Study JM-1306 December 12, 2000

First Supplement to Memorandum 2000-81

Cases in Which Court Reporter Is Required
(Additional Comments on Tentative Recommendation)

In the past few days, we received oral comments from Prof. J. Clark Kelso, as well as the following email communications relating to the tentative recommendation on *Cases in Which Court Reporter Is Required*::

Exhibit p.
1. Gary Cramer, California Court Reporters Ass'n (Dec. 10, 2000) 1
2 Ed Kuwatch, California Deuce Defenders (Dec. 6, 2000) 2

These items are discussed below.

STYLISTIC SUGGESTIONS

The tentative recommendation would revise Code of Civil Procedure Section 269(a) to read:

> 269. (a) The official reporter of a court, or any of them where there are two or more, shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, arguments of the attorneys to the jury, and all statements and remarks made and oral instructions given by the judge, in the following cases:
>
> (1) At the request of either party or of the court in a civil case.
> (2) On the order of the court, the district attorney, or the attorney for the defendant in a felony case.
> (3) On the order of the court in a misdemeanor or infraction case.

To eliminate unnecessary verbiage and prevent confusion, Prof. Kelso suggests revising the first sentence along the following lines:

> 269. (a) The official reporter of a court, or any of them where there are two or more, shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, ~~all~~ arraignments, pleas, and sentences of defendants ~~in criminal cases~~, arguments of the attorneys to the jury, and ~~all~~ statements and

remarks made and oral instructions given by the judge, in the following cases:

….

This is a good suggestion. If this revision is combined with the other revisions recommended in Memorandum 2000-81, Section 269(a) would read:

269. (a) An official reporter or official reporter pro tempore of the court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, and sentences of defendants, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge, in the following cases:

(1) On the order of the court, or at the request of either party, in a civil case.

(2) On the order of the court, or at the request of the district attorney or the attorney for the defendant, in a felony case.

(3) On the order of the court in a misdemeanor or infraction case.

Having reflected on the best means of achieving clarity, **the staff would further revise the provision as follows:**

269. (a) An official reporter or official reporter pro tempore of the court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, and sentences of defendants, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge, in the following cases:

(1) ~~On the order of the court, or at the request of either party, in a civil case~~ In a civil case, on the order of the court or at the request of either party.

(2) ~~On the order of the court, or at the request of the district attorney or the attorney for the defendant, in a felony case~~ In a felony case, on the order of the court or at the request of the district attorney or the attorney for the defendant.

(3) ~~On the order of the court in a misdemeanor or infraction case~~ In a misdemeanor or infraction case, on the order of the court.

COMMENTS OF THE CALIFORNIA DEUCE DEFENDERS: A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A VERBATIM RECORD

Ed Kuwatch has submitted comments on behalf of the California Deuce Defenders, "a bar association of over 200 attorneys and a few other professionals who represent persons accused of drunk driving both in the courts and at D.M.V.

driver's license hearings." (Exhibit p. 2.) The California Deuce Defenders have concerns regarding proposed Section 269(a)(2)-(3), which would "differentiate between felony defendants and all others in the right to have a court reporter upon request." (*Id.*) According to the California Deuce Defenders, the "Constitution provides otherwise — criminal defendants have the absolute constitutional right to a verbatim record of the proceedings." (*Id.*)

The Commission did not overlook this issue in preparing its tentative recommendation. It is clear that an indigent criminal defendant is constitutionally entitled to a free record "of sufficient completeness" to permit proper consideration of an appeal. *Mayer v. Chicago*, 404 U.S. 189, 194 (1971); *March v. Municipal Court*, 7 Cal. 3d 422, 428, 498 P.2d 437, 102 Cal. Rptr. 597 (1972). A full verbatim record, as opposed to a settled statement or partial verbatim record, may not always be necessary. *Mayer*, 404 U.S. at 194. The state must, however, "provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way." *Id.* at 195.

It is also clear that Code of Civil Procedure Section 269 gives all felony defendants the right to a free, full verbatim record prepared by a court reporter. *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981); *People v. Godeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970). "The rule requiring free transcripts in felony appeals in California, regardless of a showing of indigency, dates back to 1909." *Andrus*, 143 Cal. App. 3d at 1052.

