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December 9, 2024

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

Re: ***Family Violence Appellate Project v. Superior Courts***
Cal. Supreme Court No. S288176
Amicus Curiae Letter

Dear Chief Justice and Associate Justices:

I respectfully submit this amicus curiae letter, pursuant to rule 8.500(g)(1) of the California Rules of Court, to urge this Court to issue an order to show cause and thereafter grant the original writ petition in the above-referenced matter.

I am the author of *California Practice Guide: Civil Appeals and Writs* and have been an appellate lawyer for 45 years. I recently retired from active law practice but retain a keen interest in ensuring that the right of appellate review is available to all litigants, regardless of their economic status.

"[I]t is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, *on the basis of the record presented to the appellate court,* that the trial court committed an error that justifies reversal of the judgment." (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609 (emphasis added).) This rule dates back almost to California's inception. (See *White v. Abernathy, Clark & Co.* (1853) 3 Cal. 426, 426 ["it is not sufficient that error may have intervened, but it must be affirmatively shown by the record"].)

Throughout California's legal history, oral proceedings in civil cases have been recorded by court officials. (See Koppel, *A Tale of Two Counties: Divergent Responses in Los Angeles and Orange County Superior Courts to the Ban on Electronic Recording in California Court*

Reporters Ass'n v. Judicial Council (2000) 37 San Diego L.Rev. 47, 54-62 (hereafter Koppel).)

- The Practice Act of 1850, which predated shorthand court reporting (Koppel, *supra,* at pp. 54, 58), required the court clerk, on party request, to "take down a testimony in writing" (Stats. 1850, ch. 142, § 271, p. 452)—descriptively rather than verbatim.

- In 1861, when American courts began using shorthand court reporters to record testimony verbatim, the Practice Act was amended to require some courts to "appoint a competent Short Hand Reporter, who shall, at the request of either party in a civil case … take down in short hand, the rulings of the court, the exceptions taken, and the testimony." (Stats. 1861, ch. 434, § 1, p. 497; see Koppel, *supra*, at pp. 58, 61.)

- Code of Civil Procedure section 269, as originally enacted in 1872 and amended in 1874, authorized all courts to "appoint a competent shorthand reporter" who "must, at the request of either party, or of the Court, in a civil action or proceeding … take down in shorthand all the testimony, the objections made, the rulings of the Court, the exceptions taken, and oral instructions given …" (Stats. 1873-74, Code Am., ch. 383, § 24, p. 288.)

- Section 269 in its current form reads much the same: "An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken …, 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: [¶] (1) In a civil case, on the order of the court or at the request of a party." (Code Civ. Proc., § 269, subd. (a).)

Recently, however, court-supplied reporters have become so scarce that most litigants in unlimited civil cases must hire a *private* court reporter—*if they can afford it*—to preserve the right of appellate review. Those who cannot afford to do so must often forgo a transcript of oral proceedings and thus are effectively denied the right of appellate review because they are unable to overcome the presumption of correctness by

demonstrating reversible error "on the basis of the record presented to the appellate court." (*Jameson v. Desta, supra,* 5 Cal.5th at p. 609.)

Despite the efficacy of electronic recording, Code of Civil Procedure section 69957 has prohibited it in unlimited civil cases since 1975. The California Access to Justice Commission has estimated that, during the past year, "over one million hearings and trials took place in unlimited civil, family, and probate cases for which California Superior Courts did not provide any means to create an official transcript." (Cal. Access to Justice Comm'n, Issue Paper: Access to the Record of California Trial Court Proceedings (2024) p. 1.) The synergistic effect of Government Code section 69957 and the modern scarcity of court-supplied reporters has made the appeal right an empty promise for all but the affluent.

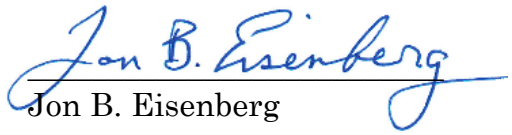
In 1894, Anatole France wrote: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Today, one might similarly say: "California law, in its majestic equality, requires rich as well as poor civil litigants to bear the cost of court reporters in order to preserve the right of appellate review."

The writ petition in this case explains how Government Code section 69957 violates the Due Process and Equal Protection Clauses of the California Constitution by depriving low-income litigants of the verbatim recording that is essential to effective appellate review. This constitutional infirmity is rooted in "the modern sense of the California Constitution as a document independent of the federal Constitution." (Grodin & Cunningham, The California State Constitution (1993) p. 21.) That doctrine began its modern evolution in 1974 (*id.* at pp. 21-22, 46-48), when section 24 of article I was added to the California Constitution to state: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." The independent status of California constitutional rights and the growing scarcity of court-supplied reporters have evolved in tandem over the past 50 years—to the point where, today, Government Code section 69957 has become an unconstitutional anachronism.[1]

[1] Prior to 1953, the cost of court reporting in civil cases was borne by one or both of the parties as prescribed in various permutations of the 1850 Practice Act and former Code of Civil Procedure section 274, which was repealed in 1953 (Stats. 1953, ch. 206, § 7, p. 1342), when official court reporters began recording civil proceedings at no cost to the parties. The constitutionality of the pre-1953 practice was never adjudicated, as it predated the evolution of independent California constitutional rights.

I urge this Court to grant the writ petition in this case and rule that Government Code section 69957 may not constitutionally be applied to relieve the superior courts of their duty to create verbatim recordings for low-income litigants who cannot afford private court reporters. Otherwise, the guarantee of appellate review will remain, for many Californians, an empty promise.

Respectfully submitted,



Jon B. Eisenberg

cc: See attached Proof of Service on all parties

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SONOMA

At the time of service, I was over 18 years of age and not a party to this action. I reside in the County of Sonoma, State of California. My home address is 507 Tucker Street, Healdsburg, California 95448-4428.

On December 9, 2024, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER OF JON B. EISENBERG IN SUPPORT OF FAMILY VIOLENCE APPELLATE PROJECT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following my ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 9, 2024, at Healdsburg, California.

Jon B. Eisenberg

Jon B. Eisenberg

SERVICE LIST
Family Violence Appellate Project v. S.C.

CA Supreme Court Case No.: S288176

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