

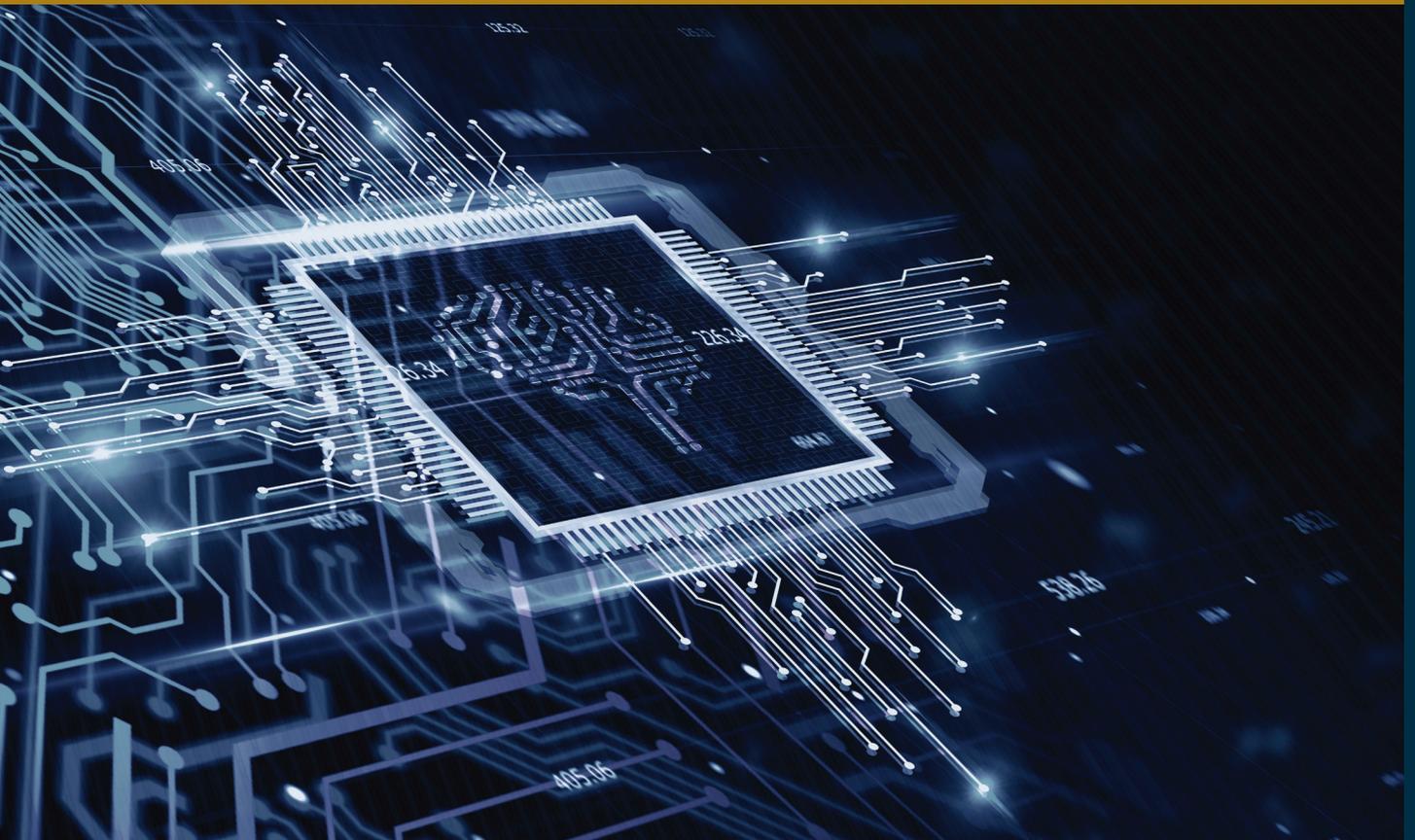


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INSIDE THIS ISSUE

WHAT WILL ARTIFICIAL INTELLIGENCE MEAN FOR LITIGATION?

