



State of California
Commission on Judicial Performance
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February 29, 2012

Honorable Edmund G. Brown, Jr.
Governor, State of California
State Capitol
Sacramento, CA 95814

Honorable Darrell Steinberg
Senate President pro Tem
State Capitol, Room 205
Sacramento, CA 95814-4900

Honorable Tani Cantil-Sakauye
Chief Justice of California
Supreme Court
350 McAllister Street
San Francisco, CA 94102

Honorable John A. Pérez
Speaker of the Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0046

Dear Governor Brown, Chief Justice Cantil-Sakauye, Senator Steinberg, and Speaker Pérez:

This letter is written at the request of the Commission on Judicial Performance to alert you to a problem that the commission believes impairs its ability to fulfill its mandate to protect the public, and undermines the administration of justice in court proceedings in California. It involves decreased reporting of court proceedings in California's courts of record. The commission takes no position on how the problem should be fixed but urges, for the public's protection, that the problem be addressed and resolved.

In summary:

- Some courts are cutting costs by terminating court reporters. Nothing requires courts to replace court reporters with another means of recording proceedings. As a result, there are fewer official records of court proceedings in California's courts of record.
- The Commission, which is responsible for investigating and disciplining misconduct by state court judges, is held to a clear and convincing evidence standard in its cases. Without any record of the proceedings, it can be difficult, if not impossible, to establish what occurred in the courtroom, where 95% of the complaints to the Commission each

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year originate. In December 2011, there were transcripts or recordings in only half of the Commission's pending investigations that involve courtroom conduct.

- California, ordinarily a leader in the administration of justice, is falling behind other states in which the public is protected and the administration of justice is preserved by recording *all* court proceedings.
- At a minimum, action should be taken to ensure that when court reporters are released, another means of creating an official record is provided.

These points are addressed in greater detail in the remainder of this letter.

As California's budget crisis has persisted and trial court funding was reduced, trial courts individually began to impose measures to achieve cost reductions, including termination of the services of court reporters. According to news reports, in October, 15 court reporters were laid off in Alameda County; in November, San Francisco Superior Court laid off 22. The website of the California Official Court Reporters Association states that Santa Cruz County Superior Court pulled reporters from civil courts in 2010, and, as of October 2011, reporters were being laid off in Napa and Marin, and warnings of imminent layoffs were being made in Los Angeles and Ventura.¹ In some counties, litigants in civil proceedings and their counsel are being told to bring their own reporters if they want a record of the proceedings.² If the trend continues towards decreased reliance upon court reporters without the substitution of other means of creating an official record, court reporters will be used only in the proceedings required by law to be reported, and there will be no official record – electronic or otherwise—of any other court proceedings.

As you are all aware, the Commission on Judicial Performance is the body constitutionally charged with responsibility to investigate and discipline misconduct by state court judges. Each year, 95 percent of the complaints submitted to the commission concern conduct by judges in the course of performing judicial duties in court proceedings. Because the standard of proof in commission disciplinary proceedings is clear and convincing evidence, it can be very difficult, if not impossible, to establish what was said and what occurred in the courtroom without any record of the proceedings. Over the past decade, there were six cases in which judges were removed from office for conduct involving courtroom proceedings. In five of those cases, there were transcripts or recordings of the proceedings that substantiated the charges of misconduct. Similarly, over the same period, in six of the seven cases in which judges were censured for

¹ <http://cocra.org/>

² (Foster, *Laid-Off Reporters Organize, Get Backing of Judges and Bar*, S.F. Recorder (Oct. 5, 2011).)

conduct that involved courtroom proceedings, there were transcripts or recordings of the proceedings.

A review of pending investigations involving court proceedings at the commission's December 2011 meeting revealed, however, that transcripts or recordings exist in only half of the cases, which means that it may not be possible to establish with certainty whether or not misconduct occurred in half of the cases. The absence of transcripts or recordings thus impedes the commission in determining that misconduct has occurred and in protecting the public from abusive judges. Equally important, the absence of a record of court proceedings prevents the swift and complete exoneration of judges by the commission when appropriate.³ In addition to causing anxiety for judges, prolonged investigations also increase their defense costs. For the commission – which has operated for the past several years with a 25 percent reduction in staffing – other investigations are inevitably delayed, when extensive interviews must be conducted because a transcript or recording is not available. This situation will become more extreme if fewer court proceedings are reported.

Ironically, California, ordinarily a leader in the administration of justice, is falling behind other states in which the public is protected and the administration of justice is preserved by recording *all* court proceedings. Some might argue that this is easier to accomplish in smaller states, yet in New York, a jurisdiction with twice as many judges as California, all proceedings are reported in courts of record and, since 2008, even the 1,200 courts that are not courts of record have been mandated to audio record all proceedings, on equipment furnished by the Office of Court Administration. That office also provides remote transcription assistance when necessary to make an actual transcript. Similarly, Utah passed legislation in 2010 requiring all justice, county and municipal courts to audio record proceedings starting July 1, 2012. Proceedings in all Utah state courts – the Supreme Court, Court of Appeals, district courts and juvenile courts – are already reported. Court reporters and video reporting in those courts are being phased out in favor of audio reporting. Other states in which all court proceedings are recorded include Alaska, Maryland, Massachusetts, Missouri, New Hampshire and New Jersey. Where audio recordings are easily made available, our counterparts in other jurisdictions report that they are able to quickly obtain and review the recordings and make a prompt determination whether an investigation is necessary, thereby avoiding unnecessary and prolonged proceedings.

In California, we are aware of nothing that requires courts to replace court reporters with any other means of reporting proceedings, unless a record is prescribed by law. We are also aware of nothing that requires consistency in how trial courts address this problem.

³ Commissions in states that have reporting of all proceedings, particularly audio proceedings, generally bear out our own experience that a record of court proceedings exonerates the judge more often than not.

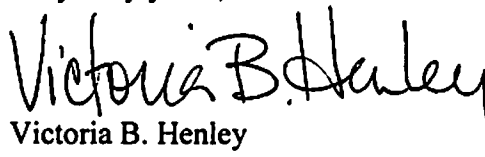
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The effect on commission proceedings is obviously not the only negative impact of decreased reporting of court proceedings in California. The elimination of reporting of court proceedings is likely to increase the workload of the trial courts and further delay both trial court and appellate proceedings. Without any official record, the trial courts will be required to produce settled statements in those cases in which appeals are taken, a time-consuming and imprecise process at best. The use of private court reporters hired by one party in litigation raises numerous concerns, including the questionable admissibility of the transcript as an official court record and access to justice for those with limited financial means. The public's confidence in the courts is also undermined. For instance, in a complaint submitted to the commission in October 2011, the complainant wrote: "Also, I feel there's misconduct also of the court due to, I was just informed when I was trying to get a recording of that hearing [], that there was no recording nor transcripts! Well how handy."

This problem should be addressed before the administration of justice in California is further compromised, in the commission's cases as well as in judicial proceedings. At a minimum, action should be taken to ensure that when court reporters are released, another means of creating an official record is provided.

The commission appreciates your consideration of its concerns and will provide any additional information that might be helpful to you.

Very truly yours,



Victoria B. Henley
Director-Chief Counsel

VBH:ng

cc: Joseph L. Dunn, Executive Director
State Bar of California