

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 662 (Rubio)
Version: March 20, 2023
Hearing Date: April 18, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Courts: court reporters

DIGEST

This bill authorizes a court to electronically record any civil case, for the purpose of creating the official record, provided that no official reporter is available, as specified; and allows the Court Reporters Board of California (CRB) to issue provisional certificates to shorthand reporters who meet certain criteria.

EXECUTIVE SUMMARY

Generally speaking, only a certified shorthand court reporter may take down the verbatim record of a court proceeding for the creation of the official transcript. A court reporter may be certified to take down the proceedings through typographic or shorthand means or through voicewriting. The exception to the rule is that a court may electronically record a proceeding to create the verbatim record in limited civil, misdemeanor, and infraction cases if there is no official court reporter available.

Courts are currently required to provide a court reporter in felony, dependency, and juvenile justice proceedings, and in civil cases where a party has a fee waiver. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 623.) In all other cases, the court may opt to provide a reporter or may leave it to the parties to provide their own court reporter.

This bill would allow a court to use electronic recording in lieu of a court reporter in all civil cases, provided (1) that the court has made “every effort” to hire a court reporter for an action or proceeding before authorizing electronic recording, and (2) that the court gives right of first refusal to transcribe the recording to a certified shorthand reporter. The bill also authorizes CRB to issue three-year provisional court reporter certifications to persons who have passed the Registered Professional Reporter examination administered by the National Court Reporters Association or are eligible to take the CRB’s court reporter examination. Finally, the bill requires the Judicial Council

of California to annually report, beginning January 1, 2025, and until the funds are expended, on its efforts to spend funds granted by the Legislature specifically to assist in the hiring and retention of court reporters.

This bill is sponsored by the Family Violence Appellate Project and the Legal Aid Association of California, and is supported by the Judicial Council of California, over 40 organizations including California Defense Counsel, Consumer Attorneys of California, and organizations dedicated to representing low-income litigants and litigants in family law and domestic violence matters, and 212 individuals. This bill is opposed by AFSCME California, the California Court Reporters Association, the California Court Reporters Association Deposition Freelance Action Committee, the Deposition Reporters Association, the International Union of Operating Engineers, the Orange County Employees Association, the Protect Your Record Project, SEIU California, and 10 individuals. If this bill is passed by this Committee, it will next be heard by the Senate Business, Professions and Economic Development Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that an official court reporter or official court reporter pro tempore¹ of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer, in the following cases:
 - a) In a civil case, on the order of the court or at the request of a party.
 - b) 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.
 - c) In a misdemeanor or infraction case, on the order of the court. (Code Civ. Proc., § 269(a).)
- 2) Requires the court to provide an official court reporter in felony, dependency, and juvenile justice proceedings. (Pen. Code, §§ 190.9, 869; Welf. & Inst. Code, §§ 347, 677.)
- 3) Requires the official court reporter, if a transcript is ordered by the court or requested by a party or nonparty entitled to receive the transcript, to, within a reasonable time, transcribe the proceedings, certify that the transcripts were correctly reported and transcribed, and, when directed by the court, file the transcripts with the clerk of the court. (Code Civ. Proc., § 269(b).)

¹ Going forward, this analysis uses “official court reporter” to include “official court reporter pro tempore.”

- a) A transcript may be delivered in electronic form, as specified. (Code Civ. Proc., § 271.)
 - b) The report of the official court reporter, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of that testimony and proceedings. (Code Civ. Proc., § 273.)
- 4) Provides that no person shall be appointed to the position of official court reporter of any court unless the person has first obtained a license to practice as a certified shorthand reporter from the CRB. (Gov. Code, § 69942.)
 - 5) Defines the practice of shorthand reporting, for purposes of becoming a certified shorthand reporter under 4), as the making, by means of written symbols or abbreviations in shorthand or machine shorthand writing, or by voice writing, of a verbatim record of any oral court proceeding, deposition, court ordered hearing or arbitration, or proceeding before any grand jury, referee, or court commissioner and the accurate transcription thereof. (Bus. & Prof. Code, § 8017.)
 - 6) Provides that, in a limited civil, misdemeanor, or infraction case, if an official court reporter is unavailable to report an action or proceeding in a court, the court may order the action or proceeding to be electronically recorded for purposes of creating the verbatim record, provided that the court has the approved equipment for doing so. (Gov. Code, § 69957(a).)

