

Memorandum 2001-77**Statutes Made Obsolete by Trial Court Restructuring:
Official Reporter**

BACKGROUND

The statutes governing official reporters are the most complex and most voluminous to contend with in the project to eliminate statutes made obsolete by trial court restructuring. Existing statutes specify details of employment status, duties, and compensation in each county, and the statutes are different for each county.

When the Commission considered this matter previously, it decided to attempt to cut through the morass by providing that official reporter compensation would be determined by agreement between the superior court and the reporters in each county, subject to the base of existing compensation, which would stand as a minimum. This treatment would apply both to reporters who are court employees and to reporters who are independent contractors.

Pursuant to this decision, the staff has drafted the key substantive provisions, with conforming revisions in the general statutes governing court reporters, and circulated that draft for comment among interested persons and organizations. The staff is separately drafting revisions of the county-specific statutes relating to each county, including the official reporter statutes for the county, and circulating those drafts for comment to persons concerned with issues in the county.

We have received useful comments on both the general provisions and the county-specific provisions. Although we are continuing to receive feedback on the county-specific provisions, the main policy issues have become reasonably clear and can appropriately be presented for Commission resolution.

Our objective in this memorandum is to resolve the key policy issues that have been raised, so that the drafts of official reporter statutes can be revised and included in a draft tentative recommendation. On approval by the Commission, the tentative recommendation can be circulated for public comment.

KEY SUBSTANTIVE PROVISIONS

The general provisions of existing law on official reporters are located at Government Code Sections 69941-69959. Of these, the two key provisions are Section 69941 relating to appointment of official reporters and Section 69947 relating to compensation of official reporters.

Nearly all of the comments we have received — from labor unions, professional associations, Administrative Office of the Courts, and court personnel of individual counties — are directed to these two provisions.

Gov't Code § 69941. Appointment of official reporters

Existing Government Code Section 69941 provides that the judges of the superior court may appoint as many official reporters as there are judges and such pro tempore official reporters as the convenience of the court may require. This provision is at odds with both the statutes governing trial court employment generally and the statutes governing municipal court employment.

The statutes governing trial court employment generally place no limit on the number of official reporters a court may hire. See Section 71620 (trial court may appoint such personnel as are deemed necessary for powers and duties conferred by law on court).

The statutes governing municipal court employment specify the number of official reporters that may be retained in each county. These county-specific statutes had continuing effect through the unification process. They are now superseded by Section 71620 as to those official reporters who are trial court employees, but presumably continue in effect as to official reporters or official reporters pro tempore who are not trial court employees.

The staff draft attempts to eliminate this confusion by adjusting Section 69941 so as to apply to all official reporters and official reporters pro tempore. We would repeal all the county specific statutes relating to the number of authorized official reporters and official reporters pro tempore.

Section 69941 would be revised to read:

69941. The judge or judges of any superior court may appoint as many competent phonographic reporter, or as many such reporters as there are judges the business of the court requires, to be known as official reporter or reporters of such court, and such pro tempore official reporters pro tempore as the convenience of the court may require. The Subject to the Trial Court Employment Protection and Governance Act, Chapter 7 (commencing with

Section 71600) of Title 8, the reporters shall hold office during the pleasure of the appointing judge or judges.

Comment. Section 69941 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution. See former Gov't Code § 72194 (municipal court reporters).

The section is also amended to reflect enactment of the Trial Court Employment Protection and Governance Act. See Gov't Code §§ 71620 (trial court personnel), 71640-71645 (employment selection and advancement), 71650-71658 (employment protection system), 71673 (authority of court).

The section is also amended to delete language referring to “the judge” of the court. Every superior court has at least two judgeships as a result of trial court unification. See Gov't Code § 69580 *et seq.* (number of judges). Where a court has only one judge due to a vacancy or otherwise, a reference to the judges of the court means the sole judge of the court. See Gov't Code § 13 (plural includes singular).

The qualification in the last sentence, that “at pleasure” appointment of official reporters is subject to the Trial Court Employment Protection and Governance Act (TCEPGA), is intended to make clear that for those official reporters who are court employees, the civil service protections of that act govern.

