

RESOLUTION ELF-01-2017

DIGEST

Court Reporters: Right to Reporting of Proceedings

Amends California Rules of Court, rules 1.150 and 2.956 and Government Code sections 68086 and 70044 to preserve the right to have court proceedings reported.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:

No similar resolutions found.

Reasons:

This resolution amends California Rules of Court, rules 1.150 and 2.956 and Government Code sections 68086 and 70044 to preserve the right to have court proceedings reported. This resolution should be approved in principle with recommended amendments because it secures the right of parties to have proceedings reported thereby ensuring the availability of an adequate record for an appeal and ends the potential for gamesmanship by parties.

With the advent of court budget cuts following the great recession of 2008, many courts throughout the state have ceased providing a court reporter in civil, probate and even family law proceedings. Under Government Code section 68086, subdivision (c), and California Rules of Court, rule 2.956(c), in those courts where a court reporter is unavailable, a party seeking to have the proceedings reported must arrange and pay for the presence of a certified shorthand reporter to be appointed by the court to serve as the pro tempore official reporter. Government Code section 70044 gives the court the authority to appoint a pro tempore official reporter and also provides, in pertinent part, "If such appointment is made for service in a contested matter, it shall be made only pursuant to a written stipulation of the parties appearing at the trial or hearing or other proceeding to be reported by such pro tempore reporter." The legislative history and final paragraph of Government Code section 70044 indicate this sentence was intended to address situations where the person to be appointed as the pro tempore official reporter was not a certified shorthand reporter such that the parties in contested proceedings were agreeing to allow the proceedings to be reported by someone lacking in full certification.

The shift to party provided court reporters in court proceedings has led to a number of problems. One significant problem faced by courts is the issue of which of several party provided reporters to appoint as the pro tempore official reporter and in such instances which party or parties should bear the cost of the reporter. Ordinarily such issues are worked out by counsel immediately before the hearing without the need for intervention of the court. Occasionally, however, a recalcitrant party will either insist their reporter report the proceedings or they will otherwise refuse to share in the cost of the reporter. This diverts judicial resources away from hearing the merits of a dispute and impacts judicial time available to all other matters on the calendar while the court resolves a dispute over the appointment of the pro tempore official reporter and which parties will bear the cost of the reporter.

The other problem that exists is the potential for gamesmanship by parties in an attempt to avoid the creation of an adequate record for appeal, particularly where there are abuse of discretion or substantial evidence issues. The potential for gamesmanship was recently exacerbated by the Santa Clara County Superior Court's adoption of a local policy requiring the parties file a stipulation for the appointment of a pro tempore official reporter at least five days prior to a hearing. At least one judicial officer is interpreting the policy and the language of Government Code section 70044 as mandating a stipulation as a prerequisite to the appointment of any pro tempore official reporter, thereby giving any party the ability to preclude the appointment of a pro tempore official reporter and deny the opposing party a meaningful basis of creating an adequate record for any appeal. The same court was prepared to preclude the party's selected court reporter from reporting any of the proceedings in the absence of a court appointment as the pro tempore official reporter.

This resolution solves the problem by guaranteeing the right of a party willing to provide and pay for a court reporter to have the proceedings reported without the need for a stipulation related to the appointment of a pro tempore official reporter. It also provides guidelines to the court and parties in the event of multiple parties each seeking to have a proceeding reported by their own provided reporter and the parties cannot resolve the issue between themselves. It also guarantees the ability of a party to have their own certified shorthand reporter create a private record of the proceedings regardless of whether a pro tempore official reporter is appointed. While this latter provision could result in possible instances of possible challenges to the official transcript through the use of competing private reporter's transcripts it will likely be rare and easily addressed by the trial court. On balance, the importance of preserving the right to what is currently the best avenue of presenting the oral proceedings on appeal outweighs any such potential concern.

This resolution also aids in ensuring meaningful appellate review. A reporter's transcript is currently the most accurate form of the record of oral proceedings. While the alternative of a settled statement exists, the process of creating one and the amount of judicial resources needed to certify the settled statement are extensive and often times unwieldy.