This bill:

- 1) Makes findings and declarations regarding the importance of a verbatim record and the availability of official court reporters.
- 2) Authorizes the CRB to issue a provisional certificate to perform the duties of a certified shorthand reporter in a court in this state to a person who either:
 - a) Has passed the Registered Professional Reporter examination administered by the National Court Reporters Association; or
 - b) Is eligible to take the CRB-approved shorthand reporter examination.
- 3) Provides that a provisional certificate issued under 2) terminates three years from the date of issuance and may not be renewed.
- 4) Expands the provisions allowing an action or proceeding to be recorded, when an official court reporter is unavailable, to permit recording in any civil case, and adds the following requirements relating to electronic recording generally:
 - a) If a transcript of the recorded proceeding is requested, the court shall provide a certified shorthand reporter the right of first refusal to transcribe the electronically recorded proceeding.

- b) The court shall make every effort to hire a court reporter for an action or proceeding before electing to electronically record the proceeding.
- 5) Requires the Judicial Council of California to adopt rules or standards regarding the use of electronic recordings to ensure recordings are able to be easily transcribed.
- 6) Requires the Judicial Council of California to collect information from courts regarding how they are utilizing funds appropriated to recruit and hire court reporters. Courts shall include whether the court reporters they have hired are court reporters that are returning to court reporting after having left the profession, coming from another court, coming from the private market, or are new to the profession in California.
- 7) Requires the Judicial Council of California, beginning January 1, 2025, and annually thereafter until all such funds are expended, to report to the Legislature on its efforts to hire and retain court reporters and how the funds appropriated for the purpose have been spent. The report shall include whether the court reporters that have been hired are court reporters that are returning to court reporting after having left the profession, coming from a different court, coming from the private market, or are new to the profession in California.

COMMENTS

1. Author's comment

According to the author:

Senate Bill 662 will ensure due process to low-and moderate-income litigants disproportionately affected due to the lack of certified shorthand court reporters (CSRs) within each court. Absent a court reporter and a record of a hearing, it can be incredibly difficult for self-represented litigants to pursue and prepare for an appeal. In *Jameson v. Desta*, the California Supreme Court held that low-income litigants with a court fee waiver are entitled to a free court reporter provided by the court. Unfortunately, it has been reported that in some cases, these litigants are experiencing delays in their court hearings due to court reporters not being available to cover these hearings. Rescheduling hearing dates, after a litigant has already come to court, becomes a tremendous burden and financial cost due to missing work, childcare, transportation/gas prices, etc. For survivors of domestic violence abuse, the emotional toll is also significant. This bill was carefully crafted to ensure all courts prioritize court reporters by requiring courts to make every effort to hire a court reporter and providing certified shorthand court reporters the first right of refusal to transcribe an electronic recording. In addition, in an effort to build the pipeline of court

reporter professionals, the bill establishes a provisional certificate and pathway for individuals pursuing a career in court reporting within 3 years.

Furthermore, according to the Bar Association of San Francisco's Justice and Diversity Center, "research shows that abusers are able to afford attorneys, while 98% of the safe parents are self-represented when they lose custody of their children and do not have the resources to pay for court reporters and transcripts." We cannot afford to deny vulnerable individuals and families full access to justice under the law.

2. Background on official court reporters in California

As a general rule, the official record of a court proceeding can be made only by a shorthand reporter licensed to practice by the CRB.² To obtain a license, a person must pass a three-part exam and, generally, graduate from a state-approved school that takes four years to graduate.³ Court reporters are vital to the litigation process: "the absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have [their] claims of trial court error resolved by the appellate court."⁴ Felony, dependency, and juvenile justice proceedings are automatically reported;⁵ in civil trials, any party may request that a court reporter make a record of the proceedings.⁶ Additionally, if a party in a civil case has a fee waiver, the court must make a court reporter available for that litigant, even if the court does not otherwise provide court reporters for that case type.⁷

There are exceptions to the rule requiring the record to be made by an official court reporter: in a limited civil, misdemeanor, or infraction case, the court may authorize the proceeding to be electronically recorded and transcribed after the fact by a person designated by the clerk of the court.⁸ Other jurisdictions currently use electronic recording in a wide array of cases, including the federal government.⁹

Prior to budget cuts made by the state in connection with the Great Recession, California's courts generally made official court reporters available for civil trials.¹⁰

² Code Civ. Proc., § 269; Gov. Code, §§ 69941, 69942, 69957.

³ Commission on the Future of California's Court System, Report to the Chief Justice (2017), Appendix 5.1C, p. 262.

⁴ *Jameson v. Desta* (2018) 5 Cal.5th 594, 608.

⁵ Pen. Code, §§ 190.9, 869; Welf. & Inst. Code, §§ 347, 677.)

