

Memorandum 2001-33

**Cases in Which Court Reporter Is Required
(Draft Revised Tentative Recommendation)**

At the December meeting, the Commission directed the staff to prepare a revised tentative recommendation on *Cases in Which Court Reporter Is Required*. A draft is attached for the Commission and interested parties to review. A few points warrant attention, as discussed below.

REQUEST BY A PARTY, AS OPPOSED TO AN ATTORNEY FOR A PARTY

In a felony case, Code of Civil Procedure Section 269(a) requires an official reporter to take down all testimony, objections made, etc., “on the order of the court, the district attorney, or *the attorney for the defendant*.” (Emphasis added.) (Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.) At the December meeting, the Commission considered means of clarifying how this provision applies to a pro se felony defendant. After much discussion, the Commission decided that the provision should refer to “the defendant,” rather than “the attorney for the defendant.” (Minutes, December 2000, pp. 10-12.)

Thus, proposed Section 269(a) would provide:

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

Comment. ...[S]ubdivision (a) is amended to make clear that a felony defendant, whether represented by counsel or in pro per, is entitled to a court reporter on request by the defendant personally

or by the defendant's attorney (if any). This is not a substantive change. See generally *People v. Turner*, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) (“a verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised”); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record “in felony proceedings by statute (Code Civ. Proc., § 269).”); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (a “felony defendant is, as a matter of right, entitled to have ‘taken down,’ all related testimony and oral proceedings”) (emphasis in original); *People v. Godeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) (“In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or an order of the court. (Code Civ. Proc., § 269.)”); *People v. Hollander*, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

(Emphasis added.)

The Commission considered the possibility of referring to both “the defendant” and “the attorney for the defendant” in Section 269(a)(2). It rejected that approach because Section 269(a)(2) is juxtaposed with Section 269(a)(1), which tracks existing law and provides that court reporting is required in a civil case “on the order of the court or at the request of a party.” (Emphasis added.) The concern was that referring to both “the defendant” and “the attorney for the defendant” in Section 269(a)(2) might create an implication that a civil litigant must personally request court reporting, rather than making the request through the litigant’s attorney.

Although the Commission tentatively settled on referring only to “the defendant,” it directed the staff to “check the Penal Code to determine whether statutes authorizing ‘the defendant’ to take a procedural step extend such authority to both the defendant and the defendant’s attorney.” (Minutes, December 2000, p. 12.) The staff has undertaken such review.

It appears that use of the word “defendant” in the Penal Code is inconsistent. Some provisions conform to the usage in proposed Section 269(a)(2). For example, Penal Code Section 995 provides that under certain circumstances “the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion. (Emphasis added.) Although the statute only refers to a motion by *the defendant*, case law establishes that *the defendant’s attorney* may file a motion pursuant to the statute. See, e.g., *People v. Ingram*, 174 Cal. App.

3d 1161, 1163, 220 Cal. Rptr. 346 (1985) (“defense counsel filed a Penal Code section 995 motion”); *People v. Stanfill*, 170 Cal. App. 3d 420, 426, 216 Cal. Rptr. 472 (1985) (“even if defense counsel had moved to set aside the information pursuant to Penal Code section 995”); *People v. Superior Court*, 74 Cal. App. 3d 407, 413, 141 Cal. Rptr. 497 (1977) (“Provision is made for defense counsel to make a Penal Code section 995 motion even though a proceeding to determine defendant’s mental competence is pending.”).

But other provisions create confusion. Perhaps the most egregious example is Penal Code Section 861, which provides:

861. (a) The preliminary examination shall be completed at one session or the complaint shall be dismissed, unless the magistrate, for good cause shown by affidavit, postpones it. The postponement shall not be for more than 10 court days, unless either of the following occur:

(1) The defendant *personally waives his or her right to a continuous preliminary examination.*

....

(b) The preliminary examination shall not be postponed beyond 60 days from the date the motion to postpone the examination is granted, unless by consent or on motion *of the defendant.*

....