“At Pleasure” Appointment

The treatment of “at pleasure” appointment in the draft drew the attention of most commentators. They generally made the point that TCEPGA now controls employment of official reporters. It is confusing to say that the appointment is at pleasure, “subject to” TCEPGA.

The staff agrees with these criticisms. The law must be laid out more clearly. The problem is that there are two types of official reporters — employees (who are subject to TCEPGA), and non-employees (who are not subject to TCEPGA). We had been led to believe early on that every county is different. In most counties official reporters are court employees but in some they are independent contractors. Conversely, in most counties official reporters pro tempore are independent contractors but in some counties they are court employees.

Now commentators are telling us that the situation is not that complex after all, and official reporters are court employees in all counties. If that is truly the situation, then the drafting of this statute is a relatively straightforward matter. However, the staff is not confident that anyone knows the ins and outs of the

status of every reporter in each of the 58 counties, and particularly it is unlikely that official reporters pro tempore are court employees in most counties.

The staff thinks the Commission needs to consider the following options, at least:

(1) Provide that official reporters and official reporters pro tempore who are court employees are governed by TCEPGA, but official reporters and official reporters pro tempore who are not court employees are at pleasure. This would be the most complete statement of all possibilities, but perhaps overkill.

(2) Provide that official reporters are governed by TCEPGA, but official reporters pro tempore are at pleasure. This would be a straightforward statute and probably in accord with the situation in most counties. But it could cause problems in unusual circumstances.

(3) Don't say anything about application of TCEPGA or "at pleasure" principles. Then TCEPGA would govern those matters to which it applies, and the status of those not covered by TCEPGA would be governed by the outcome of negotiations between the independent contractors and the courts in each county.

Of these options, the staff prefers the third, provided it is accompanied by appropriate explanatory commentary. We would revise the draft to delete the last sentence of Section 69941:

~~The reporters shall hold office during the pleasure of the appointing judge or judges.~~

Comment. The last sentence of Section 69941 is deleted as obsolete. Official reporters and official reporters pro tempore who are court employees are subject to the provisions of the Trial Court Employment Protection and Governance Act. See, e.g., Gov't Code §§ 71620 (trial court personnel), 71640-71645 (employment selection and advancement), 71650-71658 (employment protection system), 71673 (authority of court). The employment status of official reporters and official reporters pro tempore who are not court employees (including temporary employees hired through agencies and individuals hired by the trial court pursuant to an independent contractor agreement) is subject to the terms of their appointment.

Judges May Appoint

Existing Section 69941 states that the judges may appoint official reporters. We have not suggested any revision of this provision. However, we have received a comment from Santa Cruz county to the effect that the court executive officer, not the judges, makes appointments of official reporters in that county.

The staff suspects that is the case in many other counties as well. The judges have undoubtedly delegated appointment authority to the court executive officer in most cases. For those appointees who are court employees, the provisions of TCEPGA relating to employment selection will govern in any event.

The staff would revise the statute to provide that the court may appoint the necessary official reporters. The judges are the court. That will provide the necessary flexibility to accommodate hiring decisions for the different circumstances of the particular county and the status of the particular type of official reporter being retained.

~~The judge or judges of any A superior court may appoint a as many competent phonographic reporter, or as many such reporters as there are judges the business of the court requires, to be known as official reporter or reporters of such court, and such pro tempore official reporters pro tempore as the convenience of the court may require.~~

Comment. The first sentence of Section 69941 is amended to eliminate the reference to appointment by the judge or judges of the superior court. In the case of a trial court employee, the appointment is made by the court pursuant to the Trial Court Employment Protection and Governance Act. See, e.g., Gov't Code §§ 71640-71645 (employment selection and advancement), 71673 (authority of court). In the case of appointment of an official reporter or official reporter who is not a trial court employee, the hiring decision is made by the judges, the court executive officer, or otherwise as determined by the court.

