

## Memorandum 2001-64

### **Cases in Which Court Reporter Is Required: Comments on Revised Tentative Recommendation**

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At the March meeting, the Commission approved a revised tentative recommendation on *Cases in Which Court Reporter Is Required*. Since then, the Commission has received the following comments relating to this proposal:

	<i>Exhibit p.</i>
1. Gary Cramer, California Court Reporters Ass'n (April 8, 2001) . . . . .	1
2. Gary Cramer, California Court Reporters Ass'n (May 6, 2001) . . . . .	3
3. Larry Jackson, Los Angeles Superior Court (July 13, 2001) . . . . .	4
4. Terry Weiss, Los Angeles Superior Court (Sept. 12, 2001) . . . . .	5
5. Dennis Murray, Tehama Superior Court (Aug. 8, 2001) . . . . .	6

This memorandum discusses these comments and other issues relating to the proposal. A draft recommendation is attached for the Commission's consideration. The Commission needs to decide whether to approve that draft as a final recommendation (as is, or with revisions), for printing and submission to the Legislature.

#### RECAP OF THE REVISED TENTATIVE RECOMMENDATION

Two very similar provisions specify circumstances in which a court reporter is required. Code of Civil Procedure Section 269(a) governs the use of a court reporter in an unlimited civil case or a felony case. (Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.) Section 274c governs the use of a court reporter in a limited civil case or a misdemeanor or infraction case. The revised tentative recommendation proposes to consolidate these provisions into a single section, because they are unnecessarily duplicative. The revised tentative recommendation also proposes nonsubstantive revisions to clarify the application of the statute, consistent with existing law.

## OVERVIEW OF COMMENTS

Reaction to the revised tentative recommendation was mixed. Gary Cramer of the California Court Reporters Association (“CCRA”) expressed support for the proposal, but suggested some improvements. (Exhibit pp. 1-3.) On behalf of the Los Angeles Superior Court, litigation support manager Paul Runyon voiced concerns regarding the proposal. (Exhibit p. 4; see also Exhibit p. 5.) As discussed below, these concerns essentially amount to dissatisfaction with existing law.

The Commission also received a suggestion from Dennis Murray (Presiding Judge, Tehama Superior Court) regarding additional material to incorporate in the proposal. (Exhibit p. 6.)

## SUPPORT

Gary Cramer of CCRA sent two email messages relating to the revised tentative recommendation, one after the revised tentative recommendation was approved but before it was sent out (Exhibit pp. 1-2), and another after the revised tentative recommendation was finalized and circulated (Exhibit p. 3). In his first message, he made a number of suggestions, some of which the Commission had already adopted, one of which the staff addressed before finalizing the revised tentative recommendation, and some of which have not yet been considered by the Commission nor addressed in the revised tentative recommendation. In his second message, he expressed confidence that the revised tentative recommendation would be acceptable to CCRA:

*I believe the document as drafted presents a product that reflects an appropriate redraft of the various sections that will be acceptable to the California Court Reporters Association. I believe this draft makes no substantive change to the requirement of a court reporter and accomplishes the goal of consolidating and clarifying the provisions on cases in which a court reporter is required.*

(Exhibit p. 3 (emphasis added).) Mr. Cramer also mentioned a technical issue that is discussed below, along with the suggestions in his first email message that the Commission has not previously adopted. CCRA itself (as opposed to Gary Cramer) did not comment on the revised tentative recommendation.

**Shorthand Reporting of Statements, Remarks, and Oral Instructions Given By the Judge (Section 269(a))**

In specified circumstances, Section 269(a) calls for shorthand reporting of “all statements and remarks made and oral instructions given *by the judge*.” (Emphasis added.) The revised tentative recommendation would leave this language intact.

Mr. Cramer suggests, however, that the word “judge” be replaced with “court” or “bench officer.” (Exhibit p. 1.) He bases this suggestion on “the significant number of subordinate bench officers presiding over various proceedings.” *Id.*

There is, however, at least one provision that specifically pertains to court reporting for subordinate judicial officers:

**Gov’t Code § 70141.11. Contra Costa County subordinate judicial officers**

70141.11. In Contra Costa County, the superior court may provide that the commissioner, and the referee who shall have been a member of the State Bar for a period of at least five years immediately preceding his or her appointment and has been appointed pursuant to Section 247 of the Welfare and Institutions Code, shall, in addition to the duties prescribed in Section 259 of the Code of Civil Procedure, perform the duties of a probate commissioner appointed pursuant to Section 69897 of this code.

This section shall not affect any of the powers or duties otherwise authorized for the referee appointed pursuant to Section 247 of the Welfare and Institutions Code.

The commissioner shall be paid the salary recommended by the superior court and approved by the board of supervisors plus reimbursement for necessary, reasonable and actual expenses in connection with official duties. *Any court reporting functions for the commissioner may be by electronic or mechanical means and devices.*

(Emphasis added.) As discussed in the study on statutes made obsolete by trial court restructuring, this provision authorizing electronic or mechanical recording for a Contra Costa County commissioner is in use. There would be resistance to the more expensive alternative of shorthand reporting. Memorandum 2001-8, pp. 9-10. So as to strictly maintain the status quo on electronic recording, the Commission decided to preserve the Contra Costa provision in the study of trial court restructuring. *Id.*; see also February Minutes, pp. 18-19.

But that provision is apparently unique and it is illogical to distinguish between different types of presiding officers, as opposed to different types of

proceedings, in determining whether a proceeding is subject to shorthand reporting. It would be absurd to interpret Section 269(a) to require shorthand reporting of oral instructions given by a judge, but not oral instructions given by a subordinate judicial officer in the same type of case. While this should already be clear, **it might nonetheless be helpful to revise proposed Section 269(a) along the lines suggested by Mr. Cramer:**

269. (a) An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, and sentences, arguments of the attorneys to the jury, all statements and remarks made and oral instructions given by the judge or other judicial officer, 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 prosecution, the defendant, or the attorney for the defendant.

