John Gard

Speaker of the Assembly

TESTIMONY BEFORE THE ASSEMBLY COMMITTEE ON CORRECTIONS & COURTS
ON ASSEMBLY BILL 533
OCTOBER 8, 2003

Thank you, Chairman Bies for allowing me to speak in support of Assembly Bill 533. My remarks this morning will be brief because in my opinion, AB-533 is a simple approach to maintaining an impartial judicial system.

This bill requires contracts for court reporting services to be limited to one particular case or controversy. It prohibits third-party contracts for future or anticipated litigation. As a result, this legislation preserves the actual impartiality, and the appearance of impartiality, required of court reporters as officers of the court.

Court reporters provide a valuable service to our court system. As officers of the court, they are authorized to administer oaths, swear in witnesses and take depositions in judicial proceedings. Their impartiality is an essential function of a successful justice system.

Together, Senator Leibham and I have introduced this measure because we want to ensure that our justice system remains protected against conflicts of interest, from the mere appearance of such conflicts, from even the potential for impartiality.

Sometimes court reporters enter into long-term contracts with entities rather than provide their services on a case-by-case basis. However, long-term contracts between court reporters and entities, particularly when the entity may become a party to litigation, does not pass the test of a judicial system that strives toward full impartiality and complete integrity.

Some contend that court reporters who engage in long-term contracts effectively become "employees" of one of the parties to an action. We assume each of these reporters is an honest, independent and impartial officer of the court, but as long as this practice exists we cannot assure all parties involved in an action that they are receiving equal treatment.

While there is typically a cost-saving incentive to engage in long-term contracts, the cost of recording transcripts means nothing if the impartial validity of those transcripts may be called into question, or if one party is given "priority" status and consistently receives those transcripts sooner than their opposition and receives the benefit of additional preparation time.

To that end, 29 other states have addressed the anti-contracting issue by modifying their statutes or court rules to prohibit this activity. Every state in the Midwest -- Illinois, Indiana, Iowa, Michigan and Minnesota – has already enacted anti-contracting measures. It is appropriate for Wisconsin to recognize the need for this legislation.

Thank you.

Capitol Office: Post Office Box 8952 • Madison, Wisconsin 53708-8952 • (608) 266-3387
Home: 481 Aubin Street • Post Office Box 119 • Peshtigo, Wisconsin 54157 • (715) 582-2923

WISCONSIN LAWYERS
STATE BAR of WISCONSIN® | EXPERT ADVISERS. SERVING YOU.

MEMORANDUM

To: Members of the Assembly Committee on Corrections and the Courts

From: Individual Rights and Responsibilities Section, State Bar of Wisconsin

Date: October 8, 2003

Re: Assembly Bill 533 - SUPPORT

The Individual Rights and Responsibilities (IRR) Section of the State Bar of Wisconsin supports Assembly Bill 533 which prohibits a person from taking a deposition unless the person has entered into a contract for court reporting services that is limited to a particular action or incident.

This legislation would prevent large entities who are frequently involved in litigation from forcing law firms and court reporter firms into long-term contracts with a particular court reporting firm. Under these circumstances, such entities negotiate with court reporter firm X for a discounted transcript rate and then condition representation by a law firm Y on that firm using the services of court reporter firm X.

A court reporter is a court officer who is an integral part of the discovery process in civil litigation and should be an impartial participant in the proceedings. The existence of a contract between a court reporting firm and one litigant where that litigant receives special considerations or discounts in price or service, which are not accorded to the adversary, undermines the integrity of the process. At the very least, this creates an appearance of impropriety.

For these reasons, the IRR Section of the State Bar of Wisconsin urges committee members to support Assembly Bill 533.

If you have any questions, please feel free to contact Deb Sybell, Government Relations Coordinator for the State Bar of Wisconsin at (608) 250-6128.

State Bar of Wisconsin
5302 Eastpark Blvd. u P.O. Box 7158 u Madison, WI 53707-7158
(800) 728-7788 u (608) 257-3838 u Fax (608) 257-5502 u Internet: www.wisbar.org u Email: service@wisbar.org

WISCONSIN INSURANCE ALLIANCE
44 EAST MIFFLIN STREET • SUITE 201
MADISON, WISCONSIN 53703
(608) 255-1749 FAX (608) 255-2178
wial@tds.net
www.wisinsal.org

Memorandum

TO: Members of the Wisconsin State Legislature

DATE: October 8, 2003

FROM: Eric Englund

RE: **OPPOSITION - AB 533**

We oppose this bill, which prohibits long-term contracts with the reporters who take depositions.