(d) A request for a continuance of the preliminary examination that is made by *the defendant or his or her attorney of record for the purpose of filing a motion pursuant to paragraph (2) of subdivision (f) of Section 1538.5 shall be deemed a personal waiver of the defendant’s right to a continuous preliminary examination.*

(Emphasis added.) Thus, a “personal” waiver of the defendant’s right can occur by defense counsel’s actions.

In view of inconsistencies like this, it may be best to be as precise as possible in the text of Section 269. **The staff suggests revising the proposed language as shown in underscore below:**

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, all 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) 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 defendant.

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

(b) Where directed by the court or requested by a party, or where requested by a nonparty with respect to a proceeding open to public access, the official reporter or official reporter pro tempore 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.

....

(d) As used in this section, a “request of the defendant” or “request of a party” means and includes a request by the defendant or other party personally or a request by the attorney for the defendant or other party.

....

Comment. ...

Finally, subdivision (a) is amended to state that a court reporter is required at the request of “the defendant” in a felony case. Together with subdivision (d), this serves to make clear that a felony defendant, whether represented by counsel or in pro per, is entitled to a court reporter on request by the defendant personally or by the defendant’s attorney (if any). This is not a substantive change. See generally People v. Turner, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) (“a verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised”); Andrus v. Municipal Court, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record “in felony proceedings by statute (Code Civ. Proc., § 269).”); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (a “felony defendant is, as a matter of right, entitled to have ‘taken down,’ all related testimony and oral proceedings”) (emphasis in original); *People v. Godeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) (“In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or an order of the court. (Code Civ. Proc., § 269.)”); *People v. Hollander*, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

....

Subdivision (d) makes clear that a request for court reporting or a transcript pursuant to this section may be made by counsel for a litigant or by the litigant personally.

The staff leans towards this inclusive approach (permitting both the party and the attorney for the party to make the request) because:

- (1) It is consistent with existing case law relating to felony defendants. See the proposed Comment to Section 269 in the attached draft.
- (2) Only financial harm (the expense of court reporting or preparing a transcript) can occur if court reporting or preparation of a transcript is unnecessarily permitted. In contrast, failure to prepare a record can jeopardize an appeal and cause incalculable harm.

We are, however, unaware of any authority on whether a civil litigant is entitled to personally request court reporting and a transcript pursuant to Section 269. The statute currently states that “either party” may request court reporting and a transcript in a civil case other than a limited civil case; Section 274c states that “either party” may request court reporting and a transcript in a limited civil case. But statutory provisions referring to “the plaintiff” or “either party” are not to be taken literally. 1 B. Witkin, *California Procedure Attorneys* § 265, at 330 (4th ed. 1996). Such provisions generally “do not change the rule that the procedural step must be taken for the party by his attorney of record.” *Id.* We will continue to search for authority on whether a civil litigant may personally request court reporting and a transcript, to help establish that the proposed reform is nonsubstantive.

CONFORMING REVISION OF GOVERNMENT CODE SECTION 69950

The attached draft would amend Section 269 to make clear that a nonparty is generally entitled to request preparation of a transcript. **A conforming revision of Government Code Section 69950 appears to be in order:**

Gov't Code § 69950 (amended). Transcription fee

SEC. ____ . Section 69950 of the Government Code is amended to read:

69950. The fee for transcription for original ribbon copy is eighty-five cents (\$0.85) for each 100 words, and for each copy for the party person buying the original made at the same time, fifteen cents (\$0.15) for each 100 words. The fee for a first copy to any other person shall be twenty cents (\$0.20) for each 100 words, and for

each additional copy, made at the same time, fifteen cents (\$0.15) for each 100 words.

Comment. Section 69950 is amended to reflect the fact that a nonparty is generally entitled to obtain a transcript. See Section 269 & Comment.

The second sentence of Government Code Section 69950 does not require revision, because it already refers to the fee for “any other *person*,” rather than for “any other *party*.”

COURT REPORTING ON ORDER OF “THE COURT”

Like existing law, proposed Section 269 would provide for court reporting on order of “the court.” Before the December meeting, Gary Cramer of the California Court Reporters Association expressed concern that this phrase “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.” First Supplement to Memorandum 2000-81, Exhibit p. 1. The staff viewed this as unlikely, but suggested adding the following language near the end of the Comment to Section 269:

Comment. ...

