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*

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I. INTRODUCTION

In two recent decisions, California Court Reporters Ass'n v. Judicial Council (CCRA I) and California Court Reporters Ass'n v. Judicial Council (CCRA II) 2—collectively "the CCRA decisions"—the First District Court of Appeal of California appeared to deliver the coup de grace to using electronic recording in California superior court to make a verbatim record of proceedings. In CCRA I, the court considered the Judicial Council rules of court that expressly authorized superior courts to use sound and video recording devices to make the verbatim record, the "Electronic Recording Rules," 3 and it declared these rules invalid. 4

1. 46 Cal. Rptr. 2d 44 (Ct. App. 1995) [hereinafter CCRA I].
2. 69 Cal. Rptr. 2d 529 (Ct. App. 1997) [hereinafter CCRA II].
3. CAL. R. CT. 33(e), 980.3 (1996) (repealed 1997); CAL. R. CT. 891, 892 [all four rules hereinafter the ELECTRONIC RECORDING RULES].
4. See CCRA I, 46 Cal. Rptr. 2d at 56. On January 31, 1997, the Judicial Council repealed Rules 33(e) and 980.3 and revised Rules 891 and 892. See CAL. R. CT. 33(e), 980.3 (1996) (repealed 1997); CAL. R. CT. 891, 892.
In **CCRA II**, the court flatly declared that the Legislature prohibited “the creation of an official superior court record by electronic means under any circumstances,” and affirmed the trial court’s injunction that “restrains the Judicial Council . . . from authorizing and from causing the expenditure of public funds for the maintenance of or creation of a nonstenographic method and system for preparing the official verbatim record of superior court proceedings.”

Despite these explicit holdings, California courts remain uncertain as to whether they have the authority to use non-stenographic means to make a verbatim record of general jurisdiction proceedings without express statutory authorization. This uncertainty is made apparent by the widely divergent responses of the superior courts in Los Angeles and

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5. **CCRA II**, 69 Cal. Rptr. 2d at 531 (emphasis added).
6. Id. at 530-31. The court wrote, “The trial court correctly interpreted CCRA I to mean precisely what we held when it crafted paragraphs 2, 4 and 6 of the injunction.” Id. at 531.
7. “Stenography” is defined as “the art or process of writing in shorthand.” **WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY** 1155 (1989). “Shorthand” is defined as: “1: a method of writing rapidly by substituting characters, abbreviations, or symbols for letters, sounds, words, or phrases . . . 2: a system or instance of rapid or abbreviated communication.” Id. at 1090.
8. In California, municipal courts are courts of limited jurisdiction while superior courts are courts of general jurisdiction. See 2 B.E. WITKIN, **CAL. PROC.** §§ 209-10, 249 (4th ed. 1996). Section 72194.5 of the California Government Code expressly authorizes a municipal court to use electronic recording whenever an official court reporter is unavailable. See **CAL. GOV’T CODE** § 72194.5 (West Supp. 1999). No statute expressly authorizes or prohibits superior courts from electronically recording their proceedings. Under Proposition 220, passed by the voters on June 2, 1998, 54 out of 58 counties abolished their municipal courts and established unified county-wide superior courts. See Judicial Council of California, News Release: Fifty-Four California Counties Vote to Unify Trial Courts, Sept. 24, 1999 (visited Jan. 8, 2000) <www.courtinfo.ca.gov/newsreleases/NR56-99.htm>. Senate Bill 2139, enacted in 1998 to implement trial court unification in counties that so elect, was intended “to preserve the status quo through the unification process,” including the legal status of electronic recording to make the court record. **Bill Analysis**, S.B. 2139, 1997-1998 Leg., Reg. Sess. (Cal. 1998), available at California Legislative Counsel, **Bill Information** (visited Jan. 8, 2000) <http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_2139_cfa_19980830_214559_sen_floor.htm> (emphasis added). Senate Bill 2139 specifies that court unification does not “change the extent to which court reporter services or electronic reporting may be used in the courts.” Act of Sept. 28, 1998, ch. 931, sec. 507, 1998 Cal. Legis. Serv. 5101, 5308 (West) (S.B. 2139). Therefore, electronic recording is still expressly authorized under section 72194.5 “in a limited civil case, or a misdemeanor or infraction case.” **CAL. GOV’T CODE** § 72194.5 (West Supp. 1999). In this Article, the phrase “general jurisdiction proceeding” refers to a civil proceeding over which only the superior court had jurisdiction prior to court unification. **Section 269(a)** of the California Code of Civil Procedure, as amended under Senate Bill 2139, refers to such a proceeding as a “civil case other than a limited civil case.” **CAL. CIV. PROC. CODE** § 269(a) (West Supp. 1999).
Orange Counties to the CCRA decisions and to a January 1997 Judicial Council directive prohibiting the expenditure of state funds on electronic recording to make the official record in superior court. After years of fighting to preserve the option of litigants and judges to choose electronic recording as a cheaper alternative to shorthand, the Los Angeles Superior Court, at the end of 1997, shut down its sound recording equipment. Meanwhile, across the county line in Orange County, thirteen courtrooms continued to videotape general jurisdiction proceedings financed by county funds and user fees until September 27, 1999. Litigants who chose video recording to make a verbatim record

9. See Memorandum from William C. Vickrey, Administrative Director of the Courts, Judicial Council of California, to All Presiding and Sole Judges of the Superior Courts et al. (Jan. 10, 1997) (on file with author).

10. See William E. Hewitt, Video Court Reporting: A Primer for Trial and Appellate Judges, 31 Judges’ J. 2, 4 (1992) (“When compared with stenographic reporting, video court reporting produces an instantly available form of the record that is very inexpensive. A videotape may be purchased from the court for about $20 while a comparable transcript may cost from $400 to $800.”).


Los Angeles County reports that four courtrooms have video, and 69 have audio recording equipment. Restoring these courts to stenography-based systems would require the hiring of some 90 court reporters, and displacement of about an equal number of electronic recording monitors and supervisory personnel. The transition cost would be about $8,000,000. The ongoing added cost due to the higher salaries paid to stenographers is estimated at $3,900,000 per year.

The Court of Appeal in Los Angeles reports that 588 of the 1892 transcripts which the court received in 1995 were derived in part using audio or video recordings and that records derived from electronic recording are indistinguishable from the stenographic records.

Id. at 3-4. As late as July 1996, after the CCRA I decision but before Judge Garcia issued his injunction that was affirmed in CCRA II, the Los Angeles Superior Court “continued to use tape recorders instead of shorthand reporters as a cost-saving measure.” Robert Greene, Supervisors Approve Contracts for Electronic Recording in Superior Court, METRO. NEWS-ENTER., July 31, 1996, at 5 (“The [Los Angeles] Superior Court and county counsel contend that electronic monitoring continues to be allowed in court so long as neither party requests a stenographic court reporter.”).

12. The lone exception is Judge Kurt Lewin, who continues to use electronic recording. See Margaret A. Jacobs, Stenographers Fight for Their Day (Jobs) in