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# COURT REPORTER SHORTAGE SPARKS CREATIVE MEASURES AND WIDENS DOOR FOR BLUNDERS

### Article

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Any legal practitioner in California and beyond can attest to the court reporter shortage. Even before the onset of the pandemic, the court reporting industry was experiencing an increasing shortfall of court reporters available compared to the number of courtrooms and depositions needing the services of one.

Many courts have been forced to employ creative methodologies to accomplish the required documentation and recording of court proceedings as a result. Similar creative efforts are also trying to be implemented for depositions throughout California. Although much of the feedback from remote court reporting, as well as digital and voice reporting, has been positive, many have also experienced troublesome errors in the recording and reporting of proceedings, raising serious issues of admissibility and the reliability of such efforts.

This article details issues specific to California and highlights the perils and pitfalls to counsel emanating from the court reporter shortage. Nationally, this is an emerging issue given the diminishing number of available court reporters which means counsel should revisit code provisions closely as these situations will assuredly arise, and missteps could have an impact on the litigation.

### Use of a Court Reporter

*California Code of Civil Procedure* (CCP) § 2025.330, states the following for the use of court reporters for depositions:

- "(a) The deposition officer shall put the deponent under oath or affirmation.
- (b) Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically. If taken stenographically, it shall be a person certified pursuant to Article 3 of Chapter 13 of Division 3 of the Business and Professions Code.

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(c) The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all parties agree that the testimony may also be recorded by either of those methods.

Any other party, at that party's expense, may make an audio or video record of that deposition, provided that the other party promptly, and in no event less than three calendar days before the date for this deposition is scheduled, serves a written notice of this intention to make an audio or video record of the deposition testimony on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served under Section 2025.240, and on any deponent whose attendance is being compelled by a deposition subpoena under Chapter 6. If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011."

Therefore, under CCP § 2025.330, unless the parties agree or the court orders otherwise, the deposition must be taken stenographically by a certified shorthand reporter.

### **Nationwide Shortage: Unavailability of Court Reporters**

Securing the credentials to become a court reporter is a high bar academically. The National Court Reporters Association (NCRA) conducted a study in 2014 that revealed the court reporting industry's decline. The decline is a result of the current stenographer population retiring, coupled with a large decrease in individuals entering the industry. The report known as the "Ducker Report", showed that for every 1,120 stenographers that retire, only 200 new stenographers enter the field. That equals a decrease of 920 qualified stenographers per year. By 2028, the total number across the country is expected to decrease by at least half.<sup>1</sup>

In addition, the declining enrollment at court reporting schools is clear evidence of a problem that is not going away anytime soon. The arduous academic and licensing requirements to graduate from court reporting schools make it difficult to produce graduates. In fact, less than 10% of stenographers who start court reporting school actually graduate. With this decline, it is increasingly hard to meet court and lawyer demands for properly qualified court reporters. This reality has forced the legal profession to get creative in order to fulfill this need. The critical decline of court reporters has hit the California the hardest.

Reasons for the court reporting shortage include the following primary causes:

- Increased demand coming out of the COVID-19 pandemic;
- Less graduates from certified stenographer court reporting schools;
- Court reporting are again out and retiring; and
- Declining enrollment and interest in the court reporting field.

### **Remote Court Reporting**

One method of court reporting that has helped to fill the gaps in coverage is the use of remote reporters. Remote reporting allows court reporters to provide stenographic services without traveling long distances in order to be in the same room as the deponent. Legislation has made this option difficult. For example, in 2019, the California Legislature passed a bill that prevented courts from using remote reporters to record official court records, as well as prohibiting them from using state money to purchase remote reporting equipment.<sup>2</sup> However, part of this legislation was a pilot program at Santa Clara County Superior Court to test remote reporting. Notwithstanding a report was generated after the pilot study, no further action has been taken by

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the Legislature to formally permit remote reporting.<sup>3</sup>

Until the global pandemic resulting from the spread of COVID-19 occurred. As a result of COVID-19, remote reporting is now allowed in criminal proceedings according to Emergency Rule 3 . After the Emergency Rule, remote recordings in all proceedings were temporarily allowed between April 6, 2020- December 31, 2021, but on November 19, 2021, the Judicial Council of California amended Emergency Rule 3 to remove civil proceedings, effective January 1, 2022.

Thereafter, Senate Bill 241 was passed in September 2021 and allows civil conferences, hearings, proceedings, and trials to be conducted remotely from January 1, 2022- July 1, 2023. But, this law does not help the court reporting situation. That is because it still requires court reporters to be physically present in the courtroom even if all of the other proceedings are being performed remotely. It is still unknown whether the current accommodations for remote proceedings and recording of the same will remain in the future. However, many parties and judges have provided positive feedback to having remote proceedings.