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

**Comment.** ... Subdivision (a) is also amended to make clear that it requires shorthand reporting of oral instructions regardless of whether those instructions are given by a judge or by a subordinate judicial officer. For an exception to this rule, see Gov't Code § 70141.11 (court reporting for Contra Costa County Commissioner).

Finally, subdivision (a) is amended ....

### **Transcript of a Confidential Proceeding in a Criminal Case (Section 269(a); proposed Section 269(b))**

Section 269 states that 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.” (Emphasis added.) The revised tentative recommendation would revise this sentence to state that where

directed by the court, or requested by either a party, or where requested by a nonparty with respect to a proceeding to which the public is entitled to 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.

Mr. Cramer cautions that this sentence as re-written “could be construed to require preparation and delivery of a transcript of confidential proceedings to a pro per defendant in a criminal case.” (Exhibit p. 2.)

He explains that there “are times when a lawyer for a criminal defendant is given a transcript of confidential proceedings and instructed not to share the information contained therein with his or her client.” *Id.* “Under the same circumstances a pro per criminal defendant is typically not given the transcript unless appropriate redacting can occur.” *Id.*

The staff appreciates the need for some degree of confidentiality with regard to matters such as the identity of an informant in a criminal case. But Section 269 already states that a transcript is to be prepared if requested “by either party.” The statute does not specify whether the transcript is to be provided directly to a criminal defendant, as opposed to the defendant’s attorney, nor does it specify whether the transcript is to be provided to a pro per criminal defendant in unredacted form. Likewise, the proposed amendment would not address these matters. We fail to see how the proposed amendment could be construed to afford a pro per defendant greater access to confidential information than existing law. **Absent further explanation, we are inclined to leave the amendment of Section 269 as is.**

It might be helpful, however, to revise the language relating to computer-readable transcripts, which would be relocated from Section 269(c) to proposed Section 271. **It should be made clear that a computer-readable version of a transcript is available only where a person is entitled to a hard copy version:**

271. (a) Any court, party, or person entitled to a transcript may request delivery of any transcript that it be delivered 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 or official reporter pro tempore shall be delivered in computer-readable form upon request if the proceedings were produced utilizing computer-aided transcription equipment.

(b) 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 official 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.** Section 271 continues former Section 269(c) without substantive change, except to insert subdivisions, refer to official reporters pro tempore as well as official reporters, and make clear that a computer-readable version of a transcript is available only where a person is entitled to a hard copy version. These revisions are nonsubstantive. See Gov't Code § 69945 (official reporter pro tempore shall perform same duties as official reporter).

### **Computer-readable Transcript (Section 269(c); proposed Section 271)**

The provision on computer-readable transcripts (Section 269(c); proposed Section 271) provides in part that “[e]ach 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.” Mr. Cramer reports that court reporters cannot comply with this requirement “in the strictest sense of the language.” (Exhibit p. 2.)

By phone, Mr. Cramer explained that when corrections are made to a transcript, they are handwritten on the hard copy original. Where material is added, the computer version often cannot be conformed to the hard copy without altering the line numbering. For example, a court reporter might have to single-space a page to make room for new material.

This minor technical problem could be addressed by revising the sentence in question as follows:

Each Except where modifications are necessary to reflect corrections of a transcript, each disk as produced by the official reporter shall contain the identical volume divisions, pagination, line numbering, and text of the certified original paper transcript or any portion thereof.

If this revision were combined with the preceding one, proposed Section 271 would read:

271. (a) Any court, party, or person entitled to a transcript may request that it be delivered 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 or official reporter pro tempore shall be delivered in computer-readable form upon request if the proceedings were produced utilizing computer-aided transcription equipment.

(b) 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. Except where modifications are necessary to reflect corrections of a transcript, each disk as produced by the official 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.** Section 271 continues former Section 269(c) without change, except to insert subdivisions, refer to official reporters pro tempore as well as official reporters, make clear that a computer-readable version of a transcript is available only where a person is entitled to a hard copy version, and clarify how the provision applies where a transcript is corrected. These revisions are nonsubstantive. See Gov't Code § 69945 (official reporter pro tempore shall perform same duties as official reporter).

**We would incorporate this version of Section 271 into the Commission's proposal, as shown in the attached draft.**

#### **New Technology (Gov't Code § 69950)**

The revised tentative recommendation would amend Government Code Section 69950 to conform to the rule that a nonparty is generally entitled to obtain a transcript. Mr. Cramer comments that this amendment "is appropriate." (Exhibit p. 3.) He points out, however, that he could suggest further revisions to "update this section to reflect the current use of computer equipment and manner of producing transcripts." *Id.*

The staff discussed this matter with Mr. Cramer and prepared the following alternative amendment in light of that discussion:

**69950.** The fee for transcription for original ribbon or printed copy is eighty-five cents (\$0.85) for each 100 words, and for each copy ~~for the party buying the original made purchased~~ at the same time by the person buying the original, 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 purchased at the same time, fifteen cents (\$0.15) for each 100 words.

**Comment.** Section 69950 is amended to conform to the rule that a nonparty is generally entitled to obtain a transcript. See Code Civ. Proc. § 269 & Comment. The section is also amended to reflect changes in technology.

This amendment was incorporated in a draft of court reporter legislation that the staff sent to interested parties in the study on statutes made obsolete by trial court restructuring. No objections have been received. As the attached draft reflects, **we recommend that the above amendment be incorporated into the Commission's proposal on *Cases in Which Court Reporter Is Required*.**

#### **Obsolete References to the Municipal Courts (Gov. Code §§ 72196, 72197)**

Government Code Sections 72196 and 72197 concern assignment of an official reporter of the superior court to report proceedings in a municipal court:

72196. Whenever the business of the court requires, the presiding or sole judge of the municipal court may request the services of one or more official reporters of the superior court within the same county to act as pro tempore phonographic reporter of the municipal court in criminal cases. Any such request shall be addressed to the presiding judge of the superior court. Such request shall be granted or denied in the manner and subject to the provisions set forth in Article 9 (commencing with Section 69941) or Chapter 5 of Title 8 of this code.

