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A Cost Study of the Legislative Analyst's Office Proposal To Expand use of Digital Recording in California Courts

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**A Cost Study of the Legislative Analyst's Office Proposal
To Expand use of Digital Recording (DR) in California Courts**

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EXECUTIVE SUMMARY

The California Legislative Analyst's Office's (LAO) analysis of the proposed 2008/09 state budget projects that converting 20% of trial courts statewide to digital recording (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.

At a Senate Budget and Fiscal Review Subcommittee meeting on April 9, 2008, the California Administrative Office of the Courts did not support complete replacement of court reporters with DR because:

1. Court reporters using privately-funded technology enhance judicial, attorney, litigant and staff productivity by providing "Realtime" translation of the record into written text that is instantly available to users for annotation.
2. Projections of cost savings from civil cases will not occur because the civil litigants pay directly for court reporting services and transcripts.

However, the Administrative Office of the Courts did support 20% expansion of DR into other case types, specifically family and juvenile cases. Our analysis of the cost and operational implications of this expansion shows that cost savings will not occur and the negative impact to the court, litigants and staff will be substantial.

There is a false belief that recording technology has advanced to the stage where mechanical problems are few and voice-recognition software will produce cost-effective transcripts. In fact, digital recording is better technology than analog "tape," but a recording device is only as good as the operator who turns it on, it records only what a microphone "hears," and is subject to system failure. Finally, there is no voice-recognition technology currently in use or intended to be used to assist in the transcription of recordings. Voice-recognition technology is not advanced to the point where it supports this use. Accordingly, statewide court costs will rise for transcripts produced by others from recordings compared to court reporters using personally funded technological advances to produce a transcript from stenography.

THE SOURCE OF THE LAO'S COST PROJECTIONS

The LAO bases its DR cost projections on a 1992 pilot project in California courts that tested the expanded use of what was then called "electronic recording" (*the recording technology has since improved from analog to digital format, hence we now refer to it as digital recording*).

The results of the 1992 pilot project are worthy of note for two major reasons:

1. The final report does not recommend use of DR in courtrooms with regular testimony or regular production of transcripts, preferring the increased productivity and lower cost of using court reporters.
2. It does recommend use of a dedicated monitor, without other duties to distract from the task of attending to the record, on a one-per-courtroom basis,

The LAO proposal does not take these findings into consideration in their cost projections. 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.

An independent analysis of the 1992 electronic recording pilot project by KPMG/Peat Marwick (at the time, this was the CA Administrative Office of the Court's own accounting firm) revealed the following:

- The costs of court reporting services were nearly identical when compared to electronic recording when monitoring staff; equipment acquisition, licensing, installation, and purchase of playback equipment for key court stakeholders were taken into consideration.
- Transcript production costs were not considered in the pilot project; accordingly, long term cost implications are not quantified.

Survey responses to the pilot project included several important observations, including:

- *"Jury trials should not be (recorded) because it is too difficult to find a particular place in the testimony."*
- *"Trials and law and motion should not be reported by audio recording."*
- *"There are no advantages of using audiotape. Failure to adequately identify the person speaking. Should only be used in single-party court trials. Should not be used for complex civil and criminal litigation."*
- *"The audio portion of the tape is so bad that it is unintelligible."*
- *"For review purposes, audio/video requires more time and/or transcribing of segments. Further, if the matter is appealed, the transcript would be necessary unless there are stipulated facts. Furthermore, recording requires attorneys to purchase equipment in order to review record."*

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THE NATURE OF FAMILY AND JUVENILE PROCEEDINGS

Making a verbatim record is more cost effective when using a court reporter as compared to DR in court cases dealing with serious or complex issues, especially those that have a high likelihood of the need for a transcript. The reasons are simple: Complex cases often involve technical terminology, high stakes, significant investments of time, resources, and the need for rapid response.

Using DR to capture the court record in these cases runs a higher risk of inaudible recordings, lack of understanding of technical terms by transcribers, higher costs to transcribe, and more time to prepare a transcript. Using a court reporter to capture the court record in these cases means a single person is responsible for the record, proceedings are halted if testimony is inaudible or if technical terms are not understood, and computer-aided-transcription software (CAT) enables a court reporter to produce a transcript faster and cheaper. Moreover, this same CAT software used by a proficient court reporter will provide a "Realtime" record capable of annotation by the parties that significantly enhances the productivity of the judge, attorneys, litigants and court staff.

Family (domestic relations, dissolution of marriage and child custody) cases regularly involve large amounts of money and high stakes. Often, the verbatim record is needed to clarify agreements and stipulations that are made in open court concerning real estate, bank accounts, retirement funds, restraining orders, child custody/visitation, child support, spousal support, debts, and psychological evaluations, because minute orders produced by the clerks do not contain sufficient detail. The accuracy and timeliness of the verbatim record becomes paramount in these instances. The relatively high volume of transcript production in family cases justifies continued use of court reporters to report that record.

Juvenile dependency cases involve even higher stakes: Placement of abused and neglected children, and termination of parental rights.

Both family and juvenile cases are often classified as "complex," and demand significant litigant and court resources. Both of these case types also involve another important factor - privacy. A court reporter in a family or juvenile case is keenly aware of what is and what is not appropriate for public disclosure. DR is much less discreet. It is more easily disseminated to unauthorized parties because a DR monitor is not always aware of what specific information is contained in a lengthy recording. Recordings are often circulated among a variety of transcribers who are not accountable as a court reporter is for what is and is not disclosed. More importantly, digital recordings are too easily "offshored" to transcription services overseas where US privacy and disclosure restrictions are unenforceable.

Whether sent overseas or kept domestically, this entire outsourcing of the record to others for transcript production is troublesome for several reasons. Court reporters are "guardians of the record" who place high value on the accuracy, impartiality and confidentiality of the court record. Because court monitors and court staff could not possibly research the exact location of where a particular piece of the record exists, they will routinely sell audio files to attorneys and others. These audio files may contain only the recipient's case or contain whole portions of a calendar containing all cases heard during that court session. The recipient is then free to use less qualified transcription services in an effort to save costs. Each of these circumstances increases the instances of violation of privacy, illegal disclosure of protected information, and identity theft. Selling audio files to attorneys and others to transcribe

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themselves also removes the impartiality in the preparation of the record, and introduces opportunities to fraudulently alter the record using digital audio software.

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.

TRANSCRIPT COST COMPARISONS

Court-purchased transcripts prepared by a court reporter are less expensive and timelier compared with those produced from DR. A licensed court reporter pays for his/her own Computer-Aided-Transcription (CAT) software, equipment, staff, and supplies, and is paid 20-year-old statutory rates to produce transcripts as an independent contractor with a profit incentive. Transcripts produced from digital recordings, on the other hand, are usually sent to unregulated private transcribers who charge free-market rates that currently cover a wide range of costs to California courts. It is important to note that even a transcript "delivered" by a private transcriber still needs to be copied, bound, filed, billed and fees collected. All of these functions are now performed by individual court reporters, so the courts will have to hire additional staff or divert existing staff to perform these additional tasks.

Setting aside the cost issues, the accuracy of these digital recordings in California is questionable, especially if there is no dedicated DR monitor attending to the record without other duties or distractions. In a quick survey of approximately 18 counties in the state that currently utilize DR to record limited civil and misdemeanor proceedings, none of these courts is known to use a dedicated DR monitor, and in more than half of the surveyed courts, the fees paid for transcripts from DR were higher than those paid to court reporters. None were lower.

Replacing court reporters with DR, in *civil* cases in particular, does not make good financial sense. 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 the \$26 million that courts spend annually on transcripts). Replacing court reporters with DR for civil cases would eliminate this revenue source and, therefore, result in higher transcript costs. More diligent enforcement of these fees would bring in closer to \$40 million annually. Since trial courts do not retain this revenue for internal transcript cost offsets, they lack incentive to aggressively monitor compliance and oversight.

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RECORDING PROBLEMS USING DR

While technical and human error problems can occur with both court reporting and DR, there are many more documented instances of these problems in the use of DR. Having to retry a case or conduct a new hearing to recapture a lost record is a staggering price to pay for a "cost savings" that doesn't even hold up under analytical scrutiny. Here are some examples of digital recordings gone wrong:

- Essex County, NJ – (Nov 2007) A mistrial caused by a courtroom recording failure may have cost a medical malpractice plaintiff in Essex County up to \$560,000 of a high-low settlement, and it is stirring calls for more court reporters in New Jersey courts.
- Suburban Chicago, IL – (Nov 2007) Officials in Huntley Unit District 158 have taken steps to avoid a repeat of a school board meeting where all of the devices failed to record a substantial portion of open- and closed-session discussions.
- Portland, OR – (February 2004) A series of missing or inaudible recordings leads to editorials calling for a revisit of replacement of court reporters with DR. These instances include one hour of missing key witness testimony in a 2003 murder case; a retrial of a 2002 complex civil environmental case because the DR failed to record proceedings onto a CD; attorneys handling criminal appeals saying their clients' rights are compromised by inaudible portions of recordings; and attorneys hiring their own court reporters for fear of an inaccurate court record.
- Bryan TX – (December 2000) When Judge-Elect Rick Davis considered whether to use a court reporter or electronic recording in the 272nd District Court, he compared three trial transcripts – one produced by a court reporter and two produced by a transcriptionist. The comparative error rates were staggering:

Case	Volumes of transcripts	Total # of pages	# of inaudibles / errors	% Error per page
State v. Robinson (Court reporter)	9	1,288	8	>1%
State v Smith (Elect. Recording)	6	717	171	24%
State v Nutall (Elect. Recording)	3	304	45	15%

There are many more instances of mechanical and human error failures that render DR as a less desirable choice over court reporting for making the court record. Contact the National Court Reporters Association (www.ncraonline.org) or the California Court Reporters Association (www.cal-ccra.org) for more examples.

In fact, states such as New Mexico, New Jersey and Texas that replaced court reporters with alternative methodologies have now reverted back to court reporters, especially when those court reporters offer "Realtime" technology. These reversals are attributable to problems with inaudibles, missing recordings, and system failures with DR (whether audio or video).

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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.