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

Section 269 is also amended to make technical changes.

The Commission decided not to make this revision. (Minutes, December 2000, pp. 10-12.)

After the meeting, Mr. Cramer reiterated his concern, explaining:

To clarify my previous statement 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,” it was meant to describe the situation such as has occurred in the Orange County Superior Court, the Sacramento Superior Court and perhaps others wherein an individual judge requested the use of a court reporter and was denied the use of a court reporter by a court-wide policy established by an executive committee or the presiding judge even though a reporter was available or could be made available. It was common practice for this same type of “policy” to be used to prohibit a judge in a municipal court from being granted the use of a court reporter notwithstanding an order by an individual judge in

a criminal action or proceeding or upon request by either party or an individual judge in a civil proceeding. This same policy remains in effect in various unified superior courts.

(Email from Gary Cramer to Nat Sterling (Dec. 21, 2000).)

In light of Mr. Cramer's renewed expression of concern, and explanation of the reason for his concern, **the staff renews its suggestion to add language to the Comment as shown above.**

"DISTRICT ATTORNEY" VERSUS "PROSECUTION"

Like existing law, proposed Section 269(a)(2) would provide for court reporting on request of "the district attorney." Mr. Cramer suggests using the term "prosecution" instead. This suggestion "is made on the basis that there are times when there is a conflict and the Attorney General acts as the prosecutor in place of the District Attorney." (Email from Gary Cramer to Nat Sterling (Dec. 21, 2000).) **This is a good suggestion and it should be implemented.**

GOVERNMENT CODE SECTION 72194.5

Before the December meeting, the California Deuce Defenders expressed concern that proposed Section 269(a)(2)-(3) would "differentiate between felony defendants and all others in the right to have a court reporter upon request." (First Supplement to Memorandum 2000-81, Exhibit p. 2.) 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.*

However, proposed Section 269(a)(2) merely tracks the existing language of Section 269(a) regarding court reporting in felony cases, and proposed Section 269(a)(3) tracks the language of Section 274c regarding court reporting in misdemeanor and infraction cases.

At the December meeting, the Commission considered the California Deuce Defenders' concern and the state of the law regarding the use of court reporting as opposed to electronic recording or similar methods. (See First Supplement to Memorandum 2000-81, pp. 2-5.) Recognizing that this is a volatile area, the Commission decided to continue with its approach of tracking the existing statutory language. (Minutes, December 2000, pp. 10-12.)

Mr. Cramer has since suggested that “another approach to the issues he raises may be to review and refine Government Code Section 72194.5, which provides that when a court reporter is unavailable, the court may electronically record proceedings in limited civil or misdemeanor or infraction cases.” (Email from Gary Cramer to Nat Sterling (Dec. 21, 2000).) Mr. Cramer explains that

most courts treat the word “available” as “present” and make no attempt to secure a court reporter. The original legislation implementing GC 72194.5 used the term “present,” but was ultimately amended to “available.”

The staff remains wary of making any revisions relating to electronic recording. We have not yet researched the legislative history of Government Code Section 72194.5, other than to determine that the term “available” has been in the provision ever since it was first enacted. See 1975 Cal. Stat. ch. 665, § 1. If the legislative history clearly establishes an intent to differentiate between whether a court reporter is “available” as opposed to “present in the courtroom,” it might be appropriate to amend the provision to make this more clear. **We will pursue such research if the Commission is interested.**

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

Staff Draft REVISED TENTATIVE RECOMMENDATION

Cases in Which Court Reporter Is Required

March 2001

This *revised* tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the revised tentative recommendation as it is to advise the Commission that you believe revisions should be made in it.

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **xxxx.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE
RECOMMENDATION

This recommendation would consolidate in one code section the rules that establish when a court reporter must be provided in civil and criminal cases. This nonsubstantive consolidation will simplify the codes. Nonsubstantive revisions should also be made to clarify the application of the statute, consistent with existing law.

This recommendation was prepared pursuant to Government Code Section 70219.

1 CASES IN WHICH COURT REPORTER IS REQUIRED

2 Two closely similar provisions specify when a court reporter is required in a
3 civil or criminal case.¹ These provisions are unnecessarily duplicative and should
4 be consolidated. Nonsubstantive revisions should also be made to clarify the
5 statute consistent with existing law.