72197. Whenever such request has been granted and any official reporter of the superior court has been assigned to act as a pro tempore phonographic reporter of the municipal court, such reporter shall during the period of such assignment to the municipal court, perform the duties of an official reporter of such municipal court and during the time of any such assignment such reporter shall be subject to the provisions of Sections 69942 to 69955, inclusive, and Sections 273 and 274c of the Code of Civil Procedure.

The draft approved at the March meeting would have amended Government Code Section 72197 to reflect the proposed relocation of the substance of Code of Civil Procedure Section 274c. The draft did not include Government Code Section 72196, because that provision is unrelated to the proposal to consolidate Code of Civil Procedure Sections 269 and 274c.

In the email message that he sent after the revised tentative recommendation was approved but before it was finalized, Mr. Cramer pointed out that Government Code Sections 72196 and 72197 should be repealed to reflect unification of the last remaining municipal court. (Exhibit p. 2.) This point was so clearly well-taken that the staff incorporated the proposed repeal of Government Code Section 72197 into the revised tentative recommendation. We did not incorporate the proposed repeal of Government Code Section 72196 into the revised tentative recommendation, but have included it in the draft legislation on statutes made obsolete by trial court restructuring.

We have received no negative comments regarding these proposals. **For purposes of the instant study, the Commission should approve the repeal of Government Code Section 72197, as shown in the attached draft.**

### **Transcript in Death Penalty Case (Penal Code § 190.9)**

Similarly, the draft approved at the March meeting would amend Penal Code Section 190.9 to conform a cross-reference. In the revised tentative recommendation, the staff made further revisions to reflect unification of the municipal and superior courts. The attached draft includes additional revisions along these lines, which have been circulated to interested parties in the study on statutes made obsolete by trial court restructuring:

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

(2) Upon receiving notification from the prosecution that the death penalty is being sought, the superior court shall ~~notify the court in which the preliminary hearing took place.~~ Upon this notification, ~~the court in which the preliminary hearing took place~~ shall order the transcription and preparation of the record of all proceedings prior to and including the preliminary hearing in the manner prescribed by the Judicial Council in the rules of court. The record of all proceedings prior to and including the preliminary hearing shall be certified by the court no later than 120 days following notification ~~by the superior court~~ unless the superior

~~court grants an extension of time is extended~~ pursuant to rules of court adopted by the Judicial Council. Upon certification, ~~the court in which the preliminary hearing took place shall forward the record to the superior court for incorporation~~ the record of all proceedings is incorporated into the superior court record.

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

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

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

**Comment.** Subdivision (a) of Section 190.9 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (c) is amended to correct a cross-reference. The substance of former Code of Civil Procedure Section 269(c) is continued in Code of Civil Procedure Section 271.

In the study of statutes made obsolete by trial court restructuring, CCRA offered a further suggestion regarding Penal Code Section 190.9. The group maintains that the provision should be revised to make clear how it applies where the superior court is notified before the preliminary hearing that the death penalty is being sought:

Many superior courts presently receive notification from the prosecution that the death penalty is being sought at the time the original Complaint is filed prior to the preliminary hearing. As drafted, in such superior courts daily transcripts would be required starting from the original arraignment prior to the preliminary hearing. We don't object to such a procedure because it would ensure and make more efficient preparation of transcripts of proceedings prior to the preliminary hearing. However, it does appear to be inconsistent with present statutory requirements.

(Letter from John Avery, CCRA President, to Nathaniel Sterling, p. 3 (Aug. 8, 2001).)

The staff discussed this matter with Gary Cramer, pointing out that Penal Code Section 190.9(a) only requires "a daily transcript of all proceedings commencing with the preliminary hearing," and Penal Code Section 190.9(b)

does not refer to a daily transcript. Mr. Cramer acknowledged that Section 190.9(b) does not explicitly require a daily transcript, but he expressed confidence that courts would interpret it to implicitly require a daily transcript of all proceedings occurring after the court is notified that the death penalty is being sought. He considers this approach unnecessary and wasteful. He believes that the statute should be revised to specify that a daily transcript is not required before the preliminary hearing, but he does not consider this a major issue.

The staff is not inclined to try to address this point in the context of the Commission's proposal. The problem CCRA raises is unrelated to the proposed reforms. Attempting to resolve it may complicate this project. Instead of making further revisions to specify when a daily transcript must be prepared, **we would proceed with the amendment previously circulated and shown above**, which just conforms a cross-reference and updates the statute to reflect unification of the municipal and superior courts.

#### OPPOSITION

Paul Runyon, litigation support manager for the Los Angeles Superior Court, has raised concerns regarding the revised tentative recommendation. (Exhibit p. 4.) These concerns relate to the requirement that the court provide official shorthand reporting at the request of a party in a limited civil case.

#### Statutory Framework

Section 269(a) requires an official reporter of the superior court to provide shorthand reporting "at the request of either party, or of the court in a civil case other than a limited civil case." Section 274c requires an official reporter to provide shorthand reporting "at the request of either party or of the court in a limited civil case." The revised tentative recommendation would consolidate these requirements, repealing Section 274c and revising Section 269(a) to require an official reporter of the superior court to provide shorthand reporting "[i]n a civil case, on the order of the court or at the request of a party."