As the Business of the Court Requires

The draft of Section 69941 would permit appointment of as many official reporters as “the business of the court requires.” Commentary we have received suggests clarification of that phrase is needed.

The phrase is drawn from provisions relating to appointment of phonographic reporters in a number of existing statutes, both in the superior court and in the municipal court. The staff believes the phrase is self-evident and does not require further amplification.

A more significant issue, in the staff's opinion, is whether problems are created by the “business of the court requires” standard for official reporters versus the “convenience of the court may require” standard for official reporters pro tempore. **Perhaps it would be better to replace them both with a standard drawn from TCEPGA:**

~~The judge or judges of any~~ A superior court may appoint a as many competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and such pro tempore official reporters as the convenience of the court may require pro tempore, as are deemed necessary for the performance of the duties and the exercise of the powers conferred by law upon the court and its members.

Comment. The first sentence of Section 69941 is amended to incorporate the general appointment standard of the Trial Court Employment Protection and Governance Act. See, e.g., Gov't Code §§ 71620 (trial court personnel).

Technically speaking, this provision is not even necessary — TCEPGA provides sufficient authority. But the staff thinks a specific statutory context for the official reporter statutes is helpful.

Gov't Code § 69947. Compensation of official reporter

The key to the whole scheme of eliminating the detailed statutes on compensation of official reporters in every county is a new provision that would provide for compensation agreed to by negotiation, subject to a minimum or base of existing compensation, whether prescribed by statute, ordinance, or memorandum of understanding. The staff draft of this scheme is set out below.

69947. (a) As used in this section:

(1) "Compensation" includes, but is not limited to, salary, benefits, privileges, fees, and allowances.

(2) "Court operations" has the meaning defined in Section 77003 and Rule 810 of the California Rules of Court as it read on July 1, 1996.

(3) "Official reporter" includes official reporter pro tempore.

(b) The official reporter shall receive the following compensation:

(1) For reporting services, the compensation determined pursuant to the Trial Court Employment Protection and Governance Act, Chapter 7 (commencing with Section 71600), or, if the reporter is not a trial court employee within the meaning of that act, the compensation determined by agreement between the court and the reporter. In no event shall the compensation of the official reporter be less than the compensation provided by law on December 31, 2002, for duties of the reporter that constitute court operations.

(2) For transcription services, the fees prescribed in this article.

(c) If the duties for which the official reporter receives compensation from the court include services to the county that do

not constitute court operations, including but not limited to services for the county board of supervisors, board of equalization, coroner, or grand jury, the county shall reimburse the court for a pro rata share of the compensation.

Comment. Section 69947 supersedes former Government Code Section 69947 (compensation of official reporter). It reflects enactment of the Trial Court Employment Protection and Governance Act. See Gov't Code §§ 71620 (trial court personnel), 71623 (salaries), 71673 (authority of court). The section supersedes special statutes that prescribe the compensation of official reporters. See, e.g., former Gov't Code § 69948 (compensation in contested cases).

Subdivision (b)(1) sets as a minimum for compensation of the official reporter for reporting services the compensation to which the official reporter was entitled on December 31, 2002. Compensation is broadly defined in subdivision (a)(1) and would include, by way of illustration and not by way of limitation, all of the following:

- Wages, including compensation based on the salary schedule of another county. See, e.g., former Gov't Code §§ 69995 (Ventura County), 70012 (Orange County), 70050.5 (San Francisco County).
- Overtime fees. See, e.g., former Gov't Code § 70045.10 (Tehama County).
- Retirement benefits, including benefits based on transcription fees. See, e.g., former Gov't Code §§ 69991 (Monterey and Stanislaus Counties), 70045.10 (Tehama County), 70047.1 (Stanislaus County).
- Bonuses, to the extent they were part of the compensation structure for the official reporter on December 31, 2002.
- Reimbursement for supplies. See, e.g., former Gov't Code § 70045.8 (Butte County).