Some of those who advocate passage of this Legislation suggest that it is about "ethics" and "neutrality." We suggest that this is a bill in which a special interest, court reporters, seeks legislative protection from a market place, which obtains economic efficiency in paying for the cost of depositions through long-term contracts.

Court reporters, as officers of the court, have a sworn duty to be impartial. They aren't alone in having this duty; lawyers who represent clients in court also have this duty. It is true that some insurance companies do enter into long-term contracts with court reporters to provide services. Those same insurance companies enter into contracts with lawyers to work for them. As part of those contracts, court reporters agree to work for specific fees, which might be less than they might otherwise charge if hired on a piecemeal basis.

This bill will make those contracts illegal. We believe this is a pocket book issue for court reporters, and that this is legislation that attempts to shield them from competition in the marketplace. It is interesting to note that the proposed legislation allows the State, municipalities and public agencies to enter into long-term contracts with court reporters. Apparently, it's OK for government to attempt to control the cost of court reporters, but not private entities.

We'd all like to be sheltered from the realities of the marketplace and competition. It should not be the purpose of the Wisconsin Statutes to give such shelter to special interest groups.

We oppose this legislation.

Keeping Wisconsin Families Safe

www.watl.org

EXECUTIVE DIRECTOR
Jane E. Garrott
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
Telephone: 608/257-5741
Fax: 608/255-9285
exec@watl.org

October 8, 2003

The Honorable Garey Bies
Chair, Assembly Corrections & the Courts Committee
Room 125 West, State Capitol
P.O. Box 8952
Madison, WI 53708

RE: Assembly Bill 533, Contracts With Persons Who Take Depositions

Dear Representative Bies:

Please accept this letter as our testimony on Assembly Bill 533, relating to contracts with persons who take depositions. Our organization is supportive of AB 533 and hopes your committee recommends its passage to the Assembly.

AB 533 would limit private contracts between persons who take depositions and parties with an interest in the litigation. As officers of the court, persons who take depositions have a primary obligation to the court and to the integrity of the court system. All parties are entitled to be secure in the knowledge they are being treated fairly during the court process.

Long-term private contracts between court reporters and parties in interest make it difficult to maintain the impartiality and the appearance of impartiality that is the central ingredient in the public's faith in our court system. This bill is a logical extension of the current statute that prohibits court reporters from taking depositions in actions where they are related to or have a business relationship with one of the parties in interest.

The appearance of impartiality is the real problem of court reporters providing special services or exclusive services for one party. While our members

do not report this happening often in Wisconsin, we are nevertheless concerned about this potential problem. We understand the most likely problem would be expedited transcripts for one side that might give that party an advantage. It would be very difficult for parties to know when they are being disadvantaged by these special services. This bill should allow Wisconsin to restrict these practices before there are substantial abuses or significant problems in the court system.

This legislation has received support and consideration from legislatures in more than a dozen states. The American Judges Association and many court reporters themselves also support it.

We believe Wisconsin should carefully consider this issue to preserve the integrity of our court system.

Very truly yours,

Lynn Laufenberg, President
Wisconsin Academy of Trial Lawyers

cc: Members of Assembly Corrections and the Courts Committee

October 8, 2003

To: The Assembly Committee on Corrections and the Courts

From: Attorney Carmelo A. Puglisi

On behalf of: American Family Mutual Insurance Company
The Wisconsin Insurance Alliance

Re: Opposition to 2003 AB 533

Mr. Chairman and Members of the Assembly Committee on Corrections and the Courts

I am an attorney licensed to practice law in the State of Wisconsin. I am employed by American Family Mutual Insurance Company and I am the Managing Attorney in their Brookfield legal office. My office handles hundreds of lawsuits that arise in Milwaukee, Waukesha, Ozaukee, Racine, Kenosha and Washington counties. I also appear on behalf of the Wisconsin Insurance Alliance. I appear in opposition to 2003 Assembly Bill 533.

