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December 30, 2024

Hon. Chief Justice Patricia Guerrero
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amicus Curiae
Association of Certified Family Law Specialists
Supporting Petitioners in *Family Violence
Appellate Project, et al. v. Superior Courts of
California*
Case No. S288176

Dear Chief Justice Guerrero and Associate Justices:

Amicus Curiae Association of Certified Family Law Specialists (ACFLS) submits this letter supporting the petition for writ of mandate and/or prohibition filed by Family Violence Appellate Project (FVAP) and Bay Area Legal Aid (Bay Legal).

Identification and Interests of Amicus Curiae

ACFLS is an independent non-profit bar association, composed of 605 California Certified Family Law Specialists (State Bar of California, Board of Legal Specialization) who are dedicated to promoting and preserving the practice of family law since 1980. ACFLS members actively practice family law in California family courts and appellate courts. Our members also serve as court-appointed minors' counsel, mediators, private judges, judges pro tempore, and expert witnesses in child custody proceedings.

Document received by the CA Supreme Court.

Since its founding at the inception of the certification of family law specialists by the State Bar, ACFLS has an active public policy role when the Appellate Courts, Legislature, and Judicial Council consider matters of significance to family courts, family court litigants, and the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the appellate court.

ACFLS has an active all-volunteer amicus committee that reviews cases, and makes recommendations to the Board of Directors regarding letters supporting publication or depublication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs.

ACFLS's active, all-volunteer, amicus committee includes every known California lawyer that holds dual certification as a certified family law specialist and as a certified appellate law specialist. Other committee members include highly respected leaders in the family law community including Hon. Thomas Trent Lewis (ret.) and Garrett C. Dailey.

ACFLS's board of directors and amicus committee have no direct ties to or interest in the litigants or their attorneys – ACFLS is solely concerned with the development of the law for children and families in California. Committee members take turns reviewing the unpublished decisions on the California Courts website.

Introduction

ACFLS reviewed the amicus curiae letter submitted by the California Lawyers Association (CLA) and agrees with that letter.

ACFLS's own letter will focus on (a) examples of real-world problems ACFLS members have experienced because of the unavailability of court reporters and (b) the unavailability of a political (legislative) solution.

ACFLS is not asking the Supreme Court to eliminate the use of certified stenographic reporters (court reporters). Rather, ACFLS supports a remedy when the court cannot provide a court reporter in family law cases (and in all court hearings). Using electronic recording should be an available back-up option when no court reporter is available.

Real-World Examples of Problems

The following are some real-world experiences ACFLS members have experienced that could have been avoided if the back-up option of electronic recording was available absent a court reporter.

Member 1: I booked a court reporter well before a trial and paid the court's fee. On the day of trial, I was told no court reporter was available. I had to choose between asking for a continuance, which would further delay resolution of the issue for my client, or moving forward without a court reporter even though that would probably prevent appellate relief and prevent the trial court from referring to a transcript if disputes later arose over what a witness said or what the trial court ruled.

Member 2: In the late afternoon before a high-conflict domestic violence restraining order hearing, the court told me the court could not provide a previously reserved court reporter. I had to scramble to find a deposition reporter at great expense (\$700 for a half-day and \$1,400 for a full-day).

Member 3: The court could not provide a court reporter. I brought in a deposition reporter. But the other side refused to stipulate to the deposition reporter serving as a court reporter pro tem. The court could not order the deposition reporter to serve as a court reporter pro tem over the objection of the other side and I had to try the case without a court reporter. Fortunately, my client prevailed. But if my client had lost because of judicial error, my client would have lost any meaningful appellate review.

Member 4: Mother brought a move-away motion from California to Colorado. Father had committed abuse and was subject to the custody presumption of Family Code section 3044 (Father could not have sole or joint custody unless he rebutted the presumption). While Father had some visitation, Mother had sole custody. The trial court relied on the policy of “frequent and continuing contact” to deny the move away and ordered if Mother moved anyway then Father, who had not rebutted the Family Code section 3044 presumption, would have custody. This was reversible error. But Mother could not afford a privately compensated court reporter and the court could not provide an affordable court-employed court reporter.

Member 5: In my county, court reporters are not available. This forces my client to choose between having a privately compensated, expensive court reporter or an attorney. The client could not afford both.

Member 6: No court reporter was available. The trial court ordered a prejudgment sale of the marital home despite no showing of market risk, danger of loss, and absent completed mandatory financial disclosures. The client had to spend \$2,000 to obtain a settled statement for the appeal because the other side refused to cooperate to prepare an agreed statement.