The compensation to which the official reporter was entitled on December 31, 2002, may include compensation for duties that are not part of court operations. If compensation negotiated pursuant to subdivision (b)(1) excludes those duties, the floor is adjusted pro rata. If the compensation negotiated pursuant to subdivision (b)(1) includes those duties, the court is entitled to pro rata reimbursement from the county. See subdivision (c).

This section and its Comment are necessarily complex, in view of the many different circumstances of official reporters in different counties. Commentators have raised a number of issues in connection with the draft.

Base Compensation

Subdivision (b)(1) would provide that, “In no event shall the compensation of the official reporter be less than the compensation provided by law on December 31, 2002, for duties of the reporter that constitute court operations.” While it would be possible as a theoretical matter to simply provide that compensation is determined by negotiation, the Commission felt it would promote acceptance of this scheme to provide that the reporters cannot lose anything thereby.

Administrative Office of the Courts personnel suggest this scheme is inappropriate and inconsistent with TCEPGA. The staff agrees with that observation as a theoretical matter. For those official reporters who are trial court employees, TCEPGA starts from a base of existing compensation and provides for change by meet and confer; it does not provide a floor indefinitely.

71612. Except as otherwise expressly provided in this chapter, the enactment of this act shall not be a cause for the modification or elimination of any existing wages, hours, or terms and conditions of employment of trial court employees. However, except as to those procedures, rights, or practices described in this chapter as minimum standards, the enactment of this act shall not prevent the modification or elimination of existing wages, hours or terms and conditions of employment through the meet and confer in good faith process or, in those situations in which the employees are either exempted from representation, or are not represented by a recognized employee organization, through appropriate procedures.

This allows the theoretical possibility that salaries and benefits could be reduced at some time in the future.

As a practical matter, however, the net effect of either the TCEPGA approach or the absolute minimum approach will be about the same. Realistically, salaries and benefits will rise, not fall, in the future. It is anomalous, however, that of all trial court employees, only official reporters get a guaranteed minimum.

Regardless of the effect of TCEPGA on compensation on official reporters who are court employees, we still must deal with those official reporters and official reporters pro tempore who are not court employees and not covered by the act. Existing statutes still apply to them, and the only practical way to get rid of the clutter is to preserve them as a base and move on.

One option would be to leave the general provisions of TCEPGA to govern employees and provide the special provisions set out above for non-employees.

Another option is to take the approach of the staff draft and have one comprehensive statute governing employee and non-employee reporters. While it would be anomalous to treat official reporters differently from other trial court employees, it can be justified given the extensive and unique body of statutes and history governing court reporter compensation.

The Commission needs to make this basic policy decision. Some of the immediately following discussion in this memorandum will be rendered moot if the Commission's decision is to rely upon TCEPGA for those reporters who are court employees.

If the Commission's decision is to proceed with the concept of existing compensation as a permanent base for official reporters and official reporters pro tempore, there is at least one defect in the current draft. As drafted, the section provides that "in no event" shall the compensation be less than currently provided by law. But in fact in negotiations the parties may agree, for example, that it is better to receive a lower salary but greater benefits than are currently provided by law. The statute must make clear that the guaranteed minimum is subject to contrary agreement by the parties.

Section 71612 does this for TCEPGA — the statute does not affect existing compensation but it does not preclude "modification or elimination of existing wages, hours or terms and conditions of employment through the meet and confer in good faith process or, in those situations in which the employees are either exempted from representation, or are not represented by a recognized employee organization, through appropriate procedures." **The staff would add a comparable provision to the official reporters and official reporters pro tempore draft.**

December 31, 2001

One commentator questioned the selection of December 31, 2002, as the date for setting the compensation base. In many counties, reporters who are trial court employees would already have renegotiated their compensation under TCEPGA.

The staff selected that date because it is the last date existing statutes would be in effect before their repeal by this act. If the parties have renegotiated by then, the renegotiated status on December 31, 2002, would become the new base, since under the draft the base is that provided "by law" on that date. **The staff suggests no change in that date.**

Privileges

The staff draft defines compensation to include salary, benefits, privileges, fees, and allowances. One commentator requests elaboration of “privileges”.