Assembly Bill 533 seeks to disqualify court reporters from taking depositions if the court reporters have entered into a contract for court reporting services unless the contract is limited to a particular action. Yet, this bill allows for the state of Wisconsin, its municipalities and its agencies to contract with court reporters. This legislation is being endorsed by the court reporters' association on the ground that contracting with court reporters creates an appearance of ethical impropriety. The court reporters' association is attempting to clothe an economic issue in a suit of ethics. The bottom line is that this bill is anti-consumer and will raise the cost of litigation to all parties ,i.e., to the citizens and businesses of Wisconsin.

Because of the volume of lawsuits that American Family Mutual Insurance Company handles in southeastern Wisconsin, I am able to contract with a court reporting firm at a discount rate. This reduction in litigation expense helps the company keep costs down for its policy holders. Not only do insurance companies contract with court reporters, but so do plaintiffs' law firms since deposition costs are paid out of the pockets of Wisconsin citizens who are represented by trial attorneys they hire. Deposition costs are only second to expert expenses in litigation. Law firms have sought to reduce the cost of litigation to their clients by entering into agreements with court reporters for discounted rates. This legislation is supported by court reporters who do not have the contracts. This

is a pocket book issue for reporters and this legislation is an attempt to shield them from the competition of the market place.

I have contracted with court reporters since 1988. In all those years, not once has anyone brought to my attention any type of ethical impropriety committed by the court reporters that do our work. I have never had a plaintiff's attorney refuse to have the contracted court reporter take the deposition. I contract with the same court reporting firm that is used by attorneys at the law firm of Habush, Habush, and Rottier, SC., a well known Wisconsin plaintiff's firm and other plaintiffs' law firms in southeastern Wisconsin. Those law firms seem to have no concerns in using a court reporting firm that is used by an insurance company. Not only do I get a discounted rate, but I also use a reporting firm on the cutting edge of technology and one that is large enough to handle the thousand lawsuits in our office. Law firms for years have used certain court reporters and no others and yet, there has been no outrage over ethical issues until contracting made official long standing informal agreements.

It is interesting to note that the proposed legislation allows the state, municipalities and public agencies to contract with court reporters. Why is it that the government can reduce the cost of court reporters, but private entities cannot reduce the cost of litigation to the consuming public? At this time of large state budget deficits and with pressure not to raise taxes, it only makes economic sense for the state to be able to reduce its expenses by being able to contract with court reporters for reduced rates. Wisconsin citizens and businesses face the same economic pressures, so it makes economic sense as well to reduce litigation expenses by obtaining reduced rates from court reporters.

Why is there no ethical dilemma when the state contracts with a court reporting firm? I submit to you that if an ethical dilemma exists with private contracting it also exists with state contracting. Official court reporters for the county circuit courts are employees of the state. The state is a party to thousands of criminal prosecutions a year. In a criminal prosecution, the liberty of a criminal defendant is at stake in each trial. Any appeal is based on the transcript which is prepared by a state employee. It would seem that the appearance of ethical impropriety would be greater in a situation where the court reporter is employed by the state which is trying to incarcerate one of its citizens. Yet, I do not see the court reporters' association raising the red flag of ethics impropriety in this situation. It would be absurd, in either situation, to argue ethical impropriety based on payment to a court reporter for services rendered.

The court reporters' association wants it both ways. When contracting is to their economic advantage, such as in government contracting, they will protect it. When contracting is not to court reporters' association's economic advantage they will hoist the banner of ethical impropriety and march into battle. The court reporters' association also recognizes that the state would not tolerate any bill that would limit its ability to contract with court reporters and save tax dollars for its citizens, so , there is an exception for government contracting. Private contracting with court reporters reduces litigation expenses to the consumer of legal services.

An issue that is not answered by the proposed legislation is what is a prohibited contract? If a law firm conducts 50 depositions a year and uses the same court reporting firm, does the frequency of use create a prohibited contract? What if the same court reporting firm is used for the second ,third, fourth or fifth year? Does that frequency create a prohibited contract. If a court reporting firm offers volume discounts to all law firms that do business with it, does this create a prohibited contract? If those examples do not create prohibited contracts, then what about the appearance of ethical impropriety? Will lawsuits between private parties now have to litigate in the same lawsuit whether a court reporter may be used because of past and current business activities? If this legislation is passed what happens to the current contracts that private parties have with court reporting firms? Does this law unconstitutionally interfere with right to contract? This bill raises more questions than it answers.