6 **Consolidation of Duplicative Provisions**

7 Code of Civil Procedure Section 269(a) governs the use of a court reporter in a
8 felony case or a civil case other than a limited civil case.² Section 274c states
9 when shorthand reporting is required in a limited civil case or a misdemeanor or
10 infraction case.³ The only significant difference between these provisions, other
11 than the distinction in cases to which they apply, pertains to who is entitled to
12 request a court reporter in a criminal case. Section 269(a) requires shorthand
13 reporting “on the order of the court, the district attorney, or the attorney for the
14 defendant” in a felony case. In contrast, Section 274c only requires shorthand
15 reporting “on the order of the court” in a misdemeanor or infraction case.

16 This distinction does not merit a separate code provision. It is unnecessarily
17 cumbersome to have two substantively similar provisions, one for limited civil
18 cases, and misdemeanor and infraction cases, and the other for felony cases and all
19 other civil cases. For purposes of simplification, the provisions should be
20 consolidated into a single section that establishes when a court reporter must be
21 provided.

22 Accordingly, the Commission recommends broadening Section 269(a) to apply
23 to all civil and criminal cases, and repealing Section 274c. This would not be a

1. In its study on revision of the codes to accommodate trial court unification, the Commission recommended further study of the role of court reporters in a county in which the courts have unified. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 86 (1998). The Legislature directed this study. Gov’t Code § 70219.

2. Code of Civil Procedure Section 269(a) provides:

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, 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 to the jury, and all statements and remarks made and oral instructions given by the judge. If directed by the court, or requested by either 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.

For the full text of the provision, see “Proposed Legislation” *infra*. Unless otherwise specified, all further statutory references are to the Code of Civil Procedure.

3. Section 274c provides:

1 substantive change in the law, because the proposed legislation would continue the
2 current rules on who is entitled to request a court reporter in a criminal case.⁴

3 **Nonsubstantive Clarification**

4 Section 269 should also be revised to clarify its application in certain respects,
5 consistent with existing law. The Commission recommends the following
6 nonsubstantive revisions:

7 *Arguments of the attorneys.* The existing provisions require that the arguments of
8 “the prosecuting attorney” to the jury be included in the transcript. The statute
9 should be revised to refer simply to the arguments of “the attorneys,” consistent
10 with existing practice and with other statutes.⁵

11 *Official reporters pro tempore.* The statute should be amended to refer to official
12 reporters pro tempore, as well as official reporters, as is already done in other
13 provisions.⁶ This would be declaratory of existing law, because an official reporter
14 pro tempore performs the same duties as an official reporter.⁷

15 *Pro per felony defendant.* The statute should be amended to clarify its
16 application to a pro per felony defendant. It should be clear that a felony defendant
17 is entitled to a court reporter on request by the defendant personally, not just on
18 request by the defendant’s attorney. This would conform to existing interpretations
19 of the statute.⁸

274c. Official reporters must, at the request of either party or of the court in a limited civil case, or on the order of the court in a misdemeanor or infraction case, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court.

4. The rules in Sections 269(b) and (c) would not be affected by the Commission’s proposal to consolidate Sections 269(a) and 274c. Broadening Section 269(a) to cover limited civil cases and misdemeanor and infraction cases will not change the scope of subdivision (b), because subdivision (b) is expressly limited to felony cases. Similarly, Section 269(c), relating to computer transcripts, involves a distinct subject. It should be converted into a separate section. Neither consolidation of Section 274c with Section 269(a), nor relocation of Section 269(c), would affect the scope of the provision, which applies to all courts and all transcripts.