Mr. Runyon initially maintained that this would be a substantive change. He took the position that existing law does not require official shorthand reporting at the request of a party in a limited civil case. He "viewed 274c as being an anachronism from when there were still municipal courts." (Exhibit p. 4.) Further, Section 269(a) applies only to "a civil case other than a limited civil case." Los Angeles Superior Court has "used the exception language of 269 CCP

as justification” for not supplying shorthand reporters in limited civil cases. *Id.*; see also Exhibit p. 5. When parties ask for such a case to be reported, the court advises them to “hire CSRs and compensate them privately.” *Id.*

The staff found this position astonishing and has since discussed it at length with Mr. Runyon. We pointed out that before unification Section 269(a) required official shorthand reporting at the request of a party in a civil action in superior court, and Section 274c required official shorthand reporting at the request of a party in a civil action in municipal court. In 1998, these provisions were amended to refer to limited civil cases, so as to “accommodate unification of the municipal and superior courts in a county.” Sections 269 & 274c Comments. A limited civil case is a case of a type traditionally brought in municipal court. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51, 64-65 (1998); see also Section 85 Comment.

These amendments were part of the Commission’s overall effort to “preserve existing rights and procedures despite unification, with no disparity of treatment between a party appearing in municipal court and a similarly situated party appearing in superior court as a result of unification of the municipal and superior courts in the county.” *Revision of Codes, supra*, 28 Cal. L. Revision Comm’n Reports at 60. The 1998 act expressly states that it is not intended to affect the use of shorthand reporting:

Nothing in this act is intended to change the extent to which court reporter services or electronic reporting may be used in the courts. It is the intent of this act to provide for court reporter services and electronic reporting in a county in which there is no municipal court to the same extent as otherwise provided by law in a county in which there is a municipal court.

1998 Cal. Stat. ch. 931, § 507. Given this history, it is clear that the amendments of Sections 269 and 274c did not effect any change in the use of court reporter services. There is no basis for maintaining that those amendments eliminated the requirement that official shorthand reporting be provided at the request of a party in the types of cases now known as limited civil cases.

On learning the background of the amendments, Mr. Runyon acknowledged that Los Angeles Superior Court would have to reassess its position on the legal requirements. Regardless of what the law requires, however, he says there would be practical problems in Los Angeles County with providing official shorthand reporters on request in limited civil cases.

## **Practical Issues**

It has been the court's "standard practice for at least a decade not to provide reporters" in the types of cases now known as limited civil cases. (Exhibit p. 5.) Terry Weiss (Manager, Court Reporter Services) believes that changing this policy would cause "severe staffing difficulties." *Id.* In particular, the court reports that if parties were able to request official shorthand reporting in a limited civil case, the following problems would occur:

(1) The requests would come into our office the day before the need for a reporter occurs. Attorneys often do not know until the day before whether a hearing is actually going forward or not. Even if we had a reporter available the first day, depending on the number of sick calls on any given day, we may not have a reporter available the second or any consecutive day the limited civil case may be in trial. Superior Court would not leave a felony case not reported in order that a reporter finish a limited civil case.

(2) We currently are having difficulty staffing the courtrooms with reporters without having to provide coverage for limited civil. A change in the language would mean Court Reporter Services would need to budget for more reporters in order to provide reporters when required.

(3) There is a nationwide shortage of court reporters. We in Los Angeles expect to start having major recruiting difficulties in maintaining the current number of reporters necessary to cover unlimited civil, criminal and juvenile courtrooms.

*Id.*; see also Exhibit p. 4.

Mr. Runyon recognizes that these problems could be alleviated to some extent by relying on Government Code Section 72194.5, which permits electronic recording in a limited civil case or a misdemeanor or infraction case when a court reporter is unavailable:

72194.5. Whenever an official court reporter or temporary court reporter is unavailable to report an action or proceeding in a court, subject to the availability of approved equipment and equipment monitors, the court may order that, in a limited civil case, or a misdemeanor or infraction case, the action or proceeding be electronically recorded, including all the testimony, the objections made, the ruling of the court, the exceptions taken, all arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the attorneys to the jury, and all statements and remarks made and oral instructions given by the judge. The court shall assign available reporters first to report preliminary hearings

and then to other proceedings. A transcript derived from an electronic recording may be utilized whenever a transcript of court proceedings is required. The electronic recording device and appurtenant equipment shall be of a type approved by the Judicial Council for courtroom use.

But he does not think that this relief valve is adequate to fully resolve the problems. As yet, he has not explained in detail why the provision is unsatisfactory, nor has he suggested any specific improvements.

### **Analysis**

The concerns raised by Los Angeles Superior Court really amount to dissatisfaction with existing law, not dissatisfaction with the Commission's nonsubstantive proposal to consolidate Sections 269 and 274c. **The staff recommends that the Commission proceed with that proposal despite the court's concerns.**

If Los Angeles Superior Court would have serious difficulty complying with existing law, however, that problem should be independently addressed. At this point, it is not clear that the Commission could be of assistance in such an effort. Because issues relating to electronic recording are highly sensitive, it might be hard for the Commission to be effective in this area. Also, legislative reform might not be the best approach. There might be other, more effective, means of addressing whatever problems may exist.

For now, we would leave it to the court to deal with the situation. If further information suggests that the Commission could play a useful role, we will bring that to the Commission's attention.

### **POSSIBLE ADDITION TO THE PROPOSAL**

The legislation proposed in this study was incorporated not only in the revised tentative recommendation, but also in a draft of court reporter legislation that the staff sent to interested parties in its study on statutes made obsolete by trial court restructuring. In response to the latter draft, the Commission received a message from Judge Murray pertaining to Penal Code Section 1539, which warrants discussion in this context.

**Special Hearing on Motion to Suppress Evidence or Motion for Return of Seized Property (Penal Code §§ 1538.5, 1539)**

Penal Code Section 1538.5 is a lengthy provision detailing the procedure for a motion to suppress evidence or a motion for return of seized property. Before trial court unification, subdivision (g) provided for a special hearing in municipal court in misdemeanor cases:

(g) If the property or evidence relates to a *misdemeanor* complaint, the motion shall be made in the *municipal court* before trial and heard prior to trial at a *special hearing* relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(Emphasis added.) Subdivision (i) provided for a special hearing in superior court in felony cases under certain circumstances:

(i) If the property or evidence obtained relates to a *felony* offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a *felony* offense initiated by indictment, the defendant shall have the right to renew or make the motion in the *superior court* at a *special hearing* relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time.

...

(Emphasis added.) Penal Code Section 1539 provided for transcription of a special hearing in superior court:

1539. (a) If a special hearing be held in the *superior court* pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe his shorthand notes pursuant to this section if any party to a special hearing in the *superior court* files a written request for its preparation with the

clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the county clerk shall deliver the original of such transcript so filed with him to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand by him without cost to him.

(c) Upon a motion by a defendant pursuant to this chapter, the defendant shall be entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause.

(Emphasis added.)

After the Constitution was amended to permit trial court unification, Section 1538.5(g) was amended to accommodate unification:

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal court or in the superior court in a county in which there is no municipal court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

But no change was made in Penal Code Section 1539.

Judge Murray points out that this created an ambiguity in that provision. (Exhibit p. 6.) Does Section 1539 now require shorthand reporting and transcription of a special hearing relating to a misdemeanor, or only shorthand reporting and transcription of a special hearing relating to a felony? Judge Murray “believe[s] that the ‘special hearing’ referred to in 1539 that requires a court reporter is the hearing which applies to felony proceedings.” *Id.* He “submit[s] that this should be clarified.” *Id.*

The staff agrees. As previously discussed, the implementing legislation for trial court unification was not intended “to change the extent to which court reporter services or electronic reporting may be used in the courts.” 1998 Cal. Stat. ch. 931, § 507. Penal Code Section 1539 should be amended consistent with that principle. The provision should also be revised to reflect the transfer of responsibility for trial court funding from the county to the state. **These ends**

**could be achieved by amending Penal Code Section 1539 along the following lines:**

1539. (a) If a special hearing be held in the ~~superior court~~ a felony case pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against ~~him~~ the defendant; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869.

(b) The reporter shall forthwith transcribe ~~his~~ the reporter's shorthand notes pursuant to this section if any party to a special hearing in the ~~superior court~~ a felony case files a written request for its preparation with the clerk of the court in which the hearing was held. The reporter shall forthwith file in the superior court an original and as many copies thereof as there are defendants (other than a fictitious defendant) or persons aggrieved. The reporter shall be entitled to compensation in accordance with the provisions of Section 869. In every case in which a transcript is filed as provided in this section, the ~~county clerk~~ of the court shall deliver the original of such transcript so filed ~~with him~~ to the district attorney immediately upon receipt thereof and shall deliver a copy of such transcript to each defendant (other than a fictitious defendant) upon demand ~~by him~~ without cost to ~~him~~ the defendant.

(c) Upon a motion by a defendant pursuant to this chapter, the defendant shall be entitled to discover any previous application for a search warrant in the case which was refused by a magistrate for lack of probable cause.

**Comment.** Section 1539 is amended to make clear that it applies only to a special hearing in a felony case pursuant to Section 1538.5. This implements the principle that trial court unification did not change the extent to which court reporter services or electronic reporting is used in the courts. 1998 Cal. Stat. ch. 931, § 507; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998); see also 1997 Cal. Stat. ch. 279, § 3 (former Section 1538.5(g), (i)).

Section 1539 is also amended reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is

relieved of those powers, duties, and responsibilities. See Government Code Sections 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

If the Commission approves, we would incorporate this amendment into the attached draft, and make corresponding revisions in the preliminary part.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel

Exhibit

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**EMAIL FROM GARY CRAMER — APRIL 2001  
(CALIFORNIA COURT REPORTERS ASSOCIATION)**

April 8, 2001

TO: Nat Sterling/Barbara Gaal  
FROM: Gary Cramer  
SUBJECT: JM-1306  
Revised Tentative Recommendation  
Cases in Which Court Reporter Is Required  
March 2001

The following are my comments concerning the above-indicated Revised Tentative Recommendation:

In 269(a) I suggest you consider replacing the word “judge” with “the court” or “the bench officer” in the sentence that ends “... and oral instructions given by the *judge*, in the following cases ...”

The suggestion is based on the significant number of subordinate bench officers presiding over various proceedings.

In 269(a)(2) I suggest replacing “district attorney” with the term “prosecutor”.

When the district attorney declares a conflict of interest, a deputy attorney general typically acts as the prosecutor. The Attorney General’s office prosecutes Medi-Cal fraud cases.

Notwithstanding the legal analysis, I am uncomfortable with the word “defendant” in the proposed amendment to 269(a). I suggest the addition of language to indicate that “defendant” and “party” also includes the attorney for the defendant and/or party.

As written (punctuated) proposed 269(b) could be construed to require preparation and delivery of a transcript of confidential proceedings to a pro per defendant in a criminal case.

There are times when a lawyer for a criminal defendant is given a transcript of confidential proceedings and instructed not to share the information contained therein with his or her client. Under the same circumstances a pro per criminal defendant is typically not given the transcript unless appropriate redacting can occur.

The proposed Code of Civil Procedure §271(b) contains the requirement that “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.”

Court reporters have found that the above section cannot be complied with in the strictest sense of the language.

Based on unification of the last county in California to unify, Government Code §72196 and 72197 should be abolished.

In other respects I approve of the tentative recommendation.

**EMAIL FROM GARY CRAMER — MAY 2001  
(CALIFORNIA COURT REPORTERS ASSOCIATION)**

Date: Sunday, May 6, 2001  
From: Gary Cramer <gcramer@socal.rr.com>  
To: Nat Sterling <sterling@clrc.ca.gov>  
Barbara Gaal <bgaal@clrc.ca.gov>  
Cc: John Avery <jravery@concentric.net>  
Toni O'Neill <tonioneill@earthlink.net>  
Debbie Trujillo <DMT1@compuserve.com>  
Arnella Sims <csrasims@aol.com>  
Re: Comment

Nat and Barbara,

I have reviewed the latest revised tentative recommendation for cases in which court reporter is required (#JM-1306).

I believe the document as drafted presents a product that reflects an appropriate redraft of the various sections that will be acceptable to the California Court Reporters Association. I believe this draft makes no substantive change to the requirement of a court reporter and accomplishes the goal of consolidating and clarifying the provisions on cases in which a court reporter is required.

The amendment to Government Code section 69950 is appropriate for purposes of addressing the issue of cases in which a court [reporter] is required; however, there are further amendments that I could suggest that would update this section to reflect the current use of computer equipment and manner of producing transcripts therefrom.

Gary Cramer

**EMAIL FROM LARRY JACKSON  
(LOS ANGELES SUPERIOR COURT)**

Date: Friday, July 13, 2001  
From: Larry Jackson <LJACKSON@lasc.co.la.ca.us>  
To: Nat Sterling <sterling@clrc.ca.gov>  
Re: Court reporter revisions

Our litigation support manager, Paul Runyon, is convinced there will be a problem with deleting the “other than limited civil cases” language. As a matter of policy in this court, we have not supplied court reporters in limited civil courts as part of the regular court staff. When parties ask for proceedings to be reported, we advise them to hire CSRs and compensate them privately. We have used the exception language of 269 CCP as justification for that practice. Now, without that language specifically providing the exception for limited civil cases (he viewed 274c as being an anachronism from when there were still municipal courts), he feels we can no longer justify the practice. Even though 68086 requires the parties to compensate the court, per state court rule there is no compensation unless the hearing lasts longer than one hour, and many limited civil proceedings are of short duration. Also, LA is having trouble hiring an adequate number of reporters on staff to meet current demand, much less the increased demand if we were required to staff the limited civil courts as well.

## The Superior Court

JOHN A. CLARKE  
EXECUTIVE OFFICER/CLERK

111 NORTH HILL STREET • LOS ANGELES • CALIFORNIA 90012

September 12, 2001

**TO:** Barbara Gaal  
Staff Counsel, Law Revision Committee

**FROM:** Terry Weiss *tw*  
Manager, Court Reporter Services

**SUBJECT:** Staffing Limited Civil Proceedings

The Los Angeles Superior Court has 13 limited (7 limited in calendar and 6 limited special) civil courtrooms. At the present time, Court Reporter Services does not provide a court reporter to any limited civil courtroom based on our interpretation of the language in 269(a). It has been standard practice for at least a decade not to provide reporters in limited civil courtrooms.

If the language were to be removed and Superior Court had to supply a court reporter if the parties requested a reporter, this would cause severe staffing difficulties.

1. The requests would come into our office the day before the need for a reporter occurs. Attorneys often do not know until the day before whether a hearing is actually going forward or not. Even if we had a reporter available the first day, depending on the number of sick calls on any given day, we may not have a reporter available the second or any consecutive day the limited civil case may be in trial. Superior Court would not leave a felony case not reported in order that a reporter finish a limited civil case.
2. We currently are having difficulty staffing the courtrooms with reporters without having to provide coverage for limited civil. A change in the language would mean Court Reporter Services would need to budget for more reporters in order to provide reporters when required.
3. There is a nationwide shortage of court reporters. We in Los Angeles expect to start having major recruiting difficulties in maintaining the current number of reporters necessary to cover unlimited civil, criminal and juvenile courtrooms.

**EMAIL FROM JUDGE MURRAY  
(PRESIDING JUDGE, TEHAMA SUPERIOR COURT)**

From: "Dennis Murray" <dem@snowcrest.net>

To: <sterling@clrc.ca.gov>

Subject: Statutory Revisions Necessitated by Trial Court Restructuring:Clerk Statutes

Date: Wed., Aug 8, 2001

I note that while changes have been made to Penal Code Section 1539, none have been made to 1538.5. The following problem has arisen since unification: Under subdivision (g) of 1538.5, the suppression hearing for a misdemeanor is referred to as a "special hearing." Section 1539 as it presently reads and as amended requires a court reporter "if a special hearing be held in the superior court..." Since it used to be that all misdemeanor hearings were in the Municipal Court, it was clear that no court reporter was required. With unification, if read literally, a court reporter may be statutorily required on suppression motions on misdemeanors since they are now heard in the Superior Court. This may or may not be a good idea but such a rule would be different than any other proceeding in a misdemeanor including at trial where either a reporter or a tape recording may be used and even then it is only required upon request. I suspect that this anomaly just kind of "grandfathered" in without any intent to require court reporters for all suppression motions. I believe that the "special hearing" referred to in 1539 that requires a court reporter is the hearing which applies to felony proceedings. I submit that this should be clarified. Otherwise it will continue to be an issue that Court's will have to address. I realize this may be beyond the scope of your present work. However, I thought I would raise the issue since there is a proposed change to section 1539. Thank you for the opportunity to give input.

Dennis Murray

#JM-1306

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

*Staff Draft* RECOMMENDATION

Cases in Which Court Reporter Is Required

September 2001

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335 FAX: 650-494-1827

## SUMMARY OF RECOMMENDATION

This recommendation would consolidate the rules governing when a court reporter must be provided in civil and criminal cases. Nonsubstantive revisions would also be made to clarify the application of the statute, consistent with existing law.

This recommendation was prepared pursuant to Government Code Section 70219.

## CASES IN WHICH COURT REPORTER IS REQUIRED

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

### 5 **Consolidation of Duplicative Provisions**

6 Code of Civil Procedure Section 269(a) governs the use of a court reporter in an  
7 unlimited civil case or a felony case.<sup>2</sup> Section 274c governs the use of a court  
8 reporter in a limited civil case or a misdemeanor or infraction case.<sup>3</sup>

9 The only significant difference between these provisions, other than the  
10 distinction in cases to which they apply, pertains to who is entitled to request a  
11 court reporter in a criminal case. Section 269(a) requires shorthand reporting “on  
12 the order of the court, the district attorney, or the attorney for the defendant” in a  
13 felony case. In contrast, Section 274c only requires shorthand reporting “on the  
14 order of the court” in a misdemeanor or infraction case.