What is not entirely clear is whether a nonindigent defendant in a misdemeanor or infraction case is constitutionally entitled to a free record "of sufficient completeness" to permit proper consideration of an appeal. In 1981, the First District Court of Appeal concluded that "upon request therefor, there is a constitutional right that a verbatim record be provided at public expense for all defendants in misdemeanor matters." *Armstrong*, 126 Cal. App. 3d at 574. The Fourth District Court of Appeal later criticized this decision at length, concluding that "[n]othing in the Constitutions of the United States or California requires a free verbatim record in misdemeanor cases on request without a showing of indigency …." *Andrus*, 143 Cal. App. 3d at 1050. Still later, the California Supreme Court referred favorably to *Armstrong*, but did not squarely state that a nonindigent defendant is constitutionally entitled to a free verbatim record on

request. *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 541-42, 754 P.2d 724, 247 Cal. Rptr. 378 (1988).

It is also unclear whether electronic recording or a method other than shorthand reporting is sufficient to satisfy the requirement of a verbatim record where such a record is constitutionally required. The court discussed but did not resolve this point in *Armstrong*. 143 Cal. App. 3d at 571-75. The use of electronic recording has been the subject of both legislation (e.g., Code Civ. Proc. § 270; Gov't Code § 72194.5) and litigation (see *California Court Reporters Ass'n v. Judicial Council of California*, 59 Cal. App. 4th 959, 69 Cal. Rptr. 2d 529 (1997) ("CCRA II); *California Court Reporters Ass'n v. Judicial Council of California*, 39 Cal. App. 4th 15, 46 Cal. Rptr. 2d 44 (1995) ("CCRA I"); *Los Angeles Court Reporters v. Superior Court*, 31 Cal. App. 4th 403, 37 Cal. Rptr. 2d 341 (1995)).

The Commission sought to avoid these issues in its tentative recommendation and merely maintain the status quo. At pages 2-3, the preliminary part expressly points out that the proposal does not address whether "the defendant in a misdemeanor or infraction case should be entitled to request shorthand reporting." Footnote 6 refers to *Armstrong* and *Andrus*, and explains that because of the uncertainty in the law and because changing the law on use of shorthand reporting "would involve significant cost considerations, the present recommendation does not address the current scheme."

The comments from the California Deuce Defenders suggest that if the Commission goes forward with its proposal, it may encounter pressure to statutorily require shorthand reporting in misdemeanor and infraction cases. The staff sees two options at this point:

> (1) Proceed with the proposal as is, maintaining the status quo on shorthand reporting in misdemeanor and infraction cases. It is difficult to predict whether this would be successful. Although there may be significant opposition, it is not clear how much weight this opposition would receive, because the contention is that the Commission's proposal does not go far enough, not that there is anything wrong with the reforms that the Commission is proposing. The California Deuce Defenders or groups with similar concerns could always prepare their own bill relating to shorthand reporting in misdemeanor and infraction cases.
>
> (2) Prepare and circulate a revised tentative recommendation, addressing the constitutional issues relating to shorthand reporting in misdemeanor and infraction cases. If comments on the revised tentative recommendation suggest that this area is too volatile to be

successfully addressed by the Commission, the Commission could either abandon this project or proceed with its current proposal.

As between these options, **the staff leans towards proceeding with the current proposal, but not strongly.** Attempting to make revisions relating to the use of shorthand reporting in misdemeanor and infraction cases is likely to be controversial, because of cost considerations. The Judicial Council has advocated the use of electronic recording, whereas court reporters have championed shorthand reporting. See *CCRA II*; *CCRA I*; *Los Angeles Court Reporters v. Superior Court*. The staff certainly would not attempt to revise the law on shorthand reporting in misdemeanor and infraction cases without circulating a revised tentative recommendation.

COMMENTS OF MR. CRAMER ON BEHALF OF COURT REPORTERS

Gary Cramer of the California Court Reporters Association has reviewed Memorandum 2000-81 and provided comments. (Exhibit p. 1.) He suspects that the Commission "will run into opposition from the court reporters on the basis that 'On order of the court' may be construed as the entirety of the bench, whether through the presiding judge or an executive committee as opposed to the 'court' meaning an individual judge." (*Id.*)

The staff considers such a construction unlikely. The phrase "on order of the court" has been in the first sentence of Code of Civil Procedure Section 269 for many years. The statute also includes phrases such as "If directed by the court", "when directed by the court", and "unless the court determines". Although we could replace "the court" with "a judge" throughout the provision, the staff does not believe this is necessary. There is no indication that the statute has ever been construed, or anyone has suggested that the statute be construed, in the manner that Mr. Cramer suggests. To alleviate his concern, however, it may be helpful to revise the Comment along the following lines:

> **Comment.** Subdivision (a) of Section 269 is amended to include the substance of former Section 274c. Subdivision (a) is also amended to substitute "arguments of the attorneys" for "arguments of the prosecuting attorney," consistent with standard practice. See, e.g., Gov't Code § 72194.5 ("arguments of the attorneys").
>
> Former subdivision (c) is continued in Section 271 without substantive change.
>
> An order of a judge of a court constitutes an order or directive of "the court" within the meaning of this provision.