Madam Chief Justice and Associate Justices: People are being hurt in the real-world because of the absence of court reporters. ACFLS prefers court-employed court reporters be available at all hearings. But if they are not available, a backup remedy should be available. This is especially true when (a) the court cannot hire enough court reporters even when they have the budget to pay for them, (b) electronic recording is an inexpensive alternative, and (c) most courtrooms are set up to allow for electronic recordings.

The State Legislature is not a Viable Remedy

Normally, people would view this problem as a political issue to be resolved by the state Legislature. Unfortunately, the strength of labor unions and the court reporter's association makes a legislative issue a non-starter. The California Legislature will not allow an alternative remedy when court reporters are unavailable because labor unions and the court reporter's association object.

Since the Legislature will not act to resolve this problem, ACFLS turns to the Supreme Court to act under its authority as the head of a co-equal branch of government charged with operating the judiciary.

It is common knowledge and concern that parties to civil, family law, and probate court proceedings in California rarely have access to verbatim records of their proceedings. This includes impoverished parents who litigate custodial rights to their children, and thereafter have no record of what happened in their court hearings. It has become commonplace in family law proceedings, when court-employed court reporters are unavailable, for litigants with financial resources to hire privately compensated court reporters for their hearings and trial (more than \$3,000 per day) while litigants who have limited financial resources go without a court reporter.

Over many years, bills have been introduced by the members of the Legislature to expand the use of alternative methods of creating a verbatim record of court proceedings other than certified shorthand court reporting. Such bills are vigorously opposed by groups such as labor unions and the California Court Reporters Association (CCRA). Such groups hold tremendous sway in political circles, and have repeatedly, successfully persuaded members of the Legislature to oppose bills that try to expand the verbatim records of proceedings by means other than by a certified shorthand court reporter.

The issue is not whether the Legislature has considered the dire issue facing California litigants but, rather, that the Legislature is unwilling to resolve the problem given the political opposition of labor unions and the CCRA.

The Legislature cannot be relied on to address the pervasive lack of access to justice in California courts. Nor can the Legislature be relied on to place the due

process interests of litigants above the interests of labor unions and other groups. The political process is impeding access to justice for Californians and detrimentally affecting their due process rights. The political process is failing Californians.

The most recent example of the failure of the Legislature to address this important issue occurred in 2023 when Senate Bill No. 662 (2023-2024 Reg. Sess.) (“SB662”) did not make it out of the Senate. SB662 was introduced with the laudable goal of letting courts use electronic recording to create a verbatim record, while preserving certified shorthand court reporting as the primary method of doing so. Some proposed changes to the law in SB662 included:

- If a certified shorthand court report is unavailable to report a court proceeding, the court may order that, in any civil case, or a misdemeanor or infraction case, the proceeding be electronically recorded.
- A transcript derived from an electronic recording may be used whenever a transcript of court proceedings is required.
- The electronic recording equipment shall be of a type approved by the Judicial Council for courtroom use and shall only be purchased for use as provided by this section.
- If a transcript of court proceedings is requested, the court shall give a certified shorthand reporter the right of first refusal to transcribe the electronically recorded proceeding.
- The court shall try to hire a court reporter for an action or proceeding before electing to have the action or proceeding be electronically recorded under subdivision (a).

SB662 balanced the main due process rights of litigants with the desire of external groups to preserve the court reporter industry. Only if a certified shorthand court reporter were unavailable would electronic reporting occur, and a certified shorthand court reporter could transcribe the recording.

As backdrop, SB662 included substantial Legislative findings that succinctly explained the dire crises California litigants face, including:

- (a) There is a fundamental right to a verbatim record of any court proceeding because, without an accurate record, litigants may not understand what the judge has ordered.
- (b) The lack of a verbatim record of court proceedings may result in attorneys declining to take cases on appeal or may result in law enforcement being unable to enforce, among others, active restraining orders or child custody and visitation orders.
- (c) Many Californians, regardless of income, are navigating critical civil legal issues without legal representation or meaningful legal assistance. Nearly 90 percent of people facing eviction are unrepresented, and one or both parties are unrepresented in 70 percent of family law cases. The problem is worse for low-income Californians, particularly communities of color, tribal communities, rural Californians, those with disabilities, people who have limited proficiency with the English language, seniors, and people who have experienced domestic violence or sexual assault.
- (d) Under existing law, the verbatim record may only be captured and transcribed by a certified shorthand reporter (CSR) in California courts; however, since 2013, an exception has been made to allow electronic recording in eviction cases, small claims court, traffic court, and misdemeanor criminal cases.
- (e) A CSR must be provided in felony criminal cases and juvenile justice and dependency cases. In all other types of cases, the court does not have to provide a CSR, except upon the request of an indigent litigant. Parties may arrange for the services of a court reporter in all other cases, at an average cost of \$3,300 per day.