Many argue that the advantages of conducting remote proceedings with remote court reporters outweigh the negatives. The two main advantages are:

- Widens the pool of court reporters available to conduct the stenography for the proceedings; and
- Lowers overall costs due to savings on travel and accommodations.

Despite these benefits, many have rallied against remote proceedings because it is difficult to read body language and it does not provide full and open access to the general public.

### Electronic and Digital Recording

Another method used to try and get around the court reporter shortage are electronic and digital recording techniques.

Electronic recording is regulated by statute in California. California Government Code § 69957 states that electronic recording is allowed in limited civil, misdemeanors and infractions, and only when a certified court reporter cannot be obtained. Other states such as Alaska, Colorado, Florida, etc. use electronic recording regularly.<sup>4</sup>

Some states have found success in training more reporters in digital reporting instead of the traditional stenographic method, thereby increasing the overall number of reporters available to perform the job. Digital court reporting is similar to electronic reporting, but involves a digital court reporter who monitors the recording and takes notes, but does not actually type out the stenographic record in real time. Instead, a reporter listens to the digital recording and then types out the official transcript.

Many in the legal field question the accuracy and efficacy of this method. Many times, the digital recording is not sent to a single person, multiple segments will be sent out to multiple reporters, and the digital recording may even be sent to another country. Once each segment is complete, it is then returned to the digital recording company for final assembly and to put the various segments together as a single transcript. As is apparent from several accounts from lawyers, this method is ripe with the opportunity for mistakes. Further, there is no opportunity to have the reporter read back any questions or answers and if the digital recording is unclear, or where the witness was soft spoken or mumbled the answer, the opportunity to get a clear record has been compromised. For example, instead of the live stenographer interrupting the witness and attorney to ask the witness to repeat the answer so that the reporter can get the testimony clearly, it is left to a reporter to try and decipher the digital recording and if the testimony cannot be understood, the reporter will simply type "inaudible". This may be a very crucial answer to a question that is missed and there is no way for the attorney to know that the digital recording did not capture the response.

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Many are pushing back as to the validity of digital and electronic recording. Opponents point to the following negative impacts of this form of recording:

- The increased use of digital and voice to text recording is not regulated by the State of California and as such has no oversight or certification process;
- The digital recorders are not California certified court reporters, are not officers of the court, and cannot certify the record as an official document;
- Siphoning out the record in segments for transcription and then assembling the pieces leaves considerable room for error and a lack of consistency and accuracy throughout the entire transcript; and
- If a transcript is not correct, the parties and their counsel have little recourse. The correction process can be time-consuming and the issue may not be resolved in a timely manner, resulting in a transcript that cannot be used.

### Voice Writing

Voice writing is not allowed in California, but many states utilize it in their court proceedings. This method involves the court reporter speaking every word from the proceeding into a noise-cancelling mask in the courtroom. One benefit to voice writing is that it takes less time, effort and skill to achieve the required knowledge as well as certification. Voice writing school can be completed in about six months as compared to the two years for stenography school and the graduation rate is up to 90%. Court Reporters of California, Minutes of Open Session (July 19, 2018), p.10 & 18.

The voice writing method is allowed in 42 states as well as federal courts, military courts and Congress.

### Key Takeaways

- With the increasing crisis of a court reporter shortage, courts and legal professionals have taken to using creative methods to obtain the transcripts needed for their work;
- Although the pivot to remote transcription during the pandemic has resulted in many benefits including reduced travel time and costs, it also has disadvantages such as the inability to read body language of the speaker;
- Digital recording is growing in popularity, but in practice the room for error has proven problematic and creates potential issues regarding accuracy and admissibility in court;
- Digital court reporters do not undergo the same education and stringent licensing requirements of a certified court reporter; and
- Correcting errors in a digitally produced transcript can be time-consuming and difficult to achieve, if possible.

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<sup>1</sup> See, Drucker Worldwide, 2013-2014 Court Reporting Industry Outlook Report (2014), National Court Reporters Association.

<sup>2</sup> See, A.B. 253, 2019 Biennium, 2011-2012 Reg. Sess. (Calif. 2011).

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<sup>3</sup> See, 2021 California Rules of Court, Appendix I, Emergency Rules Related to COVID-19, Emergency rule 3(a): Remote appearances. (2020).

<sup>4</sup> Curt Statistics Project, "Trial Record."