WRITTEN BY JUSTICE ELIZABETH A. GRIMES, JUSTICE
JON B. STREETER & MICHAEL G. COLANTUONO
PAGE 15

AI - USE WITH CAUTION

WRITTEN BY REZA TORKZADEH & ALLEN P. WILKINSON
PAGE 26

A DAY WITHOUT A COURT REPORTER

Written by Timothy M. Kowal*



“Don’t forget to get a court reporter.”

Now that the court reporter shortage has reached an acute stage, this advice is becoming more easily said than done. The gap between the pace of retirements and entries into the field leaves California with a court reporter shortfall of around 3,000 – a gap that cannot be filled by the trickle of new entrants annually numbering a mere three dozen. By late 2022, the Los Angeles Superior Court – serving 40% of the state’s population – stopped providing reporters in probate and family law matters. When I would dispense my advice, probate and family law attorneys would be nonplused: “Court reporters are already provided for us,” they’d say. But they don’t say it anymore.

Court transcripts guarantee important interests, not merely private rights but the public’s right to open trials and the interest of the integrity of the courts. Consider just a small handful of recent cases that shaped American social and legal culture from far-flung trial courts, and how their reception might be different with less transparency: the Minnesota state court trial of George Floyd’s killer, Derek Chauvin; the Georgia state court trial of Ahmaud Arbery’s killers; the Wisconsin state court trial of Kyle Rittenhouse; the New York state court trial of Harvey Weinstein; the Illinois state court trial of Jussie Smollett; the California district court trial in the “Varsity Blues” scandal; and the New York state court trial of Donald Trump in the real estate loan

fraud case. How might it affect public perception of landmark trials, held in courts hither and yon, without access to court transcripts? And imagine enforcing the right to confront and cross-examine witnesses, enshrined in the Sixth Amendment, without a transcript of that witness’s testimony.

We just outfitted our courts with a lot of great new Zoom or other remote technology equipment. But our courts cannot simply hit the “record” button because Government Code section 69957 prohibits the courts from using any equipment to make an official or unofficial record. (But it doesn’t require courts to prohibit litigants from using their own recording equipment, such as for the purpose of creating an agreed or settled statement – more on this later.)

What would a day without a court reporter look like? That was the reality for indigent litigants until 2018 when the Supreme Court intervened in *Jameson v. Desta* (2018) 5 Cal.5th 594. But it still is the reality for the many litigants whose means are too great to get a waiver of costs but far too little to afford court reporter costs. And even for litigants with means, the diminishing ranks of certified reporters suggest that, before long, we must all prepare for a day without a court reporter.

This article discusses why electronic recordings, though used in other jurisdictions, are not allowed in California, and why that is unlikely to change. It then discusses the origins of the court reporter shortage and the

efforts to reverse it, most of them unsuccessfully. Having we've covered how we have no good way out of a pretty bad spot, we will then be ready to consider how things might get much worse.

OTHER JURISDICTIONS ALLOW ELECTRONIC RECORDING, BUT THIS METHOD OF CREATING THE ORAL RECORD IS NOT AMONG THE THREE ESTABLISHED BY THE LEGISLATURE.

Under California law, a court reporter usually is the only way to create a verbatim transcript. Advocates of electronic recordings argue that technology could replace or supplement this function. But Government Code section 69957 prohibits California courts from using electronic recordings to create a record.

Without rehashing this decades-long debate, the broad strokes are these: In 1985, the Legislature approved a project to demonstrate the cost and effectiveness of electronic recording. The project ran for about 17 years in municipal courts and six years in selected superior courts. In its report to the Legislature, the Judicial Council concluded the project was a success. But in 1992, the bill to fund and give all superior court judges discretion to use the equipment died in committee.

On the other hand, the Legislature did not explicitly bar the use of electronic recording. So the Judicial Council promulgated rules to allow superior courts to implement electronic recording. But the court reporters union sued. The result of the two Court of Appeal opinions in 1995 and 1997, both titled *California Court Reporters Association v. Judicial Council* (39 Cal. App.4th 15 and 59 Cal.App.4th 959, respectively), is that the Legislature intended to bar courts from using electronic recording except where explicitly allowed, and Rules of Court inconsistent with this intent were invalid.