⁶ Code Civ. Proc., § 369(a.)

⁷ *Jameson, supra*, 5 Cal.5th at p. 623.

⁸ Gov. Code, § 69975(a); Cal. Rules of Ct., r. 2.952(g.)

⁹ E.g., 28 U.S.C. § 753(b). The federal courts' Guide to Judiciary Policy sets forth extensive requirements for audio recordings, including for recording speeds, emergency backup measures, disaster recovery, and data security for digital recordings. (Guide to Judiciary Policy, Vol. 6: Court Reporting, Ch. 3 & Appx. 3B & 3C.)

¹⁰ *Id.* at p. 610.

Many of these court reporters were court employees who “occupy a unique dual status,” because they are “considered court employees when taking notes in a recorded proceeding but operate as independent contractors when producing and selling the certified verbatim transcript.”¹¹ As a result of budget cuts, however, many courts opted to reduce their number of employee court reporters and adopted policies for providing official court reporters only in narrow categories of civil cases that do not include “ordinary contract, personal injury, or professional negligence cases.”¹² The Superior Court for the County of Los Angeles recently announced that it would no longer provide court reporters in family law and probate matters or for cases in the writs and receiver departments.¹³

If a party in a matter in which the court does not provide a reporter wishes to have a record of the proceeding made, the party has to arrange for a non-employee reporter to attend and make a record of the matter. The per diem cost for an independent reporter can represent a significant expense for litigants, and stakeholders report that independent reporter costs can be prohibitively expensive. Litigants have also reported being unable to find reporters for certain trials and proceedings.

In recent years, the Legislature has taken steps to encourage the courts to hire more court reporters as employees so as to minimize the number of litigants who have to find an outside-contractor reporter. The 2021 Budget Act included a grant of \$30 million to increase the number of court reporters in family law and civil law cases.¹⁴ And in 2022, the Legislature authorized the Court Reporters Board to license voice writers as shorthand reporters¹⁵ with the goal of increasing the number of available licensed reporters: the training period for voice writers is generally shorter and less expensive than that for reporters who make a record of the proceedings through shorthand or stenographic means.

At this Committee’s informational hearing on March 7, 2023 – *The Judicial Branch: Protecting Access to Justice as the COVID-19 State of Emergency Expires* – the Executive Officer of the CRB stated that there is currently a sufficient number of licensed court reporters to meet the demand for court reporters. According to the Judicial Council, however, as of July 1, 2022, the courts had a 20 percent vacancy rate statewide for court

¹¹ Commission on the Future of California’s Court System, Report to the Chief Justice, *supra*, Appendix 5.1C, pp. 260-261.

¹² *Ibid.*

¹³ Superior Court of California, County of Los Angeles, News Release, Effective November 14, The Court Will Prioritize Official Court Reporters for Criminal Felony, Juvenile Cases As Severe Staffing Shortages Persist Despite New State Funding (Aug. 25, 2022) available at <https://www.lacourt.org/newsmedia/uploads/14202282512465522NRCOURTREPORTERS.pdf> (link current as of April 13, 2023).

¹⁴ SB 170 (Skinner, Ch. 240, Stats. 2021).

¹⁵ See AB 1056 (Assembly Committee on Budget, Ch. 569, Stats. 2022); Bus. & Prof. Code, §§ 8017, 8017.5, 8024.

reporter positions, 10 percent higher than the prior year.¹⁶ Stakeholders disagree on the reason the vacancies continue despite the additional funding. The Judicial Council reports that courts have made extensive efforts to hire court reporters, including generous signing and retention bonuses. Court reporters have reported that, in many cases, the salaries offered by courts are insufficient to draw court reporters away from the freedom of being a freelance court reporter; they have also reported instances wherein courts have failed to extend an offer to a court reporter despite having several qualified applicants.

3. This bill creates a provisional shorthand reporter certification and authorizes a transcript to be created through the use of electronic recording in lieu of requiring an official court reporter

This bill implements two measures the author and sponsors intend to ensure all parties in civil cases will have a record of their proceedings.

First, the bill authorizes the CRB to issue a provisional certificate that would allow persons who (1) have passed a specified national court reporter examination or (2) are eligible to take the CRB's court reporter examination to serve as a court reporter for three years; the provisional certificate may not be renewed. While these provisions are primarily within the purview of the Senate Business, Professions and Economic Development Committee, which will hear this bill if it is passed by this Committee, it is worth noting that it appears the provisional certificate could be issued to a person who attempted to pass the CRB's court reporter examination and failed. This raises concerns about the quality of the reporting by provisionally certified individuals.

