December 5, 2024

Via TrueFiling

Honorable Chief Justice Patricia Guerrero
& Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Letter of Amicus Curiae California Lawyers Association 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 California Lawyers Association (CLA) respectfully submits this letter in support of the petition for writ of mandate and/or prohibition filed by Family Violence Appellate Project and Bay Area Legal Aid.

Identification and Interests of Amicus Curiae[1]

CLA is a nonprofit, voluntary bar association serving licensed attorneys throughout California, with approximately 44,000 members. It is a member-driven, mission-focused organization dedicated to the professional advancement of attorneys practicing in the state. CLA is the premier

[1] No party or party's counsel authored this letter in any part. No person or entity made any monetary contribution intended to fund the preparation or submission of this letter, other than the amicus curiae or its counsel.

statewide voice for the legal community, advocating on behalf of its members before all branches of government.

The issue of utilizing electronic recording to create a record of oral proceedings has widespread importance to CLA attorneys (and non-CLA attorneys) in every area of practice who litigate in the trial and appellate courts. CLA respectfully requests that the Court consider this amicus letter in deciding whether to grant the petition. (Cal. Rules of Court, rule 8.487(e), Advisory Com. com. & rule 8.500(g).)

Introduction

The record of oral proceedings is of paramount importance in appellate litigation. As Justice Wiseman famously wrote, if something "is not in the record, it did not happen." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) Even without an appeal, a record of oral proceedings may be of vital importance, particularly when there are ongoing or subsequent trial proceedings.

Courts and practitioners have recognized for decades that the state's historical practice of relying on court reporters to prepare a record of oral proceedings was fast approaching a breaking point, as the number of court reporters has steadily decreased while the number of court proceedings has dramatically increased. That point has been reached; in a staggering percentage of civil cases, no record of oral proceedings is created due to a lack of court reporters. This problem threatens the appellate rights of hundreds of thousands of California litigants each year and infringes on the constitutional power of appellate courts.

A settled or agreed statement is no solution to the court reporter crisis. The solution is to allow courts and parties to make a record through electronic recording. But Government Code[2] section 69957 prohibits courts from using electronic recordings to make a record in unlimited civil, family, and probate proceedings. Section 69957's prohibition on electronic recordings

[2] Statutory references are to the Government Code unless otherwise noted.

impedes appellate review and substantially impairs the constitutional powers of the courts when a court reporter is not practicably available.

CLA respectfully requests that the Court entertain the writ petition because this case involves issues " 'of great public importance and must be resolved promptly.' [Citations.]" (*Clean Air Constituency v. Cal. State Air Resources Bd.* (1974) 11 Cal.3d 801, 808.) The Court should grant writ relief and conclude that section 69957 may not be applied to litigants who cannot afford or otherwise practicably obtain a private court reporter when the court does not provide a reporter.

Argument

A. Section 69957 Substantially Impairs the Constitutional Powers of Appellate Courts

The statutory prohibition on electronic recording in unlimited civil, family, and probate proceedings prevents the effective exercise of the constitutionally granted power of appellate review in cases where a court reporter is not practicably available – that is, when the court does not provide a reporter and the litigants either cannot afford a private one or no private reporter is available.

Under the state Constitution, the "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction[.]" (Cal. Const., art. VI, § 11; see also *id*., § 10 [appellate jurisdiction over writs].) Appellate jurisdiction is "the power to review and correct error in trial court orders and judgments." (*Leone v. Medical Bd. of Cal.* (2000) 22 Cal.4th 660, 668 (*Leone*).)

While the Legislature has the power to specify procedures governing the exercise of appellate jurisdiction (most notably, whether review is by direct appeal or writ petition), a legislative rule is unconstitutional if it prevents effective review. "Because the appellate jurisdiction clause is a grant of *judicial* authority, the Legislature may not restrict appellate review in a manner that would ' "substantially impair the constitutional powers of the courts, or practically defeat their exercise." ' [Citations.]" (*Leone*, *supra*, 22 Cal.4th at p. 668, original italics.) For example, a statute limiting appellate review to writ proceedings would be unconstitutional " '[i]f it could be

demonstrated in a given case, or class of cases, that, for whatever reason, the Courts of Appeal or this court could not effectively exercise the constitutionally granted power of appellate review by an extraordinary writ proceeding . . . ." (*Ibid.*, quoting *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110 (plur. opn. of Kennard, J.).)