15 This distinction does not merit two separate code provisions. It is cumbersome to  
16 have two substantively similar provisions, one for limited civil cases, and

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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 subsequently directed the Commission to undertake such a 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:

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.

1 misdemeanor and infraction cases, and the other for felony cases and all other civil  
2 cases. The provisions should be consolidated into a single section.

3 The Commission recommends broadening Section 269(a) to apply to all civil  
4 and criminal cases, and repealing Section 274c.<sup>4</sup> This would not be a substantive  
5 change in the law, because the proposed legislation would continue the current  
6 rules on who is entitled to request a court reporter in a criminal case.<sup>5</sup>

### 7 **Nonsubstantive Clarification**

8 Section 269 should also be revised to clarify its application consistent with  
9 existing law:

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

14 *Arguments to the jury.* The existing provisions require that the arguments of “the  
15 prosecuting attorney” to the jury be included in the transcript. The statute should  
16 be revised to refer simply to the arguments of “the attorneys,” consistent with  
17 existing practice and with other statutes.<sup>8</sup>

18 *Request of “the district attorney.”* The statute should be amended to require  
19 court reporting at the request of “the prosecution,” rather than at the request of

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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. Section 274c is cross-referenced in Government Code Section 72197. Instead of correcting this cross-reference, the proposed law would repeal Government Code Section 72197, because the provision is obsolete. The provision pertains to temporary reassignment of a court reporter from a superior court to a municipal court, but the municipal courts no longer exist due to trial court unification. Cal. Const. art. VI, § 5(e).

5. 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 would 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.

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

1 “the district attorney,” because in some circumstances the Attorney General acts as  
2 prosecutor in place of the district attorney.<sup>9</sup>

3 *Pro per felony defendant.* The statute should be amended to clarify its  
4 application to a pro per felony defendant. It should be clear that a felony defendant  
5 is entitled to a court reporter on request by the defendant personally, not just on  
6 request by the defendant’s attorney. This would conform to existing interpretations  
7 of the statute.<sup>10</sup>

8 *Transcript for nonparty.* The statute should be amended to make clear that a  
9 nonparty is generally entitled to obtain a transcript. This is consistent with  
10 longstanding practice and other statutory language.<sup>11</sup> It also conforms to  
11 constitutional constraints.<sup>12</sup> A nonparty is entitled to a transcript of a proceeding  
12 that was open to the public,<sup>13</sup> a proceeding that was erroneously closed to the  
13 public,<sup>14</sup> or a proceeding that was properly closed, once the reasons for closure are  
14 no longer viable.<sup>15</sup>

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9. See Gov’t Code § 12553 (disqualification of district attorney); see also Penal Code § 1424 (motion to disqualify district attorney).

10. 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).

11. See Section 269(c) (any “court, party, *or person* may request delivery of any transcript in a computer-readable form”) (emphasis added). See also Government Code Section 69950, which refers to the fee for a copy of a transcript for “*any other person*,” but also refers to the fee for “each copy for the *party* buying the original made at the same time.” (Emphasis added.) A conforming revision would replace “party” with “person” in this provision.

12. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (media request for 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).

13. See *Scripps Howard Broadcasting Co.*, 73 Ohio St. 3d at 21 (transcript of contempt proceeding that was open to the public); see also *Antar*, 38 F.3d at 1359-61 (transcript where court requested but did not order press to leave courtroom).

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

15. See *United States v. Ellis*, 90 F.3d 447, 450 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997); *Phoenix Newspapers, Inc. v. KPNX*, 156 F.3d 940, 947-48 (9th Cir. 1998).

1 **Scope and Effect of Proposal**

2 This recommendation would not change the extent to which court reporters may  
3 be used in the courts. It is a nonsubstantive proposal, intended to aid courts and  
4 practitioners by simplifying and clarifying existing law on when a court reporter is  
5 required.

6 The recommendation does not address the following significant issues related to  
7 court reporting, some of which may be the subject of future Commission  
8 recommendations:

- 9 (1) Whether the defendant in a misdemeanor or infraction case should be  
10 entitled to request shorthand reporting.<sup>16</sup>
- 11 (2) Whether statutes authorizing the court to order the county treasurer to  
12 pay transcript fees are obsolete in light of recent changes in trial court  
13 funding.<sup>17</sup>
- 14 (3) Whether distinctions in the superior and municipal court procedures for  
15 charging, depositing, and paying court reporter fees, and other statutes  
16 providing special rules for municipal courts, should be maintained in a  
17 unified court.<sup>18</sup>
- 18 (4) Whether the statutes governing reporters and their fees in various  
19 counties require revision.<sup>19</sup>

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16. 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 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.

17. 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.

18. 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 unification of the municipal and superior courts in every county. See Gov’t Code § 71674; 1999 Cal. Stat. res. ch. 81.

19. 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 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 superior court shall take down in shorthand all testimony,~~  
8 ~~objections made, rulings of the court, exceptions taken, all arraignments, pleas,~~  
9 ~~and sentences of defendants in felony cases, arguments of the prosecuting attorney~~  
10 ~~attorneys to the jury, and all statements and remarks made and oral instructions~~  
11 ~~given by the judge. If judge or other judicial officer, 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 prosecution,  
14 the defendant, or the attorney for 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 to which the public is entitled  
18 to access, the official reporter or official reporter pro tempore shall, within such  
19 reasonable time after the trial of the case as the court may designate, write the  
20 transcripts out, or the specific portions thereof as may be requested, in plain and  
21 legible longhand, or by typewriter, or other printing machine, and certify that the  
22 transcripts were correctly reported and transcribed, and when directed by the court,  
23 file the 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~~  
40 ~~the data contained on the disk. Each disk as produced by the court reporter shall~~

1 contain the identical volume divisions, pagination, line numbering, and text of the  
2 certified original paper transcript or any portion thereof. Each disk shall be  
3 sequentially numbered within the series of disks.