5. See, e.g., Gov’t Code § 72194.5 (“arguments of the attorneys”).

6. See, e.g., Bus. & Prof. Code § 8106; Code Civ. Proc. § 273; Gov’t Code §§ 68105, 68525, 69941, 69944, 69946, 69955.

7. Gov’t Code § 69945.

8. See generally *People v. Turner*, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) (“a verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised”); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record “in felony proceedings by statute (Code Civ. Proc., § 269.)”); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (a “felony defendant is, as a matter of right, entitled to have ‘taken down,’ all related testimony and oral proceedings”) (emphasis in original);

1 *Transcript for nonparty.* The statute should be amended to make clear that a
2 nonparty is generally entitled to obtain a transcript. This is consistent with
3 longstanding practice and other statutory language.⁹ It also conforms to
4 constitutional constraints.¹⁰ A nonparty is entitled to a transcript of a proceeding
5 that was open to the public,¹¹ a proceeding that was erroneously closed to the
6 public,¹² or a proceeding that was properly closed, once the reasons for closure are
7 no longer viable.¹³

8 **Scope and Effect of Proposal**

9 The present recommendation is nonsubstantive and would not affect the use of
10 court reporting in California. It is intended to aid courts and practitioners by
11 simplifying and clarifying existing law on when a court reporter is required.

12 The recommendation does not address any of the following significant issues
13 related to court reporting, some of which may be the subject of future Commission
14 recommendations:

- 15 (1) Whether the defendant in a misdemeanor or infraction case should be
16 entitled to request shorthand reporting.¹⁴

People v. Godeau, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) (“In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or an order of the court. (Code Civ. Proc., § 269.)”); People v. Hollander, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

9. See Section 269(c) (“Any court, party, or person may request deliver of any transcript in a computer-readable form”) (emphasis added); Gov’t Code § 69950 (fee for copy of transcript for “any other person”) (emphasis added).

10. See, e.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (media entitled to transcript of preliminary hearing); Fisher v. King, 232 F.3d 391, 397 (4th Cir. 2000) (general public and press “enjoy a qualified right of access under the First Amendment to criminal proceedings and transcripts thereof”) (emphasis added); United States v. Antar, 38 F.3d 1348, 1360-61 (3d Cir. 1994) (“First Amendment right of access must extend equally to transcripts as to live proceedings”); United States v. Berger, 990 F. Supp. 1054, 1057 (C.D. Ill. 1998) (“There is no question that a written transcript of the Governor’s deposition would be made available to the public upon admission of his testimony before the jury”); State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas, 73 Ohio St. 3d 19, 21, 652 N.E.2d 179 (1995) (right of access “includes both the live proceedings and the transcripts which document those proceedings”); see also NBC Subsidiary (KNBC-TV), Inc. v. Superior court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access applies to civil as well as criminal cases).

11. See *State ex rel. Scripps Howard Broadcasting Co.*, 73 Ohio St. 3d at 21.

12. See generally *Press-Enterprise Co.*, 478 U.S. at 15.

13. See *Phoenix Newspapers, Inc. v. KPNX*, 156 F.3d 940, 947-48 (9th Cir. 1998).

14. Appellate courts have provided conflicting guidance on whether a nonindigent defendant is constitutionally entitled to a verbatim record at public expense in a misdemeanor or infraction case. Compare *In re Armstrong*, 126 Cal. App. 3d 565, 574, 178 Cal. Rptr. 902 (1981) (“upon request therefor, there is a constitutional right that a verbatim record be provided at public expense for all defendants in misdemeanor matters”), with *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (“[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). The courts have not resolved whether electronic recording or a method besides shorthand reporting is sufficient to satisfy the requirement of a free verbatim record on request of an indigent defendant in a misdemeanor or infraction case. Electronic

- 1 (2) Whether statutes authorizing the court to order the county treasurer to
2 pay transcript fees are obsolete in light of recent changes in trial court
3 funding.¹⁵
- 4 (3) Whether distinctions in the superior and municipal court procedures for
5 charging, depositing, and paying court reporter fees, and other statutes
6 providing special rules for municipal courts, should be maintained in a
7 unified court.¹⁶
- 8 (4) Whether the statutes governing reporters and their fees in various
9 counties require revision.¹⁷

recording is permitted on order of the court in a misdemeanor or infraction case if a court reporter is unavailable (Gov't Code § 72194.5), but there does not appear to be any statute requiring electronic recording on request of a defendant in a misdemeanor or infraction case. Because of the uncertainty, and because changing the law on these points would involve significant cost considerations, the present recommendation does not address the current scheme.