Some time ago, the court reporters' association attempted to ban contracting by proposing rule changes to the Judicial Council. The Judicial Council is composed of judges and practicing attorneys. I testified at that hearing and so did members of the court reporters' association. The Judicial Council refused to ban contracting with court reporters because they viewed it as a pocket book issue and the Judicial Council did not see any ethical problems with contracting. Since the court reporters' association could not come through the front door, they are attempting to come through the back door. Judges and practicing attorneys refused to change the law to ban private contracting because they did not see an ethical problem with it. This position is supported by the unpublished California Appellate case of Saunders v. Truck Ins. Exchange 2000 WL 1609835 (Cal.App. 2 Dist.,2000). A copy of the case is attached.

In Saunders, a group of reporters sued another group of court reporters that had contracted with an insurance company to do all the deposition work for that company. The trial court dismissed the court reporters' suit and the California Court of Appeals

sustained the dismissal of the suit. The Court of Appeals ruled that the contract did not violate the rules for reporter impartiality. In discussing court reporter compensation and ethical obligations, the court reasoned as follows:

"Appellants argue that direct contracts with clients give reporters a financial interest in the actions in which they report, an interest prohibited by Code of Civil Procedure § 2025. However, the Code reference to a financial interest in the action is reasonably and usually construed to mean a share of the damages recovered in a case, or some other fiscal reward for a particular outcome--not pay given without regard to the outcome for services rendered. The vice of a financial interest would be to give the reporter a personal incentive to try to influence the outcome of the case. But there was no evidence in this case that pay for Alliance reporters was in any way contingent upon case or deposition outcomes.

Reporters don't usually work without compensation, and *all* of them are paid by clients… The legislature cannot have intended to equate "financial interest" with being paid for work. This strained construction would put the entire reporter industry in violation of the Code of Civil Procedure. Nor is pay for work under a direct contract transmuted into a "financial interest" because a particular reporter or group of reporters may get more pay from a particular client under a direct contract than they otherwise would.

Appellants also urge that reporters' impartiality, mandated by Business and Professions Code section 8025, is somehow undermined by "direct contracting" large blocks of business with clients. But the legislature cannot have intended that reporters be deemed in violation of the impartiality requirement by accepting pay from clients, since every reporter necessarily does so. Nor is there anything to indicate that the legislature intended to limit the amount of business a reporter could do for a particular client because of fear that impartiality would be compromised.

*4 In reality, there isn't much a court reporter could effectively do to be *partial* to a large volume direct client (or any other client), even if inclined to do so. Reporters are not like arbitrators. They do not decide the case for one side or the other. They do not exercise discretion, except within the narrowest parameters. Their function is essentially mechanical: to accurately transcribe all the questions and answers, just as a tape or video recorder would do. A reporter's effort to shade or tamper with transcripts would quickly become known, would surely be loudly protested by the affected parties and lawyers, and would expose the reporter to suspension or loss of license and livelihood."

If an ethical issue should arise in the future it should be addressed on a case by case approach by the county circuit courts. This is not an appropriate subject for legislation. The only group who will benefit by the passage of this bill is the court reporters' association. The passage of this bill will only harm the citizens and businesses of Wisconsin by increasing the cost of litigation. Therefore, I would respectfully ask this committee to take no further action on 2003 Assembly Bill 533.

Assembly Republican Majority
Bill Summary

AB 533: Contracts for Depositions
Relating to: Contracts with persons who take depositions.

Introduced by Representatives Gard, Ainsworth, LeMahieu, Towns, Albers, Rhoades, Freese, Hahn, Nischke, Petrowski, Kestell, Bies, Friske, F. Lasee, J. Wood, Huebsch, Hundertmark, Gunderson, Ott, Lothian, Montgomery, McCormick, Hebl, Ladwig, Cullen, Powers and Staskunas; cosponsored by Senators Leibham, Cowles, Lazich, George and Risser.

Date: February 3, 2004

BACKGROUND

Under current law, a deposition may be taken before a person authorized to administer oaths, including judges, court commissioners, administrative hearing officers, district attorneys, and court reporters. Generally, a deposition is taken before a court reporter, who records and transcribes the deposition. Currently, a deposition may not be taken before a disqualified person, which means a person who is a relative, employee, attorney, or counsel of any of the parties to the action; a relative or employee of the attorney or counsel of any of the parties; or a person who is financially interested in the action.