If this resolution passes the Conference, it should also include a clean-up change to the last paragraph of Government Code section 70044 to delete the obsolete reference to repealed "Section 69943" related to shorthand reporter certification and to replace that language with "under this Code" so as to maintain the intent of that paragraph to apply to certified shorthand reporters.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that the Judicial Council amend the California Rules of Court, rules 1.150 and 2.956, and that legislation be sponsored to amend Government Code sections 68086 and 70044 to read as follows:

- 1 Rule 1.150
- 2 (a) Introduction

3 The judiciary is responsible for ensuring the fair and equal administration of justice. The
4 judiciary adjudicates controversies, both civil and criminal, in accordance with established legal
5 procedures in the calmness and solemnity of the courtroom. Photographing, recording, and
6 broadcasting of courtroom proceedings may be permitted as circumscribed in this rule if
7 executed in a manner that ensures that the fairness and dignity of the proceedings are not
8 adversely affected. This rule does not create a presumption for or against granting permission to
9 photograph, record, or broadcast court proceedings.

10 (b) Definitions

11 As used in this rule:

12 (1) "Media coverage" means any photographing, recording, or broadcasting of court
13 proceedings by the media using television, radio, photographic, or recording equipment.

14 (2) "Media" or "media agency" means any person or organization engaging in news
15 gathering or reporting and includes any newspaper, radio or television station or network, news
16 service, magazine, trade paper, in-house publication, professional journal, or other news-
17 reporting or news-gathering agency.

18 (3) "Court" means the courtroom at issue, the courthouse, and its entrances and exits.

19 (4) "Judge" means the judicial officer or officers assigned to or presiding at the
20 proceeding, except as provided in (e)(1) if no judge has been assigned.

21 (5) "Photographing" means recording a likeness, regardless of the method used,
22 including by digital or photographic methods. As used in this rule, photographing does not
23 include drawings or sketchings of the court proceedings.

24 (6) "Recording" means the use of any analog or digital device to aurally or visually
25 preserve court proceedings. As used in this rule, recording does not include handwritten notes on
26 the court record, whether by court reporter or by digital or analog preservation.

27 (7) "Broadcasting" means a visual or aural transmission or signal, by any method, of the
28 court proceedings, including any electronic transmission or transmission by sound waves.

29 (c) Photographing, recording, and broadcasting prohibited

30 Except as provided in this rule, court proceedings may not be photographed, recorded, or
31 broadcast. This rule does not prohibit courts from photographing or videotaping sessions for
32 judicial education or publications and is not intended to apply to closed-circuit television
33 broadcasts solely within the courthouse or between court facilities if the broadcasts are
34 controlled by the court and court personnel.

35 (d) Personal recording devices

36 The judge may permit inconspicuous personal recording devices to be used by persons in
37 a courtroom to make sound recordings as personal notes of the proceedings. A person proposing
38 to use a recording device must obtain advance permission from the judge. The recordings must
39 not be used for any purpose other than as personal notes. No court or judicial officer may
40 prohibit or bar a certified shorthand reporter that is engaged by a party to a proceeding from
41 making sound recordings in connection with the creation of a record of a proceeding.

42 (e) Media coverage

43 Media coverage may be permitted only on written order of the judge as provided in this
44 subdivision. The judge in his or her discretion may permit, refuse, limit, or terminate media
45 coverage. This rule does not otherwise limit or restrict the right of the media to cover and report
46 court proceedings.

47 (1) *Request for order*

48 The media may request an order on *Media Request to Photograph, Record, or*
49 *Broadcast* (form MC-500). The form must be filed at least five court days before the portion of
50 the proceeding to be covered unless good cause is shown. A completed, proposed order on *Order*
51 *on Media Request to Permit Coverage* (form MC-510) must be filed with the request. The judge
52 assigned to the proceeding must rule on the request. If no judge has been assigned, the request
53 will be submitted to the judge supervising the calendar department, and thereafter be ruled on by
54 the judge assigned to the proceeding. The clerk must promptly notify the parties that a request
55 has been filed.