15. See, e.g., Gov't Code §§ 69952, 70131. The Legislature has directed the Commission to review these statutes, among others, and make recommendations to the Legislature as to their disposition. Gov't Code § 71674. Although both of these provisions refer to Code of Civil Procedure Section 269, neither would be affected by consolidation of Sections 269(a) and 274c. The cross-references incorporate matters required by Section 269 to be included in a transcript, not cases in which a transcript may be ordered.

16. See, e.g., Gov't Code §§ 68086 (procedures for court reporter fees), 72197 (pro tempore phonographic reporter of municipal court). The Commission is reviewing the codes for provisions that are obsolete due to the elimination of the municipal courts. See Gov't Code § 71674; 1999 Cal. Stat. res. ch. 81. (The Commission in another context has proposed a technical change in Government Code Section 68086. See *Expired Pilot Projects*, 30 Cal. L. Revision Comm'n Reports 327 (2000).)

17. The Commission has previously identified this as a matter requiring further legislative attention. "Among the county-specific statutes that must be harmonized in a county in which the courts unify are those governing appointment and compensation of municipal court reporters, and regulating their fees." *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 77 (1998). The Legislature has directed the Law Revision Commission to review these statutes, among others, and make recommendations to the Legislature as to their disposition. Gov't Code § 71674.

PROPOSED LEGISLATION

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

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

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

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

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

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

16 ~~(b) Where directed by the court, or requested by either a party, or where~~
17 ~~requested by a nonparty with respect to a proceeding open to public access, the~~
18 ~~official reporter or official reporter pro tempore shall, within such reasonable time~~
19 ~~after the trial of the case as the court may designate, write the transcripts out, or~~
20 ~~the specific portions thereof as may be requested, in plain and legible longhand, or~~
21 ~~by typewriter, or other printing machine, and certify that the transcripts were~~
22 ~~correctly reported and transcribed, and when directed by the court, file the~~
23 ~~transcripts with the clerk of the court.~~

24 ~~(b)~~

25 ~~(c) In any case where a defendant is convicted of a felony, after a trial on the~~
26 ~~merits, the record on appeal shall be prepared immediately after the verdict or~~
27 ~~finding of guilt is announced unless the court determines that it is likely that no~~
28 ~~appeal from the decision will be made. The court's determination of a likelihood~~
29 ~~of appeal shall be based upon standards and rules adopted by the Judicial Council.~~

30 ~~(e) Any court, party, or person may request delivery of any transcript in a~~
31 ~~computer-readable form, except that an original transcript shall be on paper. A~~
32 ~~copy of the original transcript ordered within 120 days of the filing or delivery of~~
33 ~~the transcript by the official reporter shall be delivered in computer-readable form~~
34 ~~upon request if the proceedings were produced utilizing computer-aided~~
35 ~~transcription equipment. Except as modified by standards adopted by the Judicial~~
36 ~~Council, the computer-readable transcript shall be on disks in standard ASCII code~~
37 ~~unless otherwise agreed by the reporter and the court, party, or person requesting~~
38 ~~the transcript. Each disk shall be labeled with the case name and court number, the~~
39 ~~dates of proceedings contained on the disk, and the page and volume numbers of~~

1 the data contained on the disk. Each disk as produced by the court reporter shall
2 contain the identical volume divisions, pagination, line numbering, and text of the
3 certified original paper transcript or any portion thereof. Each disk shall be
4 sequentially numbered within the series of disks.

5 **Comment.** Subdivision (a) of Section 269 is amended to continue former Section 274c without
6 substantive change.

7 Subdivision (a) is also amended to substitute “arguments of the attorneys” for “arguments of
8 the prosecuting attorney,” consistent with standard practice. See, e.g., Gov’t Code § 72194.5
9 (“arguments of the attorneys”).

10 Subdivision (a) is further amended to refer to official reporters pro tempore, as well as official
11 reporters. This is not a substantive change. See Gov’t Code § 69945 (official reporter pro tempore
12 shall perform same duties as official reporter).

