019-2020 Board of CalDRA