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An Analysis of Court Reporting and Digital Recording (DR) in California Courts

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EXECUTIVE SUMMARY

In the past three decades, the California Courts and the California Legislature have struggled more than a dozen times with the prospect of replacing court reporters with electronic or digital recording (DR) equipment in the state trial courts based upon the belief that such a change would result in substantial costs savings. These efforts are most often triggered by state budget shortfalls and the belief that advancements in DR technology render the use of court reporters to be less cost effective. In our analysis, the cost savings assumptions attributed to DR are not true, as they have been proven to be untrue in the preceding dozen or more efforts in California, and as the federal courts and other state trial courts have learned the hard way.

The California Legislative Analyst’s Office (LAO) analysis of the proposed 2008/09 state budget projects that converting 20% of trial courts statewide to DR will yield upwards of \$13 million savings in 2008/09 and 100% conversion in the following years will yield as much as \$111 million annually. We project the actual cost impact to California Courts will be:

<i>LAO-projected cost savings from DR</i>	<i>What will actually occur</i>
\$13 million in the 1 st year from 20% conversion	NET LOSS attributable to the purchase of DR equipment; the need to install wiring and conduit in the courtrooms; software use licensing fees; recruitment and training costs for new DR staff; and separation costs for court reporters
Unspecified savings from use of audio files in lieu of purchasing transcripts	Substantial productivity loss by judges, attorneys, parties and court staff because the written word is three to five times faster to use than reviewing an audio record
Upwards of \$111 million from full conversion, mostly from staff	NO SAVINGS because staff is still needed in higher ratios than those indicated by the LAO; transcript production costs will rise; offsetting court reporter user fees will be lost; private party transcript production will be “off-shored;” and the state would bear ongoing technology upgrade costs

Altering the California Courts’ method of managing its verbatim record from court reporting to DR will produce unintended consequences that will negate and even surpass the projected cost savings. This is akin to projecting cost savings in a hospital by replacing equipment and supplies with inferior substitutes; the resulting loss in productivity and its consequences could be dire. Use of DR produces substantial hidden and shifting costs that are not considered or quantified in the LAO’s budget analysis. These costs will be borne by citizens and court users in the form of diminished quality of justice, reduced access to justice, substantial delays, and the need for more judges and court staff to keep up with the resulting demand.

In fact, California Courts currently use DR in limited courtrooms where there is little or no testimony and little or no need for a transcript. This is a legitimate, appropriate and *targeted* use of DR to supplement court reporting resources; but DR is not an appropriate *widespread* substitute for court reporting. Federal Courts and several state courts have reversed decisions to use DR exclusively due to the several reasons provided in this report.

The remainder of this analysis is devoted to a point-by-point comparison of court reporting and DR. In each of these topical areas, court reporting is proven to be the superior and more cost effective choice.

COMPARISON OF COURT REPORTING AND DR

Each of the following topical areas will be affected by replacing court reporting with DR, resulting in substantial hidden and shifting costs that will impact the quality of justice, the productivity of those who work in the system, and the timeliness of case processing. There are also negative impacts on the workforce in the form of displacing a largely female employment base:

- **Productivity** – The role of a court reporter is not merely to “capture” the verbatim record and transcribe it when needed; it is to provide enhanced productivity to judges, attorneys, parties and court staff in dealing with the court record and managing information. The most significant impact of replacing court reporters with DR is the resulting loss in productivity by judges and key stakeholders, especially when dealing with complex cases. A good example is the need for “readback” of past testimony that can be performed instantly by a court reporter by a word or name search of the text-based record, while DR is incapable of this search, resulting in substantial delay while the testimony is located. Court productivity directly translates to improved access to justice.
- **Transcript Production** – California Courts spend \$26 million annually on transcript production. A vast majority of independent analyses of transcript production costs show that producing a transcript from an electronic recording is more costly, less timely and less accurate than one produced by a court reporter, 98% of whom use privately-funded computer-aided-transcription software to achieve this productivity. The statutory fees that courts pay for transcript production have not been increased for 20 years; standard fees for private transcript production are not controlled by statute and are considerably higher. Switching to DR will drive up costs for transcript production and increase processing delays.
- **Court Reporter Fee Revenue Loss** – Currently, California courts collect \$26 million annually from user fees charged to civil litigants for the services of a court reporter pursuant to Government Code section 68086 (coincidentally, the same amount of revenue that offsets what courts spend annually on transcripts). Replacing court reporters with DR would eliminate this revenue source and result in higher transcript costs. More diligent enforcement of these fees would bring in closer to \$40 million annually.
- **Capital Investments in Technology, Management and Staffing** – Court reporters act in a dual role of “employee” while reporting the verbatim record and “independent contractor” when transcribing that record. Accordingly, all of the costs for equipment, software, staffing, supplies and management of these processes are privately borne, saving the state tens of millions of dollars in cost avoidance. Moreover, these private investments by the court reporter have ensured that courts reap substantial productivity benefits from state-of-the-art advances in computer technology. With DR, the state would be charged with making these investments and keeping technology current.
- **Accuracy and Certification of the Record** – Court reporters are highly skilled professionals, trained and licensed to prepare accurate transcripts based upon first-hand experience, research of proper names and technical terms, extensive use of computer technology, and utilization of private staffing to produce and proof the record. When a court reporter “certifies” the record, it is an authentication to its accuracy. A transcript produced by a third party from DR is highly subject to error because all that DR captures is “sound,” which includes background noise, inaudible responses, unintelligible utterances and confidential discussions. A “certified” DR transcript is merely an indication that a typist unconnected to the record has done his or her best to discern its accuracy. Moreover, DR equipment will not inform the monitor that it is not functioning properly, and the discovery that a record is lost does not occur until it is too late. A “retranscription” of previously transcribed audio files will reveal significant differences in “certified” drafts.
- **“Off-shoring” of Transcript Production** – Court reporters are “guardians of the record” who place high value on the accuracy, impartiality and confidentiality of the court record. Selling audio files to attorneys and others will result in the use of overseas transcription services in an effort to save costs, resulting in violation of privacy, illegal disclosure of protected information, and identity theft. Selling