Second, this bill expands the current law that authorizes a case to be electronically recorded when no court reporter is available, extending the provision to any civil case. The bill also adds two conditions, in addition to the unavailability of a court reporter, for using electronic recording: the court must provide a certified shorthand reporter with the right of first refusal to transcribe the proceedings, and the court "shall make every effort" to hire a court reporter for an action or proceeding before electing to use electronic reporting.

The bill also requires the Judicial Council to collect information from the courts about how they are utilizing funds specifically designated by the Legislature for the hiring and retention of official court reporters. The bill requires Judicial Council, beginning January 1, 2025, report to the Legislature on the efforts taken to spend the funds; the reports must be made annually until the funds are expended.

This bill would implement a sea change in how civil proceedings are reported in this state and gives the Judicial Council wide latitude in how to implement that change. This

¹⁶ Judicial Council of California, *Trial Court Operational Metrics: Year One Report*, *supra*, at p. 12.

bill does not provide direction regarding minimum technological requirements, clarity regarding whether a separate employee is required to monitor the recording or standards for how to ensure the recording is properly started and stopped, or what safeguards are necessary to prevent lost or unintelligible recordings. The bill's opponents report that the existing recording systems have problems with clarity when there is ambient noise, can have a hard time picking up higher or female voices, and inadvertently pick up privileged discussions between a client and counsel. This bill does not provide any guidance or guardrails to ensure these issues are resolved before the widespread adoption of electronic recording.

It is also unclear how the bill's provision requiring a court to "make every effort" to hire an official court reporter before resorting to electronic recording would function. Who determines whether a court made "every effort" to offer the job to a court reporter? And if the court's efforts fall short, could a proceeding be invalidated if it was recorded electronically anyway? Moreover, it is unclear what constitutes "every effort"; taken literally, the term would seem to require the courts to offer significantly more generous salary and benefits terms to court reporters than they are doing now, and potentially attempt to offer a job to every court reporter in the state, before moving to electronic recording.

More likely, however, is that this term would be interpreted by the courts to mean less-than-every effort, so that they could move to electronic reporting more readily. The bill's opponents argue that allowing courts to adopt electronic reporting in this manner will result in the end, or near-end, of the court reporting profession—a profession which has provided well-paying jobs, particularly for women. The bill does not provide any support for court reporters who lose their job as a result of the transition to remote, nor does it provide any new career options in the form of requiring a person to monitor the recording. While the policy of expanding access to court transcripts is laudable, this abrupt shift toward electronic record appears to merely shift the pain to another segment of the courts rather than finding a solution that works for all involved.

There is also a question over the scope of this bill. While many of the bill's sponsors and supporters represent individuals in family law, domestic violence, and other areas of law where individuals often cannot afford a court reporter, the bill allows courts to use electronic reporting in *all* case types. The rationale for allowing recording in a case where an individual has a fee waiver or has to choose between counsel and a reporter does not appear to extend to allowing recordings in, for example, complex civil cases and large corporate disputes. Many of the supporters insist that a certified reporter remains the gold standard, but by allowing electronic cases in all case types, it seems likely that this bill will hasten the loss of court reporting jobs while providing savings to well-off litigants.

As an alternative method for ensuring a court reporter in every civil case, the Legislature could consider requiring the courts to provide court reporters in civil cases

(or a subset of civil cases, such as custody and protective order proceedings), just as the courts are currently required to provide court reporters in felony, dependency, and juvenile justice cases. This would appear to be consistent with the bill's current "make every effort" requirement and would circumvent the concerns about the integrity of electronic recording.

4. Arguments in support

According to the Judicial Council of California:

In expanding electronic reporting to all civil case types, SB 662 is consistent with the Council's adopted 2023 Legislative Priorities that include "Contribut[ing] to promote the availability of verbatim records of court proceedings by working collaboratively to address court reporter shortages and exploring innovations in technology." Due to the well-documented court reporter shortage, the prohibitive cost of hiring a private court reporter, and existing statutory restrictions on the use of electronic reporting, many parties today totally lack access to a verbatim record. The California Supreme Court, in a 2018 opinion, stated that "the absence of a verbatim record has a devastating effect" on a litigant's ability to have an appeal decided on the merits. Without an accurate and complete transcript, these parties are for all practical purposes unable to meaningfully exercise their right to appeal. Removing the statutory case type restrictions and expanding use of electronic reporting, which increases access to a verbatim record, promotes access to justice.