56 (2) *Hearing on request*

57 The judge may hold a hearing on the request or may rule on the request without a
58 hearing.

59 (3) *Factors to be considered by the judge*

60 In ruling on the request, the judge is to consider the following factors:

- 61 (A) The importance of maintaining public trust and confidence in the judicial system;
- 62 (B) The importance of promoting public access to the judicial system;
- 63 (C) The parties' support of or opposition to the request;
- 64 (D) The nature of the case;
- 65 (E) The privacy rights of all participants in the proceeding, including witnesses, jurors,
66 and victims;
- 67 (F) The effect on any minor who is a party, prospective witness, victim, or other
68 participant in the proceeding;
- 69 (G) The effect on the parties' ability to select a fair and unbiased jury;
- 70 (H) The effect on any ongoing law enforcement activity in the case;
- 71 (I) The effect on any unresolved identification issues;
- 72 (J) The effect on any subsequent proceedings in the case;
- 73 (K) The effect of coverage on the willingness of witnesses to cooperate, including the
74 risk that coverage will engender threats to the health or safety of any witness;
- 75 (L) The effect on excluded witnesses who would have access to the televised testimony
76 of prior witnesses;
- 77 (M) The scope of the coverage and whether partial coverage might unfairly influence or
78 distract the jury;
- 79 (N) The difficulty of jury selection if a mistrial is declared;
- 80 (O) The security and dignity of the court;
- 81 (P) Undue administrative or financial burden to the court or participants;
- 82 (Q) The interference with neighboring courtrooms;
- 83 (R) The maintenance of the orderly conduct of the proceeding; and
- 84 (S) Any other factor the judge deems relevant.

85 (4) *Order permitting media coverage*

86 The judge ruling on the request to permit media coverage is not required to make findings
87 or a statement of decision. The order may incorporate any local rule or order of the presiding or
88 supervising judge regulating media activity outside of the courtroom. The judge may condition
89 the order permitting media coverage on the media agency's agreement to pay any increased
90 court-incurred costs resulting from the permitted media coverage (for example, for additional
91 court security or utility service). Each media agency is responsible for ensuring that all its media
92 personnel who cover the court proceeding know and follow the provisions of the court order and
93 this rule.

94 (5) *Modified order*

95 The order permitting media coverage may be modified or terminated on the judge's own
96 motion or on application to the judge without the necessity of a prior hearing or written findings.
97 Notice of the application and any modification or termination ordered under the application must
98 be given to the parties and each media agency permitted by the previous order to cover the
99 proceeding.

100 (6) *Prohibited coverage*

101 The judge may not permit media coverage of the following:

102 (A) Proceedings held in chambers;

103 (B) Proceedings closed to the public;

104 (C) Jury selection;

105 (D) Jurors or spectators; or

106 (E) Conferences between an attorney and a client, witness, or aide; between attorneys; or
107 between counsel and the judge at the bench.

108 (7) *Equipment and personnel*

109 The judge may require media agencies to demonstrate that proposed personnel and
110 equipment comply with this rule. The judge may specify the placement of media personnel and
111 equipment to permit reasonable media coverage without disruption of the proceedings.

112 (8) *Normal requirements for media coverage of proceedings*

113 Unless the judge in his or her discretion orders otherwise, the following requirements
114 apply to media coverage of court proceedings:

115 (A) One television camera and one still photographer will be permitted.

116 (B) The equipment used may not produce distracting sound or light. Signal lights or
117 devices to show when equipment is operating may not be visible.

118 (C) An order permitting or requiring modification of existing sound or lighting systems is
119 deemed to require that the modifications be installed, maintained, and removed without public
120 expense or disruption of proceedings.

121 (D) Microphones and wiring must be unobtrusively located in places approved by the
122 judge and must be operated by one person.

123 (E) Operators may not move equipment or enter or leave the courtroom while the court is
124 in session, or otherwise cause a distraction.

125 (F) Equipment or clothing must not bear the insignia or marking of a media agency.