SUMMARY OF AB 533

Assembly Bill 533 expands the list of disqualified persons to include a person who is a party to the action. The bill also prohibits a person from taking a deposition unless the person has entered into a contract for court reporting services that is limited to a particular action or incident. The bill's prohibitions do not apply, however, to persons who take depositions for a public agency.

FISCAL EFFECT

No Fiscal Estimate was prepared for Assembly Bill 533.

PROS

1. An issue of fundamental fairness: access to the courts on a level playing field.

2. Preserves the actual impartiality and the appearance of impartiality required of court reporters as officers of the court.

3. Large firms are using clout to negotiate large-volume contracts with court reporters to obtain low pricing for services, ultimately leading to decreased quality of industry services.

4. Under current law, a situation where the utilization of a court reporter that is employed by a party to the action can occur.

5. Under current law, if frequent clients of court reporters get a discount on service, small, one-time clients of court reporters may be paying higher fees for services to compensate the court reporters for their discounts to their frequent clients.

6. 29 other states including all other states in the mid-west, have already addressed the anti-contracting issue by modifying their state statutes or court rules to prohibit this activity.

CONS

1. Contracts on case-by-case basis create excess costs.

2. Anecdotal evidence of problems occurring necessitating legislative change.

3. "The appearance of partiality is a farce." – California Court Case regarding potential partiality by court reporters.

4. Anti-consumer in that it prevents the marketplace from exercising full flexibility in setting prices.

SUPPORTERS

Rep. John Gard, author; Sen. Joe Leibham, lead co-sponsor; State Bar of Wisconsin; Wisconsin Court Reporters Association; WATL.

OPPOSITION

Wisconsin Insurance Alliance; American Family Mutual Insurance.

HISTORY

Assembly Bill 533 was introduced on September 23, 2003, and referred to the Assembly Committee on Corrections and the Courts. A public hearing was held on October 8, 2003. On January 14, 2004, the Committee voted 9-1 [Rep. Colon voting no] to recommend passage of Assembly Bill 533.

CONTACT: Andrew Nowlan, Office of Rep. Garey Bies

Court of Appeal, Second District, California.
Mark D. SAUNDERS, et al.
v.
TRUCK INSURANCE EXCHANGE, et al.
No. B122129.
March 22, 2000.

For plaintiffs: Mark D. Saunders, in pro per, William E. Meyer III of Duke, Gerstel & Shearer, San Diego, Cal., Daniel J. Mulligan of Jenkins & Mulligan, San Francisco, Cal.
For defendants: Don T. Hibner, Jr. and Michelle Sherman of Sheppard, Mullin, Richter & Hampton, Los Angeles, Cal., Dan Stormer of Hadsell & Stormer, Pasadena, Cal., Friedrich W. Seitz and Scott L. Hengesbach of Murchison & Cummings, Los Angeles, Cal., Byron J. Lawler of Benton, Orr, Duval & Buckingham, Ventura, Cal., Gregory Stubbs of Stubbs & Leone, Walnut Creek, Cal.

Before: LILLIE, Presiding Justice, WOODS and NEAL, Justices.

[Opinion]
SUMMARY

NEAL, J.
*1 A direct contract between an insurance company and an agent for an "alliance" of court reporters did not violate statutory requirements for reporter impartiality, nor did it violate the antitrust laws.

FACTS AND PROCEEDINGS IN TRIAL COURT

Mark D. Saunders and the other appellants are "deposition reporters"-- stenographers who record and transcribe depositions. Depositions are sworn pretrial interrogations of witnesses in civil lawsuits. Appellants sued respondents Ronald J. Peters, California Reporting Alliance, and others who also are deposition reporters and who compete with appellants. Appellants also sued respondent Truck Insurance Exchange, a liability insurance carrier.

The gravamen of appellants' complaint was as follows. Peters formed Peters Shorthand Reporting Corporation. Eventually he adopted for its use the fictitious business name California Reporting Alliance. Reporters traditionally are selected and engaged by the *lawyers* who represent parties in civil cases. Alliance, however, solicited and obtained Truck's agreement to hire reporters from Alliance for all depositions needed in suits against doctors insured by Truck for malpractice liability. Truck agreed to use only Alliance reporters. Alliance offered Truck volume discounts on transcript purchases. Appellants claimed that the "direct contract" between Alliance and Truck unlawfully interfered with appellants' prospective economic relations with lawyers. They alleged that the arrangement gave Alliance reporters an unlawful financial interest (prohibited by Code of Civ. Proc. § 2025, subd. (k)) in the cases it reported for direct contract clients; that Alliance's undertaking to critique lawyer deposition performances violated a reporter's legal duty to be impartial (Bus. & Prof.Code, § 8025); that the volume discounts violated Business and Professions Code section § 17045, which bars secret discounts and rebates; and that the direct contract fixed prices in violation of antitrust law, since Peters, head of Alliance, set the prices charged by Alliance reporters.

