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## PERSPECTIVE

## A better solution than resurrecting SB 662 is on its way

By Mary E. Pierce

Earlier this year, State Senator Susan Rubio authored SB 662, a bill which proposed the option of electronically recording court proceedings if a Certified Shorthand Reporter (CSR) could not be found to make the record for a hearing or trial. While those of us who are working in this profession recognize that there is indeed a tight supply of licensed court reporters in California, I would not yet call it a shortage. With advance notice, a trained and highly qualified professional stenographer can almost always be secured, and the potential threat to the accuracy of the record demands that every opportunity to ensure that accuracy be explored.

Another troubling element of SB 662 is the cost for what even the bill's author has termed a "short-term fix." A temporary solution to a long-term issue may not be the most prudent use of taxpayer money that could otherwise be spent solving this staffing problem. First, the equipment and installation alone would be a significant expenditure. Prior to purchase, court personnel would be tasked with educating themselves on different equipment options and would then be required to undergo training on the equipment, not to mention arranging for equipment upgrades and maintenance, on an ongoing basis. Additional full-time staff to monitor this equipment might need to be hired so that court staff with other full-time duties are not also tasked with preserving the record. In contrast, a Certified Shorthand Reporter

bears the cost of their equipment, maintenance and technical support, eliminating these additional expenditures for the court system.

Do you know that California courts have experimented with electronic recording several times in the past and determined it a failure? A 2009 report by Chris Crawford of Justice Served stated, "In our analysis, the cost savings assumptions attributed to DR (digital recording) 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."

While prior experiments with electronic recording in the California courts were undertaken in an attempt to save money, not only were savings not realized, but there were many other shortcomings that resulted from the process, from delays to receive transcripts to the often inferior quality of those transcripts. This can be due to the minimal training of transcribers, flaws in the quality of the recording itself, or a combination of both.

The accuracy of the transcript should be of the highest concern to any litigant and to the court system as a whole. A transcript produced by a minimally trained individual not certified by any State board, over whom there is no meaningful oversight or regulation, is a poor substitute for that produced by a professional guardian of the record. Certified Shorthand Reporters in California undergo years of training, are then tested, licensed, and regulated by the California Court Reporters Board (CRB) under the umbrella of the Department of Con-

sumer Affairs. Their licenses are hard-earned, and those who attain the distinction of licensure have a vested interest in abiding by the laws, professional ethics codes, and court rules in the performance of their duties.

So if a new version of SB 662 were to be enacted, who would prepare the transcripts from the audio recordings? While the first version of the proposed law provided that the first right to transcribe the recordings would be offered to a licensed Certified Shorthand Reporter, the CRB has confirmed that any transcription of these recordings would be subject to statutory court transcript rates and that no per diems for performing this work could be added. When you consider that it takes a trained court reporter roughly three times as long to transcribe from audio recordings than it does to report a live proceeding in real time, this means they would be paid not even the same amount, but substantially less for a tripled investment of their time. I doubt that many licensees would be interested in doing that work for the capped pay alone.

And since estimates are that it takes four or five transcribers to do the work of one stenographic court reporter, it may even prove difficult to get the work done by gig workers here or even in other countries at the historically below-market statutory rates that are offered for these assignments.

So if professional court reporters will not be producing the transcripts and gig transcribers cannot service the workload, what method steps in? Likely, it will be AI/ASR (artificial intelligence/automatic

speech recognition) producing the bulk of the transcripts.

Step back. Pandora just opened the box.

The list of troublesome issues with AI/ASR transcripts is substantial and only continues to grow. A perfect example of these shortcomings was on display earlier this year at the Alex Murdaugh trial in South Carolina, where the attorneys discussed the rough draft they had received from a company that produces transcripts using these methods, calling it "a deficit product" and "not of much use." Had a stenographic court reporter produced that rough, it would likely have been 99% accurate, a common standard in the industry. Court reporters can also provide real time text streaming during a proceeding, typically at a minimum accuracy rate of 95%.

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And accuracy is only one major issue with AI/ASR transcripts. ASR works by providing predictive answers, not always definitive or even accurate answers. And speaking of predictive answers, it is not difficult to guess who is most likely to be impacted by the inadequacies of these transcription apps. It is oftentimes the most vulnerable members of society – minorities, those with disabilities, an accent or a speech anomaly, women and older individuals – who are most adversely affected by inaccurate transcripts in litigation matters.

Furthermore, authenticating a transcript that was produced by artificial means down the line is likely to be impossible. After all, you can't have an app prepare an affidavit to attest to the transcript's bona fides. What sort of information would it take to potentially audit the accuracy of such a transcript? Well, to start, you would need to know the ASR engine that was utilized, the date of processing through the app, the accuracy of the app on the date processed and the last calibration or accuracy rating at that time, as well as the chain of custody and names of all transcribers that were involved in preparation of the transcript. Typically, it is not even disclosed that any artificial method of transcription was used. I certainly have never seen a transcript that did so.