126 (9) *Media pooling*

127 If two or more media agencies of the same type request media coverage of a proceeding,
128 they must file a joint statement of agreed arrangements. If they are unable to agree, the judge
129 may deny media coverage by that type of media agency.

130 (f) *Sanctions*

131 Any violation of this rule or an order made under this rule is an unlawful interference
132 with the proceedings of the court and may be the basis for an order terminating media coverage,
133 a citation for contempt of court, or an order imposing monetary or other sanctions as provided by
134 law.

135 Rule 2.956

137 (a) Statutory reference; application

138 This rule is adopted solely to effectuate the statutory mandate of Government Code
139 sections 68086(a)-(b) and must be applied so as to give effect to these sections. It applies to trial
140 courts.

141 (b) Notice of availability; parties' request

142 (1) *Local policy to be adopted and posted*

143 Each trial court must adopt and post in the clerk's office a local policy enumerating the
144 departments in which the services of official court reporters are normally available, and the
145 departments in which the services of official court reporters are not normally available during
146 regular court hours. If the services of official court reporters are normally available in a
147 department only for certain types of matters, those matters must be identified in the policy.

148 (2) *Publication of policy*

149 The court must publish its policy in a newspaper if one is published in the county. Instead
150 of publishing the policy, the court may:

151 (A) Send each party a copy of the policy at least 10 days before any hearing is held in a
152 case; or

153 (B) Adopt the policy as a local rule.

154 (3) *Requests for official court reporter for civil trials and notices to parties*

155 Unless the court's policy states that all courtrooms normally have the services of official
156 court reporters available for civil trials, the court must require that each party file a statement
157 before the trial date indicating whether the party requests the presence of an official court
158 reporter. If a party requests the presence of an official court reporter and it appears that none will
159 be available, the clerk must notify the party of that fact as soon as possible before the trial. If the
160 services of official court reporters are normally available in all courtrooms, the clerk must notify
161 the parties to a civil trial as soon as possible if it appears that those services will not be available.

162 (4) *Notice of nonavailability of court reporter for nontrial matters*

163 If the services of an official court reporter will not be available during a hearing on law
164 and motion or other nontrial matters in civil cases, that fact must be noted on the court's official
165 calendar.

166 (c) Party may procure reporter

167 If the services of an official court reporter are not available for a hearing or trial in a civil
168 case, a party has the right to the appointment of a pro tempore official reporter on that party's
169 request if the party may arranges for the presence of a certified shorthand reporter to serve as an
170 official pro tempore reporter at the party's expense, and the court must appoint the certified
171 shorthand reporter as the official pro tempore reporter. It is that party's responsibility to pay the
172 reporter's fee for attendance at the proceedings, but the expense may be recoverable as part of the
173 costs, as provided by law. Where multiple parties request the appointment of an official pro
174 tempore reporter and have arranged for the presence of a certified shorthand reporter for such
175 appointment, and the parties cannot agree on the certified shorthand reporter to serve as the
176 official pro tempore reporter, the court must select and designate a single shorthand reporter to
177 serve as the official pro tempore reporter. The parties exercising their right to the presence of an
178 official pro tempore reporter must bear the cost in pro rata proportions in the absence of an
179 agreement between the parties so exercising said rights, unless the court, in its discretion, orders
180 the party whose certified shorthand reporter was selected to serve as the official pro tempore
181 reporter to bear the cost of reporting. A party shall also have the right, at its own expense, to
182 have a certified shorthand reporter report the proceedings regardless of whether a pro tempore
183 official reporter is appointed by the court.

184 (d) No additional charge if party arranges for reporter

185 If a party arranges and pays for the attendance of a certified shorthand reporter at a
186 hearing in a civil case because of the unavailability of the services of an official court reporter,
187 none of the parties may be charged the reporter's attendance fee provided for in Government
188 Code sections 68086(a)(1) or (b)(1).

189 (e) Definitions

190 As used in this rule and in Government Code section 68086:

191 (1) "Civil case" includes all matters other than criminal and juvenile matters.