Next, this bill demonstrates a clear policy preference for court reporters by explicitly requiring that courts make every effort to hire a court reporter before permitting electronic recording. The bill also provides a right of first refusal to certified shorthand reporters if a transcript of an electronic recording is requested. Notably, under SB 662, these requirements would apply to both the civil cases added by the bill as well as existing case types in which electronic recording is already currently authorized.

5. Arguments in opposition

According to AFSCME California, the California Court Reporters Association, the Deposition Reporters Association, the International Union of Operating Engineers, the Orange County Employees Association, and SEIU California:

Electronically recorded proceedings create two standards for those who have and those who do not. Those with means will be able to hire a private reporter to create an accurate transcript for appeals. Those without will be given a recording or automatically generated transcript riddled with "inaudibles." The availability of an electronic recording does not advantage litigants who cannot afford a court

reporter. It advantages those with the means to afford the premium product, a verbatim transcript.

Additionally, who or what would create and own the transcript is unclear. Would a certificated court reporter, a private company, or artificial intelligence (AI) create a transcript from a recording? The cost of creating a transcript from a recording is significantly higher than even the hourly rate of a private court reporter. If AI is used to produce a transcript, the time it takes to clean up an automatically generated document is around the same as creating a transcription from a recording. There is no guarantee of even minimal cost savings to litigants. Who would own and profit from ER transcripts? Would the court or a private company profit from charging parties for transcriptions? The expansion of ER is more likely to benefit private companies and wealthy litigants than it is to provide any benefit to average court users.

Finally, there are serious privacy issues with ER – a disc sold to a party in a family law case is often not just their proceeding but instead includes whole parts of a calendar containing all cases heard during that court session. The purchaser can take the disc to a private transcriber which will substantially increase potential for violation of privacy, (a critical factor in family, dependency, juvenile and mental health proceedings) illegal disclosure of protected information (allegations of child abuse, names of accused abusers, etc) and identity theft. Additionally, the recordings with confidential or personal information can get into the hands of parties who should not have them.

SUPPORT

Family Violence Appellate Project (co-sponsor)
Legal Aid Association of California (co-sponsor)
A Window Between Worlds
Advocates for Child Empowerment and Safety
ADZ Law LLC
Asian Americans for Community Involvement
Asian Women's Shelter
Bet Tzedek
California Advocates for Nursing Home Reform
California Defense Council
California Judges Association
California Partnership to End Domestic Violence
California Protective Parents Association
California Trial Court Consortium (54 members)
California Women's Law Center
Central California Family Crisis Center, Inc.
Centro Legal de la Raza

Community Legal Aid SoCal
Community Legal Services
Consumer Attorneys of California
Disability Rights California
Disability Rights Education and Defense Fund
Elder Law and Disability Rights Center
Empower Yolo
Family Violence Law Center
Healthy Alternatives to Violent Environments
Impact Fund
Inner City Law Center
Judicial Council of California
Legal Aid Foundation of Los Angeles
Legal Aid of Marin
Legal Aid Society of San Diego
Legal Assistance to the Elderly
Legal Services for Prisoners with Children
Legislative Coalition to Prevent Child Abuse
Los Angeles Center for Law and Justice
Lumina Alliance
National Health Law Program
Neighborhood Legal Services of Los Angeles County
Next Door Solutions to Domestic Violence
OneJustice
Superior Court for the County of Los Angeles
The California Women's Law Center
The People Concern
Western Center on Law and Poverty
212 individuals

OPPOSITION

AFSCME California
California Court Reporters Association
California Court Reporters Association Deposition Freelance Action Committee
Deposition Reporters Association
International Union of Operating Engineers
Orange County Employees Association
Protect Your Record Project
SEIU California
10 individuals

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1834 (Wagner, 2015) would have allowed a court to use electronic recording in a family law case if an official court reporter is unavailable. AB 1834 died in the Assembly Judiciary Committee.

AB 251 (Wagner, 2013) would have allowed a court to use electronic recording in a family law case if an official court reporter is unavailable. AB 251 died in the Assembly Judiciary Committee.

AB 2657 (Calderon, Ch. 170, Stats. 2012) required transcripts derived from electronic recordings to include a designation of "inaudible" or "unintelligible" for the portions of a recording that contain no audible sound or are not discernable.

AB 803 (Wagner, 2011) would have required the Judicial Council, by 2012, to implement electronic court reporting in at least 20 percent of its courtrooms and in 20 percent of its courtrooms per year annually thereafter. AB 803 failed passage in the Assembly Judiciary Committee.