Appellants also alleged that the foregoing violations of law constituted unfair and unlawful business practices which violated section 17200 of the Business and Professions Code.

After an earlier appeal in which this court reversed a judgment for respondents (given after demurrers were sustained), the case was tried to a jury. Appellants moved for a non-suit at the end of appellants' case-in-chief, and for a directed verdict when all evidence was in. The following is a summary of the evidence before the trial court when it decided these motions.

Individual deposition reporters--the holders of the licenses--work as independent subcontractors to reporting agencies; few reporters have an employee-employer relationship with an agency. The agency sets a price or rate per page of transcript to be charged to the customer, and pays a percentage of this rate to the reporter, usually 75% for original transcripts and 50% for additional copies. The agency provides an IRS Form 1099 to the independent contractor reflecting total payments during the year.

*2 Respondent Alliance, like other reporting agencies, subcontracted with other deposition reporters and agencies to actually report the depositions which Alliance contracted to report. Unlike other agencies, however, Alliance engaged agencies throughout the State of California, who in turn subcontracted with individual reporters, to provide deposition reporting services to clients who engaged Alliance's services.

Agencies providing services to Alliance were referred to as "members." They signed a written agreement promising to adhere to Alliance's standards of practice and to disclose certain proprietary information. They also were required to submit a valid business license, disclose their business history, and provide their normal schedule of rates.

Alliance set the rates charged to customers for work performed on Alliance jobs. However, Alliance members remained free to compete for other deposition work.

Truck's defense of its physician-insureds required hundreds of depositions each month. Before it concluded the agreement with Alliance, Truck left selection of deposition reporters to the lawyers defending Truck's insureds. The reporters issued individual statements, requiring Truck to process and pay hundreds of bills each month.

Alliance provided Truck with "bulk" billing, aggregating the reporter charges to Truck in one or a few bills, reducing dramatically the number of checks Truck had to write, and saving thirty five to fifty five thousand dollars per year in administrative costs.

Alliance offered volume discounts to Truck and other clients who bought large quantities of depositions. The discount was in effect from April to August 1992; during this period, Truck received a total of $1,900 in discounts. Alliance's offer of volume discounts was widely publicized through mailers, phone solicitations, and in-person marketing. The discounts were offered to all Alliance customers. During the period the discount was in effect, appellants' business volume increased.

The Alliance's share of total California deposition reporting revenues in 1992 was three tenths of one percent ($1.5 million = .003% of $433 million). Truck's deposition business accounted for less than 1% of all such business in California. At the times relevant in the case, there were 7,609 certified reporters in California. Reporters' fees in general trended downward, and the number of reporters in the industry increased.

A single witness, Peyton, testified that Peters said Alliance reporters might be asked to comment to Truck about lawyer performance, but Peyton knew of no instances where such reports had been made. Numerous reporters in respondents' camp denied ever

critiquing witnesses or lawyers, and a witness from Truck denied that her company relied on reporters to evaluate, critique, or train defense counsel.

Appellants called as an expert witness a reporter from Georgia who was not licensed in California and was not familiar with California deposition reporter standards. This witness testified that a voluntary national code of reporters' ethics prohibited reporters from offering to evaluate or critique the performance of lawyers at depositions.

*3 Appellants offered no evidence other than that just mentioned to support their charge that respondents departed from the reporter's usual role as an impartial transcriber. No evidence was presented that any Alliance reporter had a direct financial interest in the outcome of the cases in which they served as reporters.

The trial court granted a partial non-suit, and later directed a verdict for respondents on the remaining claims. This appeal followed.

DISCUSSION

A plaintiff suing for interference with prospective economic advantage must prove that defendant's interfering conduct was "wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.) Non-suit in favor of defendant is proper if the evidence is insufficient to support a jury finding in plaintiff's favor. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521.)