192 (2) "Official reporter" and "official reporting services" both include an official court
193 reporter or official reporter as those phrases are used in statutes, including Code of Civil
194 Procedure sections 269 and 274c and Government Code section 69941; and include an official
195 reporter pro tempore as the phrase is used in Government Code section 69945 and other statutes,
196 whose fee for attending and reporting proceedings is paid for by the court or the county, and who
197 attends court sessions as directed by the court, and who was not employed to report specific
198 causes at the request of a party or parties. "Official reporter" and "official reporting services" do
199 not include official reporters pro tempore employed by the court expressly to report only
200 criminal, or criminal and juvenile, matters. "Official reporting services" include electronic
201 recording equipment operated by the court to make the official verbatim record of proceedings
202 where it is permitted.

203
204 § 68086

205 The following provisions apply in superior court:

206 (a) In addition to any other fee required in civil actions or cases:

207 (1) For each proceeding anticipated to last one hour or less, a fee of thirty dollars (\$30)
208 shall be charged for the reasonable cost of the court reporting services provided at the expense of
209 the court by an official court reporter pursuant to Section 269 of the Code of Civil Procedure.

210 (A) The fee shall be charged to the party, or parties if filing jointly, that filed the paper
211 that resulted in the proceeding being scheduled. If no fee has been charged, and a party
212 subsequently requests a court reporter, that party shall be charged the fee if a reporter is to be
213 provided by the court.

214 (B) All parties paying the fee shall deposit the fee with the clerk of the court as specified
215 by the court, but not later than the conclusion of each day's court session.

216 (C) The fee shall be charged once per case for all proceedings conducted within the same
217 hour if the total time taken by those proceedings is one hour or less. If the total time taken
218 exceeds one hour, the fee shall be charged and collected pursuant to paragraph (2).

219 (D) The fee shall be deposited into the Trial Court Trust Fund and distributed back to the
220 court from which the fee was collected on a dollar-for-dollar basis.

221 (E) The fee shall be refunded as soon as practicable to the remitting party or parties if no
222 court reporting services were provided.

223 (2) For each proceeding lasting more than one hour, a fee equal to the actual cost of
224 providing that service shall be charged per one-half day of services to the parties, on a pro rata
225 basis, for the services of an official court reporter on the first and each succeeding judicial day
226 those services are provided pursuant to Section 269 of the Code of Civil Procedure.

227 (A) All parties shall deposit their pro rata shares of these fees with the clerk of the court
228 as specified by the court, but not later than the conclusion of each day's court session.

229 (B) For purposes of this paragraph, “one-half day” means any period of judicial time, in
230 excess of one hour, but not more than four hours, during either the morning or afternoon court
231 session.

232 (b) The fee shall be waived for a person who has been granted a fee waiver under Section
233 68631.

234 (c) The costs for the services of the official court reporter shall be recoverable as taxable
235 costs by the prevailing party as otherwise provided by law.

236 (d) The Judicial Council shall adopt rules to ensure all of the following:

237 (1) That parties are given adequate and timely notice of the availability of an official
238 court reporter.

239 (2) That if an official court reporter is not available, (A) a party may arrange for the
240 presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs
241 therefor recoverable as provided in subdivision (c); (B) any party may arrange for the presence
242 of a certified shorthand reporter to perform the duties of a phonographic reporter in such matter,
243 the costs therefor recoverable as provided in subdivision (c). A party shall also have the right, at
244 its own expense, to have a certified shorthand reporter report the proceedings regardless of
245 whether a pro tempore official reporter is appointed by the court.

246 (3) That if the services of an official pro tempore reporter are utilized pursuant to
247 paragraph (2), no other charge shall be made to the parties.

248 (e) The fees collected pursuant to this section shall be used only to pay the cost for
249 services of an official court reporter in civil proceedings.

250 (f) The Judicial Council shall report on or before February 1 of each year to the Joint
251 Legislative Budget Committee on the fees collected by courts pursuant to this section and
252 Section 68086.1 and on the total amount spent for services of official court reporters in civil
253 proceedings statewide in the prior fiscal year.

