

RESOLUTION 08-10-2016

DIGEST

Civil Procedure: Expansion of Electronic Recording to Unlimited Civil Proceedings

Amends Government Code section 69957 to expand the availability of electronic recording and articulate requirements for official transcripts.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 69957 to read as follows:

§69957

1 (a) If an official reporter or an official reporter pro tempore is unavailable to report an
2 action or proceeding in a court, subject to the availability of approved equipment and equipment
3 monitors, the court may order that, in a ~~limited~~-civil case, inclusive of probate cases, or a
4 misdemeanor or infraction case, the action or proceeding be electronically recorded, including all
5 the testimony, the objections made, the ruling of the court, the exceptions taken, all
6 arraignments, pleas, and sentences of defendants in criminal cases, the arguments of the
7 attorneys to the jury, and all statements and remarks made and oral instructions given by the
8 judge. A transcript derived from an electronic recording may be utilized whenever a transcript of
9 court proceedings is required. Transcripts derived from electronic recordings shall include a
10 designation of “inaudible” or “unintelligible” for those portions of the recording that contain no
11 audible sound or are not discernible. The electronic recording device and appurtenant equipment
12 shall be of a type approved by the Judicial Council for courtroom use and shall only be
13 purchased for use as provided by this section. A court shall not expend funds for or use
14 electronic recording technology or equipment to make an unofficial record of an action or
15 proceeding, including for purposes of judicial notetaking, or to make the official record of an
16 action or proceeding in circumstances not authorized by this section.

17 (b) Notwithstanding subdivision (a), a court may use electronic recording equipment for
18 the internal personnel purpose of monitoring the performance of subordinate judicial officers, as
19 defined in Section 71601 of the Government Code, hearing officers, and temporary judges while
20 proceedings are conducted in the courtroom, if notice is provided to the subordinate judicial
21 officer, hearing officer, or temporary judge, and to the litigants, that the proceeding may be
22 recorded for that purpose. An electronic recording made for the purpose of monitoring that
23 performance shall not be used for any other purpose and shall not be made publicly available.
24 Any recording made pursuant to this subdivision shall be destroyed two years after the date of
25 the proceeding unless a personnel matter is pending relating to performance of the subordinate
26 judicial officer, hearing officer, or temporary judge.

27 (c) Prior to purchasing or leasing any electronic recording technology or equipment, a
28 court shall obtain advance approval from the Judicial Council, which may grant that approval
29 only if the use of the technology or equipment will be consistent with this section.

30 (d) A transcript derived from an electronic recording must be prepared by a California
31 certified shorthand reporter or a professional recording service that has been certified by the
32 federal court system or the Administrative Office of the Courts. A transcript derived from an

33 electronic recording must be prepared in a typewritten format consistent with such rules as
34 adopted by the Judicial Council of California.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Current law limits the availability of electronic recording of court proceedings to limited civil cases, misdemeanors and infractions. It does not allow electronic recording in unlimited civil cases, inclusive of probate, even if the courtroom has approved electronic recording equipment. The problem is that court reporters are no longer provided by the court in most departments hearing civil and probate cases, or their availability has been severely restricted, as a result of budget cuts. This leaves litigants with a choice of foregoing an oral transcript of the proceedings or to hire their own certified shorthand reporters if they want the proceedings reported. Current law authorizing electronic recordings of court proceedings does not specify the manner in which a typewritten transcript of an electronic recording must be prepared. California Rules of Court, rule 2.952(g), contains the requirements for the preparation of a transcript of an electronically recorded proceeding. However this allows a party to prepare what purports to be a transcript and allows the potential for gamesmanship.

The Solution: This resolution amends Government Code section 69957 to expand the allowable use of electronic recording of proceedings to include all civil cases, inclusive of probate proceedings, where an official court reporter or official reporter pro tempore is unavailable to report the proceedings and the courtroom has an approved electronic recording system available. This resolution also codifies that the preparation of a typewritten transcript from an electronically recorded proceeding must be prepared by a certified shorthand reporter or an approved professional recording service certified by the federal courts or Administrative Office of the Courts.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Similar to Resolutions 06-02-2013, 08-03-2013, and 07-03-2012. Prior legislation, AB 215 (2013-2014 Reg. Sess.), died in committee. Related to AB 803 (2011) which failed to pass and would have eliminated current Government Code section 69957 and mandated the Judicial Council implement electronic reporting in at least 20% of all superior court courtrooms in the state and continue phasing in electronic reporting by expanding it an additional 20% on an annual basis.

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RESPONSIBLE FLOOR DELEGATE: Darin L. Wessel

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolutions 07-03-2012, 06-02-2013, and 08-03-2013, which were approved in principle.

Reasons:

This resolution amends Government Code section 69957 to expand the availability of electronic recording and articulate requirements for official transcripts. This resolution should be approved in principle because a transcript of oral proceedings should be available in all California courts where such a record is necessary to perfect an appeal.

Since the courts have stopped having certified shorthand reporters present for all proceedings, in many courts, family law and unlimited civil litigants are forced to pay for a private reporter if they wish to have a full and proper record which is very expensive for pro per litigants. The lack of a transcript of the oral proceedings is frequently fatal to any effort to appeal an unfavorable result. As the Court of Appeal held in *Taylor v. Nu Digital Marketing, Inc.* (2015) |245 Cal.App.4th 283:

A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. Where, as here, the appeal is on the judgment roll alone, the question of the sufficiency of the evidence to support the findings of the trial court is not open. Instead, the evidence is conclusively presumed to support the findings, and the only questions presented are the sufficiency of the pleadings and whether the findings support the judgment. (*Id.* at 287.)

This analysis would also apply to such issues as objections on the record and other oral proceedings that are not apparent in the court's file. Although the provision for the official transcription of the proceedings will involve some costs, this resolution would at least make such transcripts more readily available when needed and the costs involved in using an electronic reporter are often lower than those associated with the use of a certified shorthand reporter.

COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

The proposal to amend Government Code section 69957 does not remedy the problem it purports to address. It is absolutely true that the budgetary damage to our courts includes a shortage in the ease of accessibility of an on demand certified reporter. However, the solution to this problem is to advocate on behalf of our courts for additional funding or for parties to ask for and pay for the certified reporter. The solution is not to make it easier to opt out of the services provided by certified reporters.

Resolution 08-10-2016 does very little to resolve the shortage of access to certified reporters. Instead, this proposal will lead to an increase in requests for the low-cost alternative of electronic recording services which will only serve to decrease the need and demand for certified reporters in court. Anyone who has used an electronic recording service is all too familiar with the shortcomings of such a system – repeated inaudibles and unintelligibles with no method for confirming whether the missing information was critical. While such shortcomings may be acceptable in cases involving potentially limited costs, such as limited civil cases, the same cannot be said for unlimited civil cases or probate cases where significant costs and money are at stake. Moreover, using certified reporters or certified professional recording services to create the transcripts of these recordings will not cure the defects in a recording that does not capture every word.