Appellants argue that direct contracts with clients give reporters a financial interest in the actions in which they report, an interest prohibited by Code of Civil Procedure § 2025. However, the Code reference to a financial interest in the action is reasonably and usually construed to mean a share of the damages recovered in a case, or some other fiscal reward for a particular outcome--not pay given without regard to the outcome for services rendered. The vice of a financial interest would be to give the reporter a personal incentive to try to influence the outcome of the case. But there was no evidence in this case that pay for Alliance reporters was in any way contingent upon case or deposition outcomes.

Reporters don't usually work without compensation, and *all* of them are paid by clients. Lawyers are ethically forbidden to pay their clients' litigation expenses (Rules of Prof. Conduct, rule 4-210), and the evidence in this case showed that before the direct contract began Truck-not the insureds or lawyers- paid the reporters. The legislature cannot have intended to equate "financial interest" with being paid for work. This strained construction would put the entire reporter industry in violation of the Code of Civil Procedure. Nor is pay for work under a direct contract transmuted into a "financial interest" because a particular reporter or group of reporters may get more pay from a particular client under a direct contract than they otherwise would.

Appellants also urge that reporters' impartiality, mandated by Business and Professions Code section 8025, is somehow undermined by "direct contracting" large blocks of business with clients. But the legislature cannot have intended that reporters be deemed in violation of the impartiality requirement by accepting pay from clients, since every reporter necessarily does so. Nor is there anything to indicate that the legislature intended to limit the amount of business a reporter could do for a particular client because of fear that impartiality would be compromised.

*4 In reality, there isn't much a court reporter could effectively do to be *partial* to a large volume direct client (or any other client), even if inclined to do so. Reporters are not like

arbitrators. They do not decide the case for one side or the other. They do not exercise discretion, except within the narrowest parameters. Their function is essentially mechanical: to accurately transcribe all the questions and answers, just as a tape or video recorder would do. A reporter's effort to shade or tamper with transcripts would quickly become known, would surely be loudly protested by the affected parties and lawyers, and would expose the reporter to suspension or loss of license and livelihood. In this case appellants presented *no* evidence of any effort by Alliance or its reporters to show partiality in depositions conducted on Truck cases. Their argument is purely theoretical, and unsupported by any facts.

Appellants also claim that Alliance violated ethical standards and the impartiality mandate by offering to evaluate and critique witness's and lawyer's deposition performances for the benefit of the party which hired the Alliance reporter. However, there was no evidence that Alliance reporters in fact ever provided such evaluations or critiques, and there was strong evidence that this did *not* occur. Appellants' expert testimony from a Georgia reporter not licensed in California, to the effect that merely offering to provide critiques would violate a voluntary code of ethics espoused by a national reporters association, was not sufficient to support a jury finding that respondents engaged in conduct wrongful or unlawful under California tort law.

Appellants urge that Alliance's volume discounts violated the ban on secret rebates (Bus. & Prof.Code, § 17045). That section bars only secret rebates which injure a competitor and tend to destroy competition. The evidence was insufficient to support a jury verdict finding a violation. It showed that Alliance's volume discounts were not secret, but rather, widely publicized; that appellants' revenues increased while the discounts were in effect; and that the discounts were short lived and de minimis. There was no other evidence to show that appellants or competition were injured.

Appellants also claimed that Alliance's direct-contracting arrangements violated antitrust law prohibitions on price fixing, because Peters selected the prices to charge for services each "member" rendered under the contract with Truck.

California's antitrust laws are modeled on the federal Sherman Act, and federal cases are applicable in construing California law. (*Mailand v. Burckle* [1978-1 TRADE CASES ¶ 61,818], (1978) 20 Cal.3d 367, 376.) Certain classes of antitrust violations have come to be viewed as so inherently anti- competitive as to be unlawful without inquiry into their actual effects. These so-called "per se violations" include conspiracies and agreements among competitors setting the prices they will charge ("horizontal price fixing"), or allocating territories among them. Most claimed antitrust violations, however, are analyzed under the "rule of reason" which examines and balances the pro-and anti-competitive effects of the challenged conduct.