13 Finally, subdivision (a) is amended to make clear that a felony defendant, whether represented
14 by counsel or in pro per, is entitled to a court reporter on request by the defendant personally or
15 by the defendant’s attorney (if any). This is not a substantive change. See generally *People v.*
16 *Turner*, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) (“a verbatim record is
17 implicitly among the rights of which a defendant appearing in propria persona must be
18 apprised”); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983)
19 (California confers right to free verbatim record “in felony proceedings by statute (Code Civ.
20 Proc., § 269.)”); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (a
21 “felony defendant *is*, as a matter of right, entitled to have ‘taken down,’ all related testimony and
22 oral proceedings”) (emphasis in original); *People v. Godeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal.
23 Rptr. 424 (1970) (“In California felony proceedings a court reporter must be present if requested
24 by the defendant, the district attorney, or an order of the court. (Code Civ. Proc., § 269.)”); *People*
25 *v. Hollander*, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro
26 per indigent defendant was prejudicial error).

27 Subdivision (b) is amended to make clear that a nonparty is generally entitled to request
28 preparation of a transcript. This is consistent with longstanding practice and conforms to
29 constitutional constraints. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)
30 (media entitled to transcript of preliminary hearing); *Fisher v. King*, 232 F.3d 391, 397 (4th Cir.
31 2000) (general public and press “enjoy a qualified right of access under the First Amendment to
32 criminal proceedings *and transcripts thereof*”) (emphasis added); *United States v. Antar*, 38 F.3d
33 1348, 1360-61 (3d Cir. 1994) (“First Amendment right of access must extend equally to
34 transcripts as to live proceedings”); *United States v. Berger*, 990 F. Supp. 1054, 1057 (C.D. Ill.
35 1998) (“There is no question that a written transcript of the Governor’s deposition would be made
36 available to the public upon admission of his testimony before the jury”); *State ex rel. Scripps*
37 *Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St. 3d 19, 21,
38 652 N.E.2d 179 (1995) (right of access “includes both the live proceedings and the transcripts
39 which document those proceedings”); see also *NBC Subsidiary (KNBC-TV), Inc. v. Superior*
40 *court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access
41 applies to civil as well as criminal cases). A nonparty is entitled to a transcript of a proceeding
42 that was open to the public, see *State ex rel. Scripps Howard Broadcasting Co.*, 73 Ohio St. 3d at
43 21, a proceeding that was erroneously closed to the public, see generally *Press-Enterprise Co.*,
44 478 U.S. at 15, or a proceeding that was properly closed, once “the competing interests
45 precipitating closure are no longer viable,” see *Phoenix Newspapers, Inc. v. KPNX*, 156 F.3d
46 940, 947-48 (9th Cir. 1998).

47 Subdivision (b) is also amended to refer to official reporters pro tempore, as well as official
48 reporters.

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

50 Section 269 is also amended to make technical changes.

1 **Code Civ. Proc. § 271 (added). Computer-readable transcripts**

2 SEC. 2. Section 271 is added to the Code of Civil Procedure, to read:

3 271. (a) Any court, party, or person may request delivery of any transcript in a
4 computer-readable form, except that an original transcript shall be on paper. A
5 copy of the original transcript ordered within 120 days of the filing or delivery of
6 the transcript by the official reporter or official reporter pro tempore shall be
7 delivered in computer-readable form upon request if the proceedings were
8 produced utilizing computer-aided transcription equipment.

9 (b) Except as modified by standards adopted by the Judicial Council, the
10 computer-readable transcript shall be on disks in standard ASCII code unless
11 otherwise agreed by the reporter and the court, party, or person requesting the
12 transcript. Each disk shall be labeled with the case name and court number, the
13 dates of proceedings contained on the disk, and the page and volume numbers of
14 the data contained on the disk. Each disk as produced by the court reporter shall
15 contain the identical volume divisions, pagination, line numbering, and text of the
16 certified original paper transcript or any portion thereof. Each disk shall be
17 sequentially numbered within the series of disks.

18 **Comment.** Section 271 continues former Section 269(c) without substantive change.