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

6 Subdivision (a) is also amended to refer to official reporters pro tempore, as well as official  
7 reporters. This is not a substantive change. See Gov't Code § 69941 (appointment of official  
8 reporters).

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

12 Similarly, subdivision (a) is amended to substitute “prosecution” for “district attorney,” to  
13 reflect that the Attorney General sometimes acts as prosecutor in place of the district attorney.  
14 See Gov't Code § 12553 (disqualification of district attorney); see also Penal Code § 1424  
15 (motion to disqualify district attorney).

16 Subdivision (a) is also amended to make clear that it requires shorthand reporting of oral  
17 instructions regardless of whether those instructions are given by a judge or by a subordinate  
18 judicial officer. For an exception to this rule, see Gov't Code § 70141.11 (court reporting for  
19 Contra Costa County Commissioner).

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

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

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

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

4 Section 269 is also amended to make technical changes.

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

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

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

13 (b) Except as modified by standards adopted by the Judicial Council, the  
14 computer-readable transcript shall be on disks in standard ASCII code unless  
15 otherwise agreed by the reporter and the court, party, or person requesting the  
16 transcript. Each disk shall be labeled with the case name and court number, the  
17 dates of proceedings contained on the disk, and the page and volume numbers of  
18 the data contained on the disk. Except where modifications are necessary to reflect  
19 corrections of a transcript, each disk as produced by the official reporter shall  
20 contain the identical volume divisions, pagination, line numbering, and text of the  
21 certified original paper transcript or any portion thereof. Each disk shall be  
22 sequentially numbered within the series of disks.

23 **Comment.** Section 271 continues former Section 269(c) without change, except to insert  
24 subdivisions, refer to official reporters pro tempore as well as official reporters, make clear that a  
25 computer-readable version of a transcript is available only where a person is entitled to a hard  
26 copy version, and clarify how the provision applies where a transcript is corrected. These  
27 revisions are nonsubstantive. See Gov't Code § 69945 (official reporter pro tempore shall  
28 perform same duties as official reporter).

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

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

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

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

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

2 SEC. 4. Section 69950 of the Government Code is amended to read:

3 69950. The fee for transcription for original ribbon or printed copy is eighty-five  
4 cents (\$0.85) for each 100 words, and for each copy ~~for the party buying the~~  
5 ~~original made~~ purchased at the same time by the person buying the original, fifteen  
6 cents (\$0.15) for each 100 words. The fee for a first copy to any other person shall  
7 be twenty cents (\$0.20) for each 100 words, and for each additional copy, ~~made~~  
8 purchased at the same time, fifteen cents (\$0.15) for each 100 words.

9 **Comment.** Section 69950 is amended to conform to the rule that a nonparty is generally  
10 entitled to obtain a transcript. See Code Civ. Proc. § 269 & Comment. The section is also  
11 amended to reflect changes in technology.

12 **Gov't Code § 72197 (repealed). Duties on assignment to municipal court**

13 SEC. 5. Section 72197 of the Government Code is repealed.

14 ~~72197. Whenever such request has been granted and any official reporter of the~~  
15 ~~superior court has been assigned to act as a pro tempore phonographic reporter of~~  
16 ~~the municipal court, such reporter shall, during the period of such assignment to~~  
17 ~~the municipal court, perform the duties of an official reporter of such municipal~~  
18 ~~court and during the time of any such assignment such reporter shall be subject to~~  
19 ~~the provisions of Sections 69942 to 69955, inclusive, and Sections 273 and 274c~~  
20 ~~of the Code of Civil Procedure.~~

21 **Comment.** Section 72197 is repealed to reflect unification of the municipal and superior courts  
22 pursuant to Article VI, Section 5(e), of the California Constitution.

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

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

25 190.9. (a)(1) In any case in which a death sentence may be imposed, all  
26 proceedings conducted in the ~~municipal~~ and superior courts, including all  
27 conferences and proceedings, whether in open court, in conference in the  
28 courtroom, or in chambers, shall be conducted on the record with a court reporter  
29 present. The court reporter shall prepare and certify a daily transcript of all  
30 proceedings commencing with the preliminary hearing. Proceedings prior to the  
31 preliminary hearing shall be reported but need not be transcribed until the  
32 ~~municipal~~ or superior court receives notice as prescribed in paragraph (2) of  
33 subdivision (a).

34 (2) Upon receiving notification from the prosecution that the death penalty is  
35 being sought, the superior court ~~shall notify the court in which the preliminary~~  
36 ~~hearing took place. Upon this notification, the court in which the preliminary~~  
37 ~~hearing took place shall order the transcription and preparation of the record of all~~  
38 ~~proceedings prior to and including the preliminary hearing in the manner~~  
39 ~~prescribed by the Judicial Council in the rules of court. The record of all~~  
40 ~~proceedings prior to and including the preliminary hearing shall be certified by the~~  
41 ~~court no later than 120 days following notification by the superior court unless the~~  
42 ~~superior court grants an extension of time~~ is extended pursuant to rules of court

1 adopted by the Judicial Council. Upon certification, ~~the court in which the~~  
2 ~~preliminary hearing took place shall forward the record to the superior court for~~  
3 ~~incorporation~~ the record of all proceedings is incorporated into the superior court  
4 record.

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

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

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

13 **Comment.** Subdivision (a) of Section 190.9 is amended to reflect unification of the municipal  
14 and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

15 Subdivision (c) is amended to correct a cross-reference. The substance of former Code of Civil  
16 Procedure Section 269(c) is continued in Code of Civil Procedure Section 271.

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

18 SEC. 7. Nothing in this act is intended to change the extent to which official  
19 reporter services or electronic reporting may be used in the courts.

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