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audio files to attorneys and others also introduces opportunities to fraudulently alter the record using digital audio software.

- **Accountability** – California Government Code section 69944 provides tight controls enabling the court to disqualify employed and contract court reporters from further work until delinquent transcripts are filed for cases on appeal. Since court reporters are highly skilled professionals, licensed and regulated by the California Department of Consumer Affairs, they are held to very high standards. No such controls exist over DR monitoring staff or privately retained transcript production contractors. Errors and delays in producing transcripts from a DR record have become a way of life in those states that have adopted its widespread use.
- **Replacing Transcripts with a DR Audio File is Not a Cost Savings** – One of the biggest myths about DR is that judges, attorneys, parties and court staff can review the audio DR files in lieu of a transcript and thereby realize substantial cost savings. Every study conducted on this subject shows that it takes three to five times longer to review an audio file compared to a written transcript. Widespread use of audio files is highly unproductive and will result in delay while transcripts are more cost effective, especially electronic versions of transcripts that are capable of word and name searches, including Boolean search functionality.
- **Personnel Cost Savings will Not Occur with DR** – The LAO projects the largest cost savings from DR in the form of salary savings by eliminating court reporters. These cost savings are over-projected for two reasons. First, the LAO assumes that most DR monitoring can be done with a single staff person handling multiple courtrooms, or no monitoring staff at all. This refutes the California Electronic Recording Advisory Commission finding in 1992 that “audio recording is an acceptable method in *all courts which do not have testimony if there is a trained monitor who has no other duties while recording*” (emphasis added). Second, transcript production cost savings are achieved by a court reporter using computer-aided transcription software and privately-paid staff, both of which (technology and staffing) would become state costs when using DR.
- **Court Reporter Technologies Yield Substantial Cost Savings** – Court reporters have privately invested in computer hardware, software, telecommunications, and staffing to make technological advances available to judges, attorneys, parties and court staff, thereby increasing productivity. One of these technologies, “realtime” instant display of the record for view and annotation, is a substantial benefit when efficiently resolving cases. Computerized court reporting, in general, produces electronic transcripts, ease of storage of notes/transcripts, printed concordance indices, condensed printed transcripts, and computer-integrated courtrooms, which are substantial improvements in the administration of justice that will be lost with DR. Moreover, a court reporter’s “realtime” record allows courts to make proceedings available to the hearing impaired, while computer-aided-transcription supports sight-impaired users, enabling courts to comply with *Americans with Disabilities Act* requirements.
- **The Court Reporter Job Market** – Finally, the LAO justifies replacing court reporters with DR because of a “dwindling” supply of court reporters. The concerns expressed in 2005 on this topic have not come to pass and there are ample candidates for courts seeking qualified replacement court reporters. More than 100 applicants took the 2007 Los Angeles County Superior Court Hiring test. The court reporting workforce is overwhelmingly female, as is the privately retained transcript production staff hired by court reporters to produce timely transcripts. Replacing court reporters with DR will displace this female workforce with what is predominately a male field of DR monitors.

Please visit www.cal-ccra.org and click on the “California Digital Recording Report” link for an electronic version of this report and hyperlinks to the various resources used in its creation.

This report was prepared by Chris Crawford, president of JUSTICE SERVED®, a court management and technology consulting firm. Mr. Crawford has more than 34 years of court management experience, including 21 years managing California trial courts. For more information, please visit www.justiceserved.com.