Mr. Cramer does not see any other problem with the Commission's proposal from the court reporter perspective. (Exhibit p. 1.) He does point out, however, that the "term 'either party' is used to designate more than one party, unless it is meant to define just the plaintiff and the defendant generically." (*Id.*) The staff cannot tell from this statement whether Mr. Cramer objects to use of the phrase "either party". In any event, however, **it would be a good idea to substitute "a party" for "either party" throughout Section 269.** With this revision and the other modifications recommended by the staff, the proposed amendment of Section 269 would read:

Code Civ. Proc. § 269 (amended). Reporting of cases

SECTION 1. Section 269 of the Code of Civil Procedure is amended to read:

269. (a) ~~The official reporter of a superior court, or any of them where there are two or more, shall, at the request of either party, or of the court in a civil case other than a limited civil case, and on the order of the court, the district attorney, or the attorney for the defendant in a felony case~~, An official reporter or official reporter pro tempore of the court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, ~~all~~ arraignments, pleas, and sentences of defendants ~~in felony cases~~, arguments of the ~~prosecuting attorney~~ attorneys to the jury, and ~~all~~ statements and remarks made and oral instructions given by the judge~~.~~ , in the following cases:

(1) In a civil case, on the order of the court or at the request of a party.

(2) In a felony case, on the order of the court or at the request of the district attorney or the attorney for the defendant.

(3) In a misdemeanor or infraction case, on the order of the court.

(b) If directed by the court, or requested by ~~either~~ a party, the official reporter shall, within such reasonable time after the trial of the case as the court may designate, write the transcripts out, or the specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify that the transcripts were correctly reported and transcribed, and when directed by the court, file the transcripts with the clerk of the court.

~~(b)~~ (c) In any case where a defendant is convicted of a felony, after a trial on the merits, the record on appeal shall be prepared immediately after the verdict or finding of guilt is announced unless the court determines that it is likely that no appeal from the decision will be made. The court's determination of a likelihood of

appeal shall be based upon standards and rules adopted by the Judicial Council.

~~(c) Any court, party, or person may request delivery of any transcript in a computer-readable form, except that an original transcript shall be on paper. A copy of the original transcript ordered within 120 days of the filing or delivery of the transcript by the official reporter shall be delivered in computer-readable form upon request if the proceedings were produced utilizing computer-aided transcription equipment. Except as modified by standards adopted by the Judicial Council, the computer-readable transcript shall be on disks in standard ASCII code unless otherwise agreed by the reporter and the court, party, or person requesting the transcript. Each disk shall be labeled with the case name and court number, the dates of proceedings contained on the disk, and the page and volume numbers of the data contained on the disk. Each disk as produced by the court reporter shall contain the identical volume divisions, pagination, line numbering, and text of the certified original paper transcript or any portion thereof. Each disk shall be sequentially numbered within the series of disks.~~

Comment. Subdivision (a) of Section 269 is amended to include the substance of former Section 274c. Subdivision (a) is also amended to substitute "arguments of the attorneys" for "arguments of the prosecuting attorney," consistent with standard practice. See, e.g., Gov't Code § 72194.5 ("arguments of the attorneys").

Former subdivision (c) is continued in Section 271 without substantive change.

An order of a judge of a court constitutes an order or directive of "the court" within the meaning of this provision.

Mr. Cramer also makes a number of other comments, which are not criticisms of the Commission's proposed reforms but rather suggestions for further improvements in the provisions in the tentative recommendation:

(1) Court reporters operate on the premise that absent an order sealing their notes or sealing a transcript, anybody can order a transcript and the reporter is obligated to prepare it. Yet nothing in Code of Civil Procedure Sections 269 or 274c authorizes or requires this.

(2) Sections 269 and 274c provide that when directed by the court, the reporter shall file the transcripts with the clerk of the court. These statements may not go far enough, because there are various other instances in which a transcript is required to be filed with the clerk of the court.

(3) Penal Code Section 190.9 provides for certification of the record, including the preliminary hearing transcript, no later than

120 days following notification by the superior court." Often, however, the preliminary hearing transcript is filed with the clerk pursuant to Penal Code Section 869 and is not available for such certification.

(4) "Requiring a daily transcript for all preliminary hearings in death penalty cases seems wasteful, particularly when so many preliminary hearings don't last more than a day and there is no useful purpose for preparing a daily under such circumstances."

(Exhibit p. 1.) **If the Commission decides to prepare and circulate a revised tentative recommendation, it should explore these points.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

COMMENTS OF GARY CRAMER, SPOKEPERSON FOR COURT REPORTERS

From: "Gary Cramer" <gcramer@socal.rr.com>
To: "Nat Sterling" <nsterling@clrc.ca.gov>
Date: Sunday, December 10, 2000

Nat,

I have reviewed Memorandum 2000-8. With regard to your proposed 269(a), I suspect you will run into opposition from the court reporters on the basis that "On order of the court" may be construed as the entirety of the bench, whether through the presiding judge or an executive committee as opposed to the "court" meaning an individual judge. You may want to use the language indicated as "(1) At the request of either party or of the court in a civil case." Other than above, I don't see a problem from the court reporter perspective. Additional considerations related to these same sections are as follows: The term "either party" is used to designate more than one party, unless it is meant to define just the plaintiff and defendant generically. Court reporters operate on the premise that absent an order sealing their notes or sealing a transcript, anybody can order a transcript of proceedings and the reporter is obligated to prepare it. However, nothing in 269 or 274c authorize or require such. These sections also provide that when directed by the court, the reporter shall file the transcripts with the clerk of the court. There is no argument with such a statement, except it may not go far enough. There are various other instances when a transcript is required to be filed with the clerk of the court. Section 190.9 provides for certification of the record, INCLUDING THE PRELIMINARY HEARING TRANSCRIPT, no later than 120 days following notification by the superior court. It is most often that the preliminary hearing transcript is filed with the clerk pursuant to 869 of the Penal Code and is not available for such certification by the bench officer. Requiring a daily transcript for all preliminary hearings in death penalty cases seems wasteful, particularly when so many preliminary hearings don't last more than a day and there is no useful purpose for preparing a daily under such circumstances.

Gary Cramer

COMMENTS OF CALIFORNIA DEUCE DEFENDERS

Date: Wednesday, December 6, 2000
To: Stan Ulrich <sulrich@clrc.ca.gov>
From: Ed Kuwatch <ekuwatch@dui-law.com>
Subject: Comment on Memorandum 2000-81 - Court Reporters

I am writing on behalf of the California Deuce Defenders, a bar association of over 200 attorneys and a few other professionals who represent persons accused of drunk driving both in the courts and at D.M.V. driver's license hearings.

I am writing to express our concerns about the recommended revisions to C.C.P. § 269. In particular, subdivision (a), paragraphs (2) and (3), which differentiate between felony defendants and all others in the right to have a court reporter upon request. The Constitution provides otherwise - criminal defendants have the absolute constitutional right to a verbatim record of the proceedings.

In Ryan v. Commission on Judicial Performance (1988) 45 C3d 518, 541, 247 CR 378, an action to remove a judge from the bench for misconduct, the California Supreme Court reiterated and elaborated upon the holding of In re Armstrong (1981) 126 CA3d 565, 178 CR 902, that the right to a verbatim record of the proceedings in misdemeanors is protected by the Due Process and Equal Protection clauses of the United States and California Constitutions, and that unrepresented defendants must be either given a verbatim record, or they must be advised of that right. The court said, at page 541, "The judge correctly interprets Armstrong as requiring a court reporter upon request. However, he misperceives the significance of his failure to instruct defendants appearing in propria persona that they had a right to a verbatim record. The judge's stubborn and obstructionist attitude effectively denied those defendants their constitutional right to have a reporter present."

This California Supreme Court opinion is unequivocal in its statement that misdemeanor defendants have a constitutional right to a verbatim record, and that unrepresented misdemeanor defendants must be advised of that constitutional right.

This decision has been interpreted by the commission (1988 ANNUAL REPORT, 8 (San Francisco, CA: Commission on Judicial Performance, 1988)), as follows:

"In three instances the judge failed to provide a court reporter in a criminal proceeding. The judge knew that a court reporter had to be provided on request; but he failed to inform pro per defendants of their right to make the request, thereby 'effectively [denying] those defendants their constitutional right to have a reporter present.' The judge asserted that he was trying to save money for the county. The Supreme Court called his attitude 'stubborn and obstructionist.'"

Functionally, there is no difference between misdemeanor and infraction defendants. Both have an absolute constitutional right to a verbatim record of the proceedings.

In addition, I must point out that § 269 fails to require a court reporter for a defendant who represents himself.

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