(f) California courts employ about 1,200 full-time court reporters. To provide CSRs in mandated cases, courts estimate they will need to hire about 650 new court reporters. Over 50 percent of California courts have reported that they do not have CSRs to routinely cover nonmandated cases, including civil, family law, and probate cases, and over 30 percent can never provide CSRs in those cases. 74.5 percent of courts are recruiting official court reporters to fill vacancies throughout California, with 102 court reporter vacancies for the Los Angeles County Superior Court alone.

(g) Although indigent litigants have the right to a CSR for free, courts cannot fulfill those requests. Instead, indigent litigants, including those seeking domestic violence restraining orders, emergency custody orders, and elder abuse and civil harassment protection orders, are forced to choose whether to move forward with their matter without a verbatim record or to return to court later when a CSR may be available.

(h) In 2022, the Legislature appropriated \$32,000,000 for courts to recruit, hire, and retain CSRs. These funds are meant for courts to offer salary raises, bonuses, and educational benefits to incentivize becoming a court reporter. According to the preliminary fiscal year 2022–23 Schedule 7A, court-employed reporters' median total salary and benefits are an estimated \$184,184. This is significantly lower than the cost to hire a court reporter through a private company at \$2,580 per day for a deposition and \$3,300 per day for a trial, on average. Transcripts must also be bought from court reporters. In 2021, the Legislature increased the statutory transcript fees by about 30 percent. In the 2021–22 fiscal year, California courts spent \$18,400,000 on transcripts.

(i) Courts must compete with the private market for CSR services and these services are required daily for thousands of non-court proceedings, including depositions, administrative hearings, arbitration hearings, and cases being heard by private judges.

(j) In 2022, there were 5,605 active CSRs of whom 4,829 listed an address in California. The number of licensed CSRs has been steadily dropping from 8,004 in 2000, to 7,503 in 2010, to 6,085 in 2020, representing a 30-percent decline since 2000.

(k) According to the National Court Reporters Association, the average court reporter is 55 years of age. In California, 44 percent of all licenses were issued 30 years ago or more.

(l) Applications to take the CSR licensing exam have declined, and the passage rate is low. In 2018, 369 individuals took the licensing exam, and in 2021, only 175 individuals took the exam. Of those, only 40 individuals passed. In 2015, 96 licenses were issued, and in 2021, only 39 licenses were issued. Only 8 court reporter training programs remain in California, down from 16 programs in 2011.

(m) In January and February of 2023 alone, the Los Angeles County Superior Court could not provide a CSR in 52,000 nonmandated civil, family, and probate cases. According to calculations by the court, this will result in over 300,000 cases going without a record this year.

(n) Where electronic recording is allowed, California has put stringent technical standards into practice to ensure the recordings are of high quality and can be transcribed for use to craft orders, to provide meaningful access to an appeal, and for future proceedings to enforce or change a court's prior orders.

(o) Electronic recordings have the same privacy, protection, and storage requirements as all other digital records held by California courts, and all California courts must maintain digital court files.

(p) The Court Reporters Board of California should assign funding toward recruitment and retention by publicizing the profession to high schools, vocational schools, and higher education institutions.

(q) Courts are encouraged to provide senior CSRs as mentors to provisionally licensed CSRs until the end of the provisional license and make sure courts continue to recruit, hire, and retain CSRs.

SB662 represented an important step in the right direction but was unfortunately opposed by labor unions and the CCRA. The efforts to undermine SB662 were celebrated as a victory by CCRA, while leaving indigent California family law litigants with no redress to the lack of a verbatim record in their proceedings.

The CCRA and labor unions celebrated their victory at the cost of justice for the court, attorneys, and litigants.

ACFLS emphasis: In an ideal world, all hearings would be reported by a court-employed court reporter. But, in the all-too-common absence of a court reporter, the court should provide an alternate option for a verbatim record of the proceedings. This is critical for an appellate record, to ensure formal orders are correct, to have a record of former testimony, to have a record of potential misconduct by a judicial officer, and more.

Since the Legislature will not act, the Judiciary, as a co-equal branch of government, should step in and order the use of electronic recordings as a substitute for court reporters whenever the court cannot provide a court reporter.

The California Supreme Court should grant the writ petition.

Very truly yours,

/S/

Fredrick S. (Rick) Cohen
Co-Chair, ACFLS Amicus Committee

Document received by the CA Supreme Court.