The case for using court reporters is that they create the most accurate and reliable verbatim record. Court reporters are superior to electronic recordings because only a court reporter present at the hearing can reliably identify who is speaking, address cross-talk and inaudible speech, and keep private and privileged conversations out of the record. Electronic recordings cannot match these benefits, which is why contemporaneous transcription by a

court reporter is the "gold standard." But electronic recordings also offer powerful benefits, including cheap, reliable, and automatic recording of open court proceedings, which can later be transcribed by a court reporter on an as-needed basis. There is little doubt that reporter's transcripts are usually superior to an electronic recording. But they are also superior to agreed statements and settled statements. Yet of these avenues of creating a record, only electronic recordings are prohibited.

Recording technology and infrastructure in the courts increased rapidly since first introduced in the '90's. And even then, the decision between traditional court reporting and electronic recording was a close call. As a Second District panel put it at the time, "the battle over use of certified shorthand reporters versus electronic recording appears to be more political than factual." (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1266 [citing Don J. DeBenedictis, *Excuse Me, Did You Get All That?* (May 1993) 79 A.B.A. J., 84].)

Over the years, many proposals have been made to implement electronic recording, but all have failed. Perhaps the most promising of them all was Senator Susan Rubio's Senate Bill (SB) 662, introduced in 2023 after all California's trial courts were outfitted with new recording equipment, and when three-quarters of those courts were struggling to recruit more court reporters. As the Supreme Court had noted in its 2018 decision in *Jameson, supra*, 5 Cal.5th at page 618, footnote 17, "[t]he 2017 Futures Commission Report discusses the substantial cost savings that could be obtained by the use of digital recording, in place of court-employed court reporters, to obtain a verbatim record of trial court proceedings," but the Legislature needed to relax section 69957's prohibition first.

Senator Rubio proposed accomplishing this with SB 662. The bill was endorsed by San Francisco Superior Court Presiding Judge Anne-Christine Massullo, who said: "It is essential to find a remedy to close this chasm of injustice that fails litigants who cannot afford to hire their own CSR (certified shorthand reporter) while favoring others with the financial means to pay a court reporter to take a verbatim record of their day in court."

But like the electronic recording proposals that came before, SB 662 died in committee following union opposition.

WHY IS THERE A SHORTAGE OF COURT REPORTERS?

The short answer is no one really knows. Ask active court reporters and they will tell you they love their jobs and that more people should consider the profession. One court reporter from the National Court Reporters Association provides a description worthy of a recruitment brochure: “I have literally gone around the world doing this work, to every continent but Antarctica; sat next to the most malicious and most charitable, the most destitute and most wealthy, the most helpless and most powerful; and listened to stories that span the depth and breadth of human experience. Other colleagues have worked in environments that offer security and stability. Yet other colleagues have captioned the most popular sports and most attention-grabbing news stories in our world. If people truly understood the opportunities and rewards of this profession, they would be flocking and clamoring to be a part of it.”

The origins of the shortage date back to the 1990’s. This was when the court reporters union, the California Court Reporters Association, was lobbying and litigating against moves to implement electronic recording. No one ever doubted that certified shorthand reporters are the gold standard for creating a verbatim record, so in fairness to the union, it probably thought that eliminating electronic recording was necessary to ensure the gold standard remained available for future generations. But while the union successfully ensured reporters’ job security, it still failed to attract new reporters.

A detailed press release from the Los Angeles Superior Court in November 2022 tells the history of the shortage. As of 2005, the Judicial Council was warning of a “steady decline” in the number of reporters since the ‘90’s, as well as court-reporting schools and training materials. This trend was occurring nationwide. In 2017, the Chief Justice confirmed the trend continued. And in 2018, the Judicial Council warned the Legislature it was facing a gap of 2,750 court reporters by 2023.

Only 2,750? That might not sound like such a big gap. But to grasp how difficult it would be to fill the missing 2,750, consider that in 2021, only 175 aspiring court reporters took the licensing exam. The number who passed: 36. Meanwhile, existing reporters continue to retire — over the past five years or so in Los Angeles, the court reporter workforce dropped almost 25%.

The funding to hire court reporters is there. In 2021, the Legislature and governor gave trial courts \$30 million to increase the number of certified reporters in family law and civil cases. Some courts offer applicants a \$30,000 signing bonus and a top-step salary of nearly \$150,000. But there just are not enough court reporters to do the job.