254
255 § 70044

256 When needed in order that the judicial business of the superior court in the county may be
257 diligently carried on and a particular matter may proceed to trial or hearing without delay, a pro
258 tempore official reporter may be appointed to perform the duties of a phonographic reporter in
259 such matter, or until a regular official reporter becomes available for such service. A pro tempore
260 official reporter for such service may be appointed by the presiding judge of the court and the
261 judge presiding in the department where such reporter will serve. A party has the right to the
262 appointment of a pro tempore official reporter on that party's request at the expense of the party
263 so requesting if the party has arranged for the presence of a certified shorthand reporter to serve
264 in the capacity of a pro tempore official reporter and the certified shorthand reporter is present at
265 the hearing. In the event multiple parties arrange for the presence of a certified shorthand
266 reporter to serve in the capacity of a pro tempore official reporter and the parties cannot agree on
267 a single certified shorthand reporter to serve in the function of a pro tempore official reporter, the
268 court must select the certified shorthand reporter for appointment as the pro tempore official
269 reporter, and in such case the cost of the pro tempore official reporter will be shared on a pro rata
270 basis by all parties requesting the appointment of a pro tempore official reporter, unless the
271 court, in its discretion, order the party who arranged for the certified shorthand reporter selected
272 to bear the cost of the reporter. No court, presiding judge or judge presiding in the department
273 where such reporter will serve may require a stipulation by the parties regarding the appointment
274 of a pro tempore official reporter or otherwise deny appointment of a pro tempore official

275 reporter in the absence of a stipulation or agreement the parties to the proceeding related to the
276 appointment of such reporter. If such appointment is made for service in a contested matter and
277 no certified shorthand reporter is available to be appointed as the pro tempore official reporter,
278 the appointment of any person to serve in the capacity of a pro tempore reporter ~~it~~ shall be made
279 only pursuant to a written stipulation of the parties appearing at the trial or hearing or other
280 proceeding to be reported by such pro tempore reporter.

281 A pro tempore official reporter who has passed the test on qualifications and has a
282 certificate thereof on file among the records of the court as prescribed by Section 69943, and
283 who has been appointed a pro tempore official reporter by a majority of the judges of such court
284 pursuant to Section 69941, may serve in any matter without further order of the court or
285 stipulation of the parties.

(Proposed new language underlined, language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

The Problem: Under current law and superior court policy, there is no express statement that a party has the right to create a record, and some superior courts interpret the current code to allow a party to refuse to stipulate to a court reporter, for any reason or for no reason, and thereby block the creation of a record. Such policies cause irreparable harm to parties' fundamental constitutional rights, such as the right to an appeal. Such policies also put the courts in a position to institutionally assist an unscrupulous litigant's effort to shroud legal proceedings in a cloak of secrecy. No party should have the unilateral power to bar another party from making a record; nor should a lower court take part in blocking a higher court from reviewing its actions.

The Santa Clara County Court ("SCCC") has adopted a local rule, effective July 24, 2017, that requires all parties to a hearing to stipulate to the creation of an official record in a proceeding. SCCC states that its policy and interpretation is based on the policies of other superior courts. SCCC cites for its authority Government Code section 70044 which requires, in a contested matter, that the appointment of a reporter be made only pursuant to a written stipulation of the parties appearing at the trial or hearing or other proceeding to be reported by such pro tempore reporter that is not a certified shorthand reporter. The code does not make a positive statement that a party has a right to create a record.

The Solution: This resolution amends the California Rules of Court, rules 1.150 and 2.956, and Government Code sections 68086 and 70044 to remove any ambiguity regarding a party's fundamental right to create a record and to remove the ambiguity that blocks that right.

These amendments will clarify and codify that a party has the right to create a record. This resolution removes any basis for denying a party's right to create a reporter's transcript required for an appeal (CRC 8.130) while also codifying the fact that a party has a right to a transcript. Further, this clarifies Government Code section 70044, such that where a certified shorthand reporter is available, no court can block the creation of a record. This clarification, though

seemingly elementary, is demonstrably necessary to guarantee persons access to the courts and recourse to appellate review.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

No similar resolutions found.

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