This is a term used throughout existing reporter compensation statutes. The staff hesitates to guess at the types of privileges that may be included in various compensation packages, including courthouse parking privileges, etc. **We would not attempt to elaborate this concept.**

Bonuses

The draft Comment mentions, as included in the compensation base, bonuses “to the extent they were part of the compensation structure of the official reporter on December 31, 2002.” One commentator objects to this reference — trial court employees do not get bonuses, so why should court reporters who are trial court employees?

The staff included a reference to bonuses in the Comment at the suggestion of reporters who indicated that is part of their compensation structure in some counties. It is noteworthy, however, that existing statutes that authorize pay-for-performance bonuses for Contra Costa County employees make clear that this is not considered court operations and is not payable out of the state’s trial court funding obligation. See Section 73353.2.

This presents a problem. If a Contra Costa County reporter was entitled to a pay-for-performance bonus as a county employee, how is that to be reconciled with the law precluding payment of such a bonus to the reporter as a court employee? One possible answer is that the Contra Costa County statute may be obsolete under the new regime of local court control of court employment and compensation issues. **The staff suggests we address this matter in the context of the county-specific statutes relating to Contra Costa County.**

Retirement Benefits

Statutes governing reporter compensation in Monterey, Stanislaus, and Tehama counties make clear that reporter transcription fees become part of the basis for determining retirement benefits. The staff draft refers to these statutes in the Comment as constituting part of the compensation scheme in effect on December 31, 2002.

The California Court Reporters Association believes these provisions should not be a minimum, but should be part of the ongoing compensation of reporters

in those counties, subject to the meet and confer provisions of TCEPGA. That is certainly the intention of the staff draft when it sets the December 31, 2002, compensation base and specifically references the relevant statutes in the Comment.

Short of preserving the existing county-specific statutes verbatim, we are not sure how we can make the system any more clear. **Perhaps it would help to further elaborate the base compensation concept:**

In no event shall the compensation of the official reporter be less than the compensation provided by law on December 31, 2002, for duties of the reporter that constitute court operations, **including any retirement benefits based on transcription fees.**

[Note. This provision should also include language that it does not preclude modification or elimination of existing wages, hours or terms and conditions of employment through the meet and confer in good faith process or, in those situations in which the employees are either exempted from representation, or are not represented by a recognized employee organization, through appropriate procedures.]

Comment. This provision preserves the effect of former Sections Government Code Sections 69991 (Monterey and Stanislaus Counties), 70045.10 (Tehama County), and 70047.1 (Stanislaus County) as they existed on December 31, 2002, ensuring that official reporter retirement benefits in those counties will continue to be based on transcription fees. This is subject to modification or elimination by negotiation and agreement of the parties.

Salaries

In Ventura, Orange, and San Francisco counties, by statute official reporter salaries are tied to Los Angeles County reporter salaries. These statutes are referenced in the staff draft Comment. The apparent purpose of the statutes is to enable reporters in those three counties to obtain the benefit of Los Angeles salary negotiations without the burden.

One issue is whether those three counties ought to remain in lock step with Los Angeles into the future, or whether they ought to be free to negotiate upward independently after December 31, 2002. The California Court Reporters Association takes the position that this process should be locked in for the future, subject to meet and confer principles. The Service Employees International Union likewise takes the position that the existing statutes should be maintained.

We have heard from other official reporter representatives, however, that this may not be particularly desirable for them. Conditions differ in the various

counties and may call for different benefit packages. The existing statutes only govern salaries. Therefore, when reporters in Los Angeles County negotiated a compensation package calling for lower salary but higher benefits, this hurt reporters in the other three counties who were guaranteed the lower salaries but not the higher benefits.

Nonetheless, **the concept of keeping the existing system in place, subject to meet and confer, appears sound to the staff.** This would allow reporters in the other counties to depart from the scheme by agreement if that is what they desire. This could be done by the following language:

In no event shall the compensation of the official reporter be less than the compensation provided by law on December 31, 2002, for duties of the reporter that constitute court operations, **including any determination of salaries based on salaries in Los Angeles County.**

[Note. This provision should also include language that it does not preclude modification or elimination of existing wages, hours or terms and conditions of employment through the meet and confer in good faith process or, in those situations in which the employees are either exempted from representation, or are not represented by a recognized employee organization, through appropriate procedures.]