This is an acute problem for Superior Courts because they are required by law to provide court reporters in certain proceedings. Under Penal Code sections 190.9 and 869, Code of Civil Procedure section 269, and Welfare and Institutions Code sections 347 and 677, courts must provide reporters in felony criminal and dependency and delinquency juvenile courtrooms. But courts are not statutorily required to provide court reporters in civil, family law, probate, misdemeanor criminal, and traffic courtrooms — and over 50% of courts are unable to routinely provide reporters for these nonmandated proceedings. So if you practice in those departments, do not expect the courts to provide reporters.

A DAY WITHOUT A COURT REPORTER

So what will happen on that day when, the unabated crisis having worsened, you are left without a court reporter? Here I offer a parade of horrors:

1. **A Two-tiered Justice System:** “The right of appeal cannot lie in that discriminatory morass in which it is accessible to the rich and denied to the poor. Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent.” (*Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 87-88.) The unavailability of official court reporters presents a special hardship to the poor. The Supreme Court addressed this in *Jameson, supra*, 5 Cal.5th at page 608, holding that, so long as well-heeled litigants are permitted to hire private court reporters, the indigent who qualify for cost waivers must be provided with an official court reporter.

But *Jameson* still leaves a large population unaddressed: those in the great gulch between the indigent and the well-heeled. A system that waives costs of transcripts only for the very poor leaves those scratching out a slightly better living — that is, anyone with an annual income above \$30,000 — with a degraded form of justice.

2. **Weakened Sixth Amendment Rights:** “[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination.” (*Davis v. Alaska* (1974) 415 U.S. 308, 315.) A key tool of cross-examination is impeaching the credibility of one’s accuser — including with prior testimony. There is “incalculable value of a transcript to trial counsel and the unique assistance which it provides counsel in preparing for trial and in impeaching witnesses at trial.” (*United States v. Jonas* (7th Cir. 1976) 540 F.2d 566, 572.) While the trial judge has discretion to control the conduct of the proceedings, the Supreme Court has held that that discretion does not extend to putting court transcripts out of the reach of counsel: “In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.” (*Dennis v. United States* (1965) 384 U.S. 855, 873.)
3. **A Weakened Right to a Public Trial:** There is a right of access to court proceedings. And where audio is not available, some authorities suggest that the courts should consider the lack of ability to attend and should provide access to documents necessary to understand the merits. (See *Newsday LLC v. County of Nassau* (2d Cir. 2013) 730 F.3d 156, 164.) As the Ninth Circuit has stated, “[c]itizens could hardly evaluate and participate in robust public discussions about the performance of their court systems if complaints — and, by extension, the very existence of lawsuits — became available only after a judicial decision had been made.” (*Courthouse News Serv. v. Planet* (9th Cir. 2020) 947 F.3d 581, 592.)
4. **A Curtailed Right to Appeal:** Except in relatively rare circumstances, appeals not accompanied by a reporter’s transcript face grim odds. “[T]he absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant’s ability to have his or her claims of trial court error resolved on the merits by an appellate court.” (*Jameson, supra*, 5 Cal.5th at p. 608.) Ordinarily, trial court orders that prohibit an appeal from its own judgment are improper. (*MacDonald v. Superior Court* (1977) 75 Cal.App.3d 692, 696-697; see also *In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1222, fn. 4 [finding it “highly inappropriate for a trial court to attempt to dissuade a litigant from exercising his or her right to appeal”].) The worsening court reporter crisis may result in trial court outcomes effectively insulated from review for lack of a suitable oral record. If trial courts deny continuances to litigants who cannot find an available court reporter, appellate courts might consider whether such orders amount to improper denials of the right to review.
5. **Criminal Convictions Without an Adequate Record Might Be Vacated:** The lack of an oral record effectively deprives litigants of the ability to show prejudicial error. (*Bergerco, U.S.A. v. Shipping Corp. of India, Ltd.* (9th Cir. 1990) 896 F.2d 1210, 1215.) Where an error is raised on appeal and the lack of a record materially undermines the ability to review the error, the lack of a record may require a new trial. (*Id.* at p. 1217.) While the Ninth Circuit contemplated these circumstances probably would arise “only in rare circumstances” (*ibid.*), that prediction predated the current crisis.

Holding proceedings in public may satisfy the constitutional minimum. But where the proceedings involve national significance, the abstract right to attend a trial thousands of miles away may not satisfy civic curiosity. Making audio or transcripts available should be the minimum. For example, *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 597, held that reporters did not have a First Amendment right to the Nixon audio tapes because, among other things, they had been provided the transcripts. This suggests that, had the transcripts not been provided, the First Amendment may have required they be provided. (But see *United States v. Beckham* (6th Cir. 1986) 789 F.2d 401 [holding that the opportunity to hear the audio recordings at trial was enough].)

6. **Stunted Legal Development and Other Problems:** The diminishing availability of transcripts may also frustrate appellate courts’ ability to review important legal problems. Holdings are defined by their facts, and a principal mode of capturing the facts of the case is the transcript. Estoppel doctrines may also be frustrated. An issue might have been fully and fairly litigated, but demonstrating that may be impossible without a transcript. And for the same reason, claims for attorney malpractice and defenses based on ineffective assistance of counsel also may be out of reach.

PATHS FORWARD

Unlike most state judiciaries, California's lacks control over many of its own procedures, including record preparation. Other state judiciaries, operating independent of the Legislature, are free to experiment with and implement electronic recording. California's court procedures, in contrast, are governed by statute via the Code of Civil Procedure and the Government Code. (Glenn S. Kopel, *A Tale of Two Counties: Divergent Responses in Los Angeles and Orange County Superior Courts to the Ban on Electronic Recording in California* Court Reporters Assn. v. Judicial Council (2000) 37 San Diego L.Rev. 47, 57 ["California is one of only a handful of states that takes the federal view that the legislature has plenary authority to enact court rules if it wishes to do so. The rule-making authority of the California Judicial Council is limited to rules consistent with state statute. Most states take the contrary view – that rule making is the exclusive province of the judiciary."], quoting John M. Greacen (Sept. 1997, 5th Nat. Ct. Tech. Conf.) *Court Rules and Technology*.)

So while the court reporter crisis is a national crisis, it is felt most acutely in California. And after three decades and over a dozen failed legislative proposals, including in early 2024, a legislative solution appears unlikely.

In 2022, the Legislature did pass, and the governor signed into law, Assembly Bill 156, which allows the Court Reporters Board to license voice writers to work as certified court reporters. Voice writers use a mask or mouthpiece to transmit voice codes to create a verbatim transcript. The training and certification process is slightly less onerous than for shorthand reporters. The addition of voice writers to the stable of professionals allowed to create transcripts will probably relieve some pressure, but not solve the problem.

Another way to relieve pressure is to change record-preparation practices in arbitration. Nothing prevents litigants from using electronic recordings in arbitration. A significant minority of disputes are resolved through private arbitration, which furnishes the opportunity to make use of technology like live transcripts through AI tools like Whisper.ai and Otter.ai. And court reporters should be encouraged to prioritize their availability for court trials, where the prohibition on those tools make their services indispensable.

As for court proceedings, while Government Code section 69957 prohibits *courts* from using electronic recordings, the prohibition does not extend to the *litigants*. The current rules that prohibit making recordings of court proceedings are court rules, not statutes. Superior courts might consider relaxing these rules to allow litigants to make their own electronic recordings. Aside from these local rules, "nothing in the rules of appellate practice, as best we can discern, precludes the use of electronic recordings in the production of reporter's transcripts for purposes of appeal." (*Gandall v. Grimes* (Aug. 26, 1998, G017121) [nonpub. opn.]; see also *People v. Turner* (1998) 67 Cal. App.4th 1258, 1263, quoting *In re Armstrong* (1981) 126 Cal.App.3d 565, 560 [an electronic recording or electronically derived transcript satisfies the due process right of a criminal defendant to "a record of sufficient completeness to permit proper consideration of his appeal"].)

In the meantime, I dispense the same advice as always – "Don't forget to get a court reporter" – but now with the further admonition: "*and well in advance.*"

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