This Court's decision in *Leone* discussed some restrictions that could rise to the level of a constitutional violation, although the plaintiffs in that case failed to meet the standard. The plaintiffs argued that a statute permitting only writ review of physician disciplinary decisions "substantially impair[ed]" appellate jurisdiction because courts of appeal summarily deny more writ petitions than they affirm judgments in direct appeals. (*Leone*, *supra*, 22 Cal.4th at p. 668.) The Court rejected the argument for lack of evidentiary or logical support. First, the plaintiffs cited no statistics to support their assertion that the rate of summary denials was greater than the affirmance rate. (*Id.* at p. 669.) Second, there was "no reason to infer from the frequency of summary denials that extraordinary writ review is not a sufficient or effective appellate remedy," because the statute placed no limits on appellate review. (*Ibid.*) For example, it placed no limit on the type of error that appellate courts could correct or on the record that appellate courts could consider. (*Ibid.*)

Here, in contrast to *Leone*, statistics and logic show that section 69957's restriction on electronic recording "substantially impairs" or "practically defeat[s]" the exercise of appellate courts' constitutional powers when a court reporter is not practicably available. (*Leone*, *supra*, 22 Cal.4th at p. 668.) Petitioners cite statistics showing the paucity of court-employed reporters and the lack of verbatim records in an alarming number of proceedings. (Petn., pp. 26-33.) Private court reporters are cost-prohibitive for most Californians. A *single day* of trial can cost as much as $3,300. (Judicial Council, *Fact Sheet: Shortage of Certified Shorthand Reporters in California* (January 2024).)[3] In California, the median household income for a *month*,

[3] <https://www.courts.ca.gov/documents/Fact-Sheet-Shortage-of-Certified-Shorthand-Reporters-June2024.pdf> (as of Dec. 4, 2024).

before taxes, is not much more than twice that amount.[4] If a court-employed reporter is not available and a litigant cannot afford to pay for a private one, there will be no verbatim record of oral proceedings.

Moreover, the same statistics that explain the current shortage of court-employed reporters demonstrate that even the pool of private reporters is decreasing each year through attrition. (Judicial Council, *Fact Sheet*, *supra*; see also Legis. Analyst, letter to Sen. Thomas J. Umberg (2023-2024 Reg. Sess.) Mar. 5, 2024, pp. 4–5.)[5] This exacerbates two distinct problems: unaffordability and unavailability. Basic market dynamics will cause the cost of private reporters to grow as the number of all available reporters shrinks, which prices out many litigants. And given the accelerating rate at which the profession is shrinking, soon even litigants that could theoretically afford to hire a private reporter may be unable to find one at any price.

As discussed in the next section and in the petition, fundamental rules governing appellate review essentially preclude review without a record of oral proceedings. The prohibition on electronic recording thus substantially impairs the ability of appellate courts to exercise their constitutional power of review, and it should be eliminated. (*Leone*, *supra*, 22 Cal.4th at pp. 668–669.)

B. A Verbatim Record of Oral Proceedings is Essential to Meaningful Appellate Review

The absence of a verbatim record will frequently preclude resolution of an appeal on the merits. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608 (*Jameson*).) Judgments and orders are presumed to be correct, and the appellant has the burden of showing reversible error with an adequate record. (*Id.* at pp. 608–609.) If the record is missing or incomplete, it is

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[4] The median annual household income in California from 2018 to 2022 (in 2022 dollars) was $91,905, which is $7,658.75 per month. (U.S. Census Bureau, *QuickFacts California*, <https://www.census.gov/quickfacts/fact/table/CA/INC110222> [as of Dec. 4, 2024].)