In fact, transparency is lacking even when human transcribers are used. When a file is of any significant size, it is customarily split into a series of clips and distributed to multiple transcribers, then assembled into a transcript when all the files are returned. Yet even when this practice is utilized, there is just one certificate of transcription, signed by just one individual, that is affixed to the back of the transcript. And as I have mentioned, many of these recordings are sent overseas for transcription. How are these individuals to be tracked, never mind held accountable and questioned, in the event that their inaccurate transcriptions materially affect the potential outcome of a case?

And you can't necessarily rely on a company providing these types of transcription services to authenticate it either, as they merely process the work product of others. As my article *"Make Sure Your Court Reporter Is Really A Court Reporter"* (Daily Journal 4/13/22) illustrates, in that particular instance the agency declared for months that the transcript that was missing 55 pages of testimony was complete and accurate.

Don't despair because help is on the way!

So what is the solution?

Yes, we need more court reporters, and many of us in the profession are working toward that goal. In our spare time, when we aren't reporting a proceeding, producing transcripts, upgrading our equipment or learning new software, getting continuing education or booking our calendar, we are promoting the profession online and at job fairs, trying to get programs in court reporting established at community colleges and even introductory classes in high schools.

Our efforts are already producing results. Many of the court reporting schools in California now have waiting lists to get in, another reason to expand the number of schools in the state. We've lost so many court reporting schools in California in the past 20 years that it hobbles the effort to replenish the workforce. A potential short-term goal is to work in concert with the Department of Education or the Court Reporters Board in this effort. Preserving the accuracy of the record is too imperative to the justice system, and it is a daunting challenge to conquer alone.

The statistics from the two most recent state tests are very encouraging. There are three examinations given each year. In the three tests given from November 2020 to July of 2021, 41 applicants passed the test in that 12-month period. In the three most recent exams, given from November 2022 through July of this year, 86 applicants were successful and earned their California license. We need to expand those results exponentially, which

means getting more students in more schools and giving them every opportunity to succeed. Don't hinder these efforts by supporting a plan to eliminate or greatly diminish the need for their chosen profession.

Voice stenographers, also called voice writers, can also now test for licensure in California. This is an exciting development in that the schooling process is 30% to 50% quicker for most voice writing students when compared to stenographic students, and the success rate is nearly 10 times as high. It may be a different method of capturing the record in California, but it has been in use for decades in other states. Voice writers must pass the same test as stenographic applicants and meet the same accuracy standard of 97.5%, so you can rest assured that your record will be protected by licensees using this new method.

In the meantime, let's consider some other short-term fixes that promise quicker interim solutions and give us more time to bolster the workforce with new professionals.

The National Court Reporters Association conducts testing for entry-level court reporters and issues the RPR (Registered Professional Reporter) certificate, which is recognized nationally. The Court Reporters Board considers the RPR as a qualifying certificate for testing admittance to our state exam. The most recent test statistics demonstrate that this is a highly qualified pool in that roughly 62% of test applicants with this certification passed the state exam to attain their California license. The only group that surpassed that statistic for the July 2023 exam was the voice writers, who achieved a 75% pass rate. RPRs who tested in March 2023 passed at the same impressive rate of 75%.

While the proposal in the original version of SB 662 allowed for provisional licenses for holders of the RPR certificate for a single three-year period, during which they would need to pass our state exam in order to continue working here, this promising element

was removed during the debate process due to concerns about a lack of guardrails, including background checks and other things. Serious consideration needs to be given to addressing any concerns about this proposal and clearing the way for it to be implemented.

In fact, I found it quite alarming that there was almost no discussion of guardrails during Senate committee meetings when it came to anyone other than a CSR producing a transcript from the recordings. In truth, it should be of the highest concern if minimally trained transcribers or apps and machines are left to perform the crucial function of a highly trained court reporter, who is the custodian of the record from start to finish and produces a verbatim transcript that can be relied upon.

The history of using audio recordings across the country is replete with caution signs. Flaws or gaps in the recording, cross-talk, a mumbling witness, an audience member coughing, a speaker's microphone not being activated, or the recording never being turned on, or perhaps being left on and capturing a protected conversation are just some examples of significant issues. And any shortfall of the recording cannot be corrected afterwards.

In contrast, a licensed court reporter has multiple backups of their record and is trained and even required by law in California to interrupt the proceeding when circumstances merit it. We speak up when there is a potential compromise of the record, whether it be to have something repeated so that it can be captured, or to admonish participants to speak one at a time.

The fact that Certified Shorthand Reporters are mandated in criminal courts should not be overlooked. In criminal proceedings, a person's life and liberty are on the line. In these instances, the law recognizes the importance of the record being accurate by mandating that there be a CSR to capture the proceedings. Is your case any less important?