19 **Code Civ. Proc. § 274c (repealed). Reporting of limited civil cases and misdemeanor and**
20 **infraction cases**

21 SEC. 3. Section 274c of the Code of Civil Procedure is repealed.

22 ~~274c. Official reporters must, at the request of either party or of the court in a~~
23 ~~limited civil case, or on the order of the court in a misdemeanor or infraction case,~~
24 ~~take down in shorthand all the testimony, the objections made, the rulings of the~~
25 ~~court, the exceptions taken, all arraignments, pleas and sentences of defendants in~~
26 ~~criminal cases, the arguments of the prosecuting attorney to the jury, and all~~
27 ~~statements and remarks made and oral instructions given by the judge; and if~~
28 ~~directed by the court, or requested by either party, must, within such reasonable~~
29 ~~time after the trial of such case as the court may designate, write out the same, or~~
30 ~~such specific portions thereof as may be requested, in plain and legible longhand,~~
31 ~~or by typewriter, or other printing machine, and certify to the same as being~~
32 ~~correctly reported and transcribed, and when directed by the court, file the same~~
33 ~~with the clerk of the court.~~

34 **Comment.** Former Section 274c is continued in Section 269(a) without substantive change.

35 **Gov't Code § 72197 (amended). Pro tempore phonographic reporter of municipal court**

36 SEC. 4. Section 72197 of the Government Code is amended to read:

37 72197. Whenever such request a request pursuant to Section 72196 has been
38 granted and any official reporter of the superior court has been assigned to act as a
39 pro tempore phonographic reporter of the municipal court, such the reporter shall,
40 during the period of such the assignment to the municipal court, perform the duties
41 of an official reporter of such the municipal court and during the time of any such
42 the assignment such the reporter shall be subject to the provisions of Sections

1 69942 to 69955, inclusive, and Sections ~~273 and 274e~~ 269 and 273 of the Code of
2 Civil Procedure.

3 **Comment.** Section 72917 is amended to correct cross-references. The substance of former
4 Code of Civil Procedure Section 274c is continued in Code of Civil Procedure Section 269.

5 **Penal Code § 190.9 (amended). Record in death penalty cases**

6 SEC. 5. Section 190.9 of the Penal Code is amended to read:

7 190.9. (a)(1) In any case in which a death sentence may be imposed, all
8 proceedings conducted in the municipal and superior courts, including all
9 conferences and proceedings, whether in open court, in conference in the
10 courtroom, or in chambers, shall be conducted on the record with a court reporter
11 present. The court reporter shall prepare and certify a daily transcript of all
12 proceedings commencing with the preliminary hearing. Proceedings prior to the
13 preliminary hearing shall be reported but need not be transcribed until the
14 municipal or superior court receives notice as prescribed in paragraph (2) of
15 subdivision (a).

16 (2) Upon receiving notification from the prosecution that the death penalty is
17 being sought, the superior court shall notify the court in which the preliminary
18 hearing took place. Upon this notification, the court in which the preliminary
19 hearing took place shall order the transcription and preparation of the record of all
20 proceedings prior to and including the preliminary hearing in the manner
21 prescribed by the Judicial Council in the rules of court. The record of all
22 proceedings prior to and including the preliminary hearing shall be certified by the
23 court no later than 120 days following notification by the superior court unless the
24 superior court grants an extension of time pursuant to rules of court adopted by the
25 Judicial Council. Upon certification, the court in which the preliminary hearing
26 took place shall forward the record to the superior court for incorporation into the
27 superior court record.

28 (b)(1) The court shall assign a court reporter who uses computer-aided
29 transcription equipment to report all proceedings under this section.

30 (2) Failure to comply with the requirements of this section relating to the
31 assignment of court reporters who use computer-aided transcription equipment
32 shall not be a ground for reversal.

33 (c) Any computer-readable transcript produced by court reporters pursuant to
34 this section shall conform to the requirements of ~~subdivision (c) of Section 269~~
35 Section 271 of the Code of Civil Procedure.

36 **Comment.** Section 190.9 is amended to is amended to correct a cross-reference. The substance
37 of former Code of Civil Procedure Section 269(c) is continued in Code of Civil Procedure Section
38 271.

39 **Uncodified (added). Effect of act**

40 SEC. 6. Nothing in this act is intended to change the extent to which court
41 reporter services or electronic reporting may be used in the courts.