[5] <https://lao.ca.gov/letters/2024/Letter-Umberg-Court-Reporters-030524.pdf> (as of Dec. 4, 2024).

construed against the appellant. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498.) Absent a complete record, "it is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) This presumption is conclusive. (See, e.g., *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.) In short, " ' "if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." ' [Citation.]" (*Jameson*, *supra*, 5 Cal.5th at p. 609.)

In light of these fundamental rules governing appellate review, the absence of a verbatim record often deprives litigants of their right to appeal – including in cases involving domestic violence restraining orders, custody disputes, and probate matters. Attorneys routinely turn down potential appeals when there is no reporter's transcript. Members of CLA sections and committees – particularly those on the Litigation Section's Committee on Appellate Courts, but also many others who are involved with appeals – are keenly aware of the need for a verbatim record on appeal.

Practitioners have described the importance of a verbatim record for an appeal:

- One attorney explained that the lack of a reporter's transcript is a pervasive problem in family law appeals. In a significant percentage of consultations, this attorney and the party decide not to pursue an appeal because there is no verbatim record, particularly in fact-intensive areas such as domestic violence restraining orders and child custody, where review is impossible without a verbatim record.

- A civil appellate specialist similarly noted the need to turn down multiple appeals because there was no reporter's transcript. This undoubtedly reflects the experience of many appellate attorneys. The same attorney also observed that many self-represented litigants learn about the unavailability of a court reporter only after they arrive at a hearing, and they do not understand the importance of procuring a verbatim record.

- As one specialist in both appellate law and family law explained, "even lawyers sometimes forget to order a court reporter. A divorce, custody or parentage case is the most important thing that happens in many people's lives. It's terrible for the case to suffer due to the absence of a record."

- In a trust case, an attorney and nonprofit organization represented a disabled, elderly client at a two-week trial. The court did not provide a court reporter, and the client could not afford a private one. The client lost the case and might have appealed, but the lack of a reporter's transcript made it practically impossible to do so.

These are but a few of the numerous, everyday problems that CLA's members and their clients face from section 69957's prohibition on electronic recordings.

C. A Verbatim Record of Oral Proceedings is Often Essential Even Absent an Appeal

A verbatim record is not just essential for appeals. It is also important in some cases where no appeal is anticipated. The absence of a verbatim record can harm litigants when, for example, a dispute or uncertainty arises about the court's decision or the basis of that decision. Or it can harm litigants if the case plays out for months or years and there is no record of what happened earlier. It is challenging enough when the same judge presides over the matter in the future, because the judge may hear hundreds of matters in the interim and may forget what occurred. It is impossible for a new judge to know the details of what occurred earlier without a verbatim record. The problems are exacerbated when one or both litigants are self-represented.

Practitioners have emphasized the importance of a verbatim record for trial court proceedings:

- As one attorney explained, if a new attorney substitutes in, a verbatim record of a hearing or trial is critical – particularly when the litigant was self-represented – so that the new attorney

can fully understand what took place and how to proceed rather than rely on the client's memory or understanding, or on a minute order that might be incomplete or even inconsistent with what actually happened.

- One family law attorney described a case in which the court did not provide a court reporter at a hearing and the parties could not afford a private one. During the hearing, the court made several rulings, and counsel later disagreed about what the rulings were. The minute order was not helpful (and was inaccurate about some undisputed matters). The attorneys submitted competing orders after the hearing. Before ruling on the dispute, the judge was reassigned to a different department. The new judge was unable to resolve the matter, and there was no order entered after the hearing. The parties needed rulings, so they were forced to compromise and stipulate to an order that each party could live with.

- Another family law attorney explained that the lack of a reporter deprives parties of a record of the court's reasoning and can cause them to miss work due to continuances granted simply because no reporter was available. The parties might need to proceed without a reporter because of the time sensitive nature of issues like domestic violence restraining orders and child custody.

- One probate attorney emphasized that the details of a prior hearing or bench trial can be important to frame the issues of a subsequent proceeding. For example, consider a beneficiary of a trust who files a petition to invalidate the trust based on undue influence. At a bench trial, the probate court finds there was no undue influence. There is no court reporter, and the court's minute order does not include any details. The prevailing beneficiary then files a petition to enforce the trust's no-contest clause (to disinherit the petitioning beneficiary) on the ground that the petition lacked probable cause. (Prob. Code, § 21311, subd. (a)(1).) Without a verbatim record, the prevailing

beneficiary cannot rely on the court's prior findings to show lack of probable cause – even though issue preclusion would apply and likely impact the probable-cause analysis. (*Key v. Tyler* (2019) 34 Cal.App.5th 505, 534–535, 539.)

- Prior hearings can be important to visitation and custody issues in family law and conservatorship cases. For example, at a hearing the court might grant a family member visitation of a conservatee and explain the circumstances under which the court would increase or limit visitation, but the minute order only states that the request was granted. If someone later seeks to modify the order and the judge does not remember the details (or if there is a new judge), that person will not be able to use the transcript to show the court's reasoning about the circumstances warranting a change in visitation.

D. A Settled Statement or Agreed Statement Is Not an Adequate Replacement for a Verbatim Record of Oral Proceedings

The Rules of Court theoretically allow parties to prepare a record of oral proceedings by using a summary of the proceedings and evidence, either as a settled or agreed statement. (Cal. Rules of Court, rules 8.120(b), 8.134, 8.137.) But this is usually no substitute for a verbatim record. Indeed, this Court has held that an in forma pauperis litigant is entitled to a court-provided reporter in part because a settled or agreed statement is not a viable alternative to protect that litigant's appellate rights. (*Jameson*, *supra*, 5 Cal.5th at p. 622, fn. 20.)

Even if experienced trial counsel keep contemporaneous notes to facilitate the creation of a settled or agreed statement, such statements are not a feasible alternative in a proceeding of any length or complexity. And, of course, many litigants have no attorney. As the petition notes, one or both parties are self-represented in 75 percent of family law cases. (Petn., p. 23, fn. 16.) Many self-represented litigants are unaware of the settled or agreed statement process and, even if they are, it is undoubtedly difficult for them to learn the mechanics of preparing one.

After the 2018 amendments to the settled statement process, a 2020 survey of 140 decisions discussing settled statements showed that more than 80 percent of appellants either did not use one when they should have or failed to follow the proper procedures. (Grimes et al., *Navigating the New Settled Statement Procedures* (No. 2 2020) 33 Cal. Litigation 23, 29.)

Even if parties comply with the detailed procedures for a settled statement, settled statements are simply not a reliable way to record what happened, particularly given that there may be a significant gap in time between the proceedings and the settling of a statement. Judges often will not remember what occurred months after the proceedings, during which time they have presided over hundreds of other matters. Courts recognized the problem with settled settlements more than a half-century ago. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 72; *People v. Wilson* (1977) 72 Cal.App.3d Supp. 59, 63–64.) It is difficult to understand how this type of record – reconstructed from memory and notes taken while presiding over a trial – can be viewed as reliable. (See *In re Armstrong* (1981) 126 Cal.App.3d 565, 573 ["where the parties are not in agreement, and the settled statement must depend upon fading memories or other uncertainties, it will ordinarily not suffice"].) A settled statement is certainly far less reliable than an audio recording.

The problem is aggravated by the fact that electronic recording cannot even be used to assist the court in settling the record. Parties are permitted to make electronic recordings with court permission, but the court is prohibited from listening to the recordings in order to settle the record because "[t]he recordings must not be used for any purpose other than as personal notes." (Cal. Rules of Court, rule 1.150(c), (d).)

Agreed or settled statements are a good way to shore up a missing record concerning an unreported bench conference, but they are no substitute for a verbatim transcript of oral testimony.

E. Electronic Recording Is an Established, Commonly Used Technology for Creating an Official Record

For many years the courts in this state have not employed sufficient court reporters to prepare a record of oral proceedings. Private reporters, when available, are inordinately expensive. This is no longer a future problem; it is an immediate one.

The solution is clear. Digital recording technology is ubiquitous; even a mobile phone can create high fidelity digital audio or video recordings. Many California courtrooms are already equipped with audio recording equipment, and the rest can be as well. California courts are already recording proceedings in limited civil, misdemeanor, and infraction cases.

This Court's oral arguments are digitally recorded, broadcast live, and archived on the Internet. So are oral arguments at the Courts of Appeal. The United States Supreme Court began audio recordings of oral arguments in the 1950's.[6] Federal district judges may use electronic recordings instead of court reporters, and electronic recording is the normal practice before magistrate judges and bankruptcy judges. (28 U.S.C. § 753, subd. (b); Guide to Judiciary Policy, *Court Reporting Guidance*, vol. 6, §§ 280.40 (magistrate judges) and 420.10 (bankruptcy court); see generally *id*., vol. 6, §§ 350 et seq.[7]) Most states also use electronic recording in their courts. (Cal. Access to Justice Com., *Access to the Record of Cal. Trial Court Proceedings* (Nov. 16,

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[6] See *Argument Audio* <https://www.supremecourt.gov/oral_arguments/argument_audio/2024#:~:text=The%20Court%20began%20audio%20recording,beginning%20of%20the%20next%20Term> (as of Dec. 4, 2024).

[7] <https://www.uscourts.gov/rules-policies/judiciary-policies> (as of Dec. 4, 2024).

Audio recording has been authorized by the Judicial Council of the United States since 1983, and digital audio recording since 1999. (Report of the Proceedings of the Judicial Conference of the United States (Sept. 1983) pp. 47-49; Report of the Proceedings of the Judicial Conference of the United States (Sept. 1999), pp. 56-57.)

2024), pp. 16-17).[8] Thus, modern audio recording equipment is widely used to create an accurate and inexpensive record of proceedings in virtually every courtroom setting except unlimited civil, family, and probate proceedings in California.

Conclusion

The inability to use electronic recording to create a verbatim record, combined with the shortage of court reporters, is substantially impairing the constitutional powers of the appellate courts. The prohibition on electronic recording – even when there is no other way of making a verbatim record – has created a system of injustice throughout the state.

Amicus curiae California Lawyers Association respectfully requests that this Court consider this letter in support of the petition and grant the relief requested by Family Violence Appellate Project and Bay Area Legal Aid.

Respectfully Submitted,

Complex Appellate Litigation Group LLP
Jocelyn Sperling
Michael von Loewenfeldt

By /s/ Jocelyn Sperling
Jocelyn Sperling

[8] <https://calatj.org/publications/a2r> (as of Dec. 4, 2024).

Proof of Service

I, Stacey Schiager, declare as follows. I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On December 5, 2024, I mailed the following document:

> **Letter of Amicus Curiae California Lawyers Association Supporting Petitioners in *Family Violence Appellate Project et al. v. Superior Courts of California*, Case No. S288176**

I enclosed a copy of the document identified above in an envelope and deposited the sealed envelopes with the U.S. Postal Service, with the postage fully prepaid, addressed to the following individuals:

Hon. Edward G. Wei, Presiding Judge
Kate Bieker, Court Executive Officer
Superior Court of California
County of Contra Costa
Wakefield Taylor Courthouse
725 Court Street
Martinez, CA 94553

Hon. Samantha P. Jessner, Presiding Judge
Hon. Sergio C. Tapia, Presiding Judge
David Slayton, Executive Officer/Clerk of Court
Superior Court of California
County of Los Angeles
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

Hon. Beth McGowen, Presiding Judge
Hon. Julie A. Emede, Presiding Judge-Elect
Rebecca Fleming, Chief Executive Officer
Superior Court of California
County of Santa Clara
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191 N. First Street
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Hon. Maureen F. Hallahan, Presiding Judge
Hon. Michael S. Groch, Assistant Presiding Judge
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Rob Bonta
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Additionally, on December 5, 2024, I caused the above-identified document to be electronically filed and served via TrueFiling, which will submit a separate proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 5, 2024.

/s/ *Stacey Schiager*
Stacey Schiager