*5 Marketing by a group of competing sellers through a joint agent is not a per se violation, and instead is analyzed under the rule of reason. (*Broadcast Music, Inc. v. CBS* [1979-1 TRADE CASES ¶ 62,558], (1979) 441 U.S. 1 [per se rule does not apply to arrangement where association whose members are musical composers and publishers offers blanket licenses to performers to use all the members' compositions, even though association unavoidably sets a price for the blanket license]; *Appalachian Coals v. U.S.* [1932-1939 TRADE CASES ¶ 55,025], (1933) 288 U.S. 344 [exclusive selling agency for coal producers whose production accounts for 54 to 74% of coal produced in relevant market area, not a per se antitrust violation].) In *Appalachian Coals,* the court extensively

analyzed the proand anti-competitive effects of the joint selling agency, concluding that the agency was neither intended to nor had the power to fix or stabilize market prices, and was not unlawful.

The arrangement between Alliance and the "members" with whom it subcontracted was similar to the joint sales agency in *Appalachian Coals,* and its antitrust legality is properly analyzed by weighing its negative and positive effects.

Appellants presented no substantial evidence that the Alliance, or its direct contracting activities, fixed or stabilized market prices, or had other anti- competitive effects. Instead, the evidence showed both the absence of anti- competitive effects, and the presence of efficiencies justifying the arrangement. Alliance's share of the total sales of deposition services was less than one percent. Reporters who joined Alliance remained free to contract outside the Alliance with other agencies, lawyers, or clients, at prices of their own choosing. Truck was not compelled to pay Alliance's price or use its services-rather it *chose* to do so in order to streamline its use of reporters, and save administrative expense. Reporters' fees on average continued to decline, while the number of reporters in the market increased. There was no substantial evidence to show that the Alliance unreasonably restrained competition.

In summary, there was not enough evidence presented to support a jury verdict in appellants' favor on any theory on which they claimed respondents' conduct was unlawful, and the trial court did not err in granting non-suit on appellants' claim for interference with prospective advantage.

Similar analysis leads to the conclusion that the trial court also was correct in granting non-suit on appellants' claims under Section 17200 of the Business & Professions Code. That section required a showing that respondents engaged in an "unlawful business practice." But, as discussed above, there was no evidence of wrongful or unlawful business practices sufficient to support a jury verdict against respondents. The trial court did not err in granting non- suit on this claim.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

We concur: LILLIE, P.J., and WOODS, J.

Cal.App. 2 Dist.,2000.

Saunders v. Truck Ins. Exchange

2000 WL 1609835 (Cal.App. 2 Dist.), 2000-2 Trade Cases P 72,963 Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

END OF DOCUMENT

Assembly Committee on Corrections and the Courts

DATE
Moved by A/B Seconded by Uno
AB 533 SB Clearinghouse Rule
AJR SJR
A SR Other
A/S Amdt
A/S Amdt to A/S Amdt
A/S Sub Amdt
A/S Amdt to A/S Sub Amdt
A/S Amdt to A/S Amdt to A/S Sub Amdt

Be recommended for:

- ☒ Passage
- ☐ Introduction
- ☐ Adoption
- ☐ Rejection
- ☐ Indefinite Postponement
- ☐ Tabling
- ☐ Concurrence
- ☐ Nonconcurrence

	Committee Member	Aye	No	Absent	Not voting
1.	Rep. Garey Bies, chair	1			
2.	Rep. Sheryl Albers, vice-chair	2			
3.	Rep. Greg Underheim	3			
4.	Rep. Carol Owens	4			
5.	Rep. Frank Lasee	5			
6.	Rep. Scott Suder				
7.	Rep. Mark Pocan	6			
8.	Rep. Pedro Colon		1		
9.	Rep. Tony Staskunas	7			
10.	Rep. Sheldon Wasserman	8			
	Totals	8	1		

MOTION CARRIED ☐ MOTION FAILED ☐

s:\comclerk\rollcall.1

533

(Ask Elka for a copy of the speaker's comments
Better work w/ underlining)

"Anecdotal evidence of problems occurring necessitating legislative change."

Contracts ~~unnecessary~~ on case-by-case basis creates excess costs.

"The appearance of partiality is a farce" - Cal. Court Case

Anti-consumer

Disclosure requirement an alternative -> cólon.
amendment

Fundmental Fairness -

Access to the courts -

"Show the money"

If insurance cos get x-y for cost of reporter, the small, one-time client must pay x+y.

Can force the utilization of a court reporter that is employed by a party to the action.
A tie directly to a party that has a stake in the case

Vague
Early dispersement
Extra service

Large firms using clout to large-volume contract to get low price on services, ultimately leading to decreased quality.