Comment. This provision preserves the effect of former Sections Government Code Sections 69995 (Ventura County), 70012 (Orange County), and 70050.5 (San Francisco County) as they existed on December 31, 2002, ensuring that official reporter salaries in those counties will continue to be determined by the official reporter salaries in Los Angeles County. This is subject to modification or elimination by negotiation and agreement of the parties.

An alternative, of course, would simply be to keep the existing county-specific statutes in place, subject to meet and confer. The staff would prefer to avoid doing this, if we can accomplish the same effect by general language.

Billing Procedure

An anomaly of the shift from county funding to state funding of trial court operations is that official reporters in many counties perform non-court county functions (e.g., reporting board of equalization hearings or coroners inquests). To the extent the compensation paid by the court continues to cover these duties, some accommodation needs to be made. The staff draft provides in that situation

the county must reimburse the court for a pro rata share of the compensation paid to the reporter.

One court representative raises the question of how the billing of county departments will work in that circumstance. **The staff does not think it would be profitable to try to specify billing procedures.** We are confident the courts and counties will be able to work it out.

Transcription Fees

In addition to base compensation, official reporters are entitled to transcription fees. This is recognized in the staff draft.

One commentator notes that an official reporter may work overtime to prepare a transcript, and in some counties may be entitled to overtime pay or may be granted compensatory time off. Where the transcript has been ordered at the request of a party, the reporter will receive double compensation in the form of compensation paid by the court plus transcription fees paid by the party ordering the transcript. Should the statute address this issue?

The staff would not attempt to deal with this matter by statute. It seems to us that is a matter for negotiation between the reporters and the courts, resolvable in a number of different ways.

CONFORMING REVISIONS

Gov't Code § 68073. Responsibility for court operations and facilities

The staff draft includes only technical amendments to Government Code Section 68073:

68073. (a) Commencing July 1, 1997, and each year thereafter, no county or city and county shall be responsible to provide funding for "court operations" as defined in Section 77003 and Rule 810 of the California Rules of Court as it read on July 1, 1996.

(b) Commencing as of July 1, 1996, and each year thereafter, each county or city and county shall be responsible for providing necessary and suitable facilities for judicial and court support positions created prior to July 1, 1996. In determining whether facilities are necessary and suitable, the reasonable needs of the court and the fiscal condition of the county or city and county shall be taken into consideration.

(c) If a county or city and county fails to provide necessary and suitable facilities as described in subdivision (b), the court shall give notice of a specific deficiency. If the county or city and county then

fails to provide necessary and suitable facilities pursuant to this section, the court may direct the appropriate officers of the county or city and county to provide the necessary and suitable facilities. The expenses incurred, certified by the judge or judges to be correct, are a charge against the county or city and county treasury and shall be paid out of the general fund.

(d) Prior to the construction of new court facilities or the alteration, remodeling, or relocation of existing court facilities, a county or city and county shall solicit the review and comment of the judge or judges of the court affected regarding the adequacy and standard of design, and that review and comment shall not be disregarded without reasonable grounds.

(e) For purposes of this section, “facilities” means: (1) rooms for holding superior and municipal court, (2) the chambers of the judges of the court, (3) rooms for the attendants of the court, and (4) sufficient heat, ventilation, air-conditioning, light, and fixtures for those rooms and chambers.

(f) This section shall not be construed as authorizing a county, a city and county, a court, or the state to supply to the official reporters of the courts stenography, steno-type, or other shorthand machines; nor as authorizing the supply to the official reporters of the courts, for use in the preparation of transcripts, of typewriters, transcribing equipment, supplies, or other personal property.

Comment. Subdivisions (c) and (d) of Section 68073 are amended to delete language referring to “the judge” of the court. Every superior court has at least two judgeships as a result of trial court unification. See Gov’t Code § 69580 *et seq.* (number of judges). Where a court has only one judge due to a vacancy or otherwise, a reference to the judges of the court means the sole judge of the court. See Gov’t Code § 13 (plural includes singular).

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

The California Court Reporters Association would delete subdivision (f). They argue that by deleting the provision, the issue presented in it would be subject to the meet and confer provisions of TCEPGA. They note that several county-specific provisions proposed for repeal purport to authorize local courts to provide supplies notwithstanding subdivision (f).

This position makes sense to the staff. However, we do not know the background of the provision; it has been in the law since 1953. Perhaps it reflects an attitude that if an official reporter is allowed to earn supplemental income by

production of transcripts outside regular employment, that ought not to be done using publicly-provided equipment and supplies.

In any event, we suggest that any draft circulated for comment should propose deletion of subdivision (f), with a specific request for comment on it.

~~(f) This section shall not be construed as authorizing a county, a city and county, a court, or the state to supply to the official reporters of the courts stenography, stenotype, or other shorthand machines; nor as authorizing the supply to the official reporters of the courts, for use in the preparation of transcripts, of typewriters, transcribing equipment, supplies, or other personal property.~~

Comment. Subdivision (f) of Section 68073 is deleted as obsolete. Provision of stenographic equipment and supplies to official reporters of the courts is a matter of negotiation between official reporters and the courts. Cf. Section 69947 (compensation of official reporter).

Note. The Commission solicits comment on the proposed deletion of subdivision (f).

Gov't Code § 72194.5. Use of electronic equipment

The municipal court statutes include a provision authorizing use of electronic reporting where an official reporter or an official reporter pro tempore is unavailable. See Government Code Section 72194.5. Consistent with the Commission's policy not to propose any changes in the law affecting the incidence of use of electronic reporting, we have simply adjusted this provision for application in the superior court after unification:

72194.5. Whenever an official court reporter or a temporary court reporter reporter or an official reporter pro tempore 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 unlimited civil cases and felony cases, including 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.

Comment. Section 72194.5 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

The section is also amended for consistency of terminology. See, e.g., Gov't Code § 69941 (appointment of official reporters).

☞ **Staff Note.** This provision may be relocated among other provisions relating to official reporters.

The California Court Reporters Association has suggested that, rather than revise the second sentence of Section 72194.5, the sentence should simply be deleted:

~~The court shall assign available reporters first to report preliminary hearings, and then to other proceedings.~~

They argue that there is no need for the provision. It is a separate issue from the remainder of the statute authorizing use of electronic recording. Keeping the provision in the statute would likely be construed as authorizing the use of electronic recording equipment when a reporter was not available in a felony case, including a preliminary hearing, or an unlimited civil case.

We certainly don't intend to create an implication that electronic recording may be used in felony cases and unlimited civil cases. Just the opposite. Our thought is that if there are not enough official reporters and reporters pro tempore to go around, they should be assigned first to felony and unlimited civil cases. That will enable any gap to be filled by electronic recording in the types of cases in which it is authorized — misdemeanor and limited civil cases.

However, the staff agrees that it is not necessary to say that in the statute. That is the approach a court would undoubtedly take in any event. Accordingly, **we would include in the tentative recommendation a proposal simply to delete that sentence**, as suggested by the California Court Reporters Association.

Penal Code § 190.9. Record in death penalty cases

The staff draft includes technical revisions of Penal Code Section 190.9:

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.

The California Court Reporters Association notes an anomaly in the statute. It provides for a daily transcript only from the preliminary hearing onward, but notification to the court that the death penalty is being sought may occur before the preliminary hearing. This is not an obsolete statute issue. **The staff proposes to address it in the context of the Commission's substantive project on cases in which a court reporter is required.**

CONCLUSION

The staff will revise the general and county-specific statutes on official reporters in accordance with Commission decisions on the policy issues raised in this memorandum, and present the revised drafts for inclusion in any tentative recommendation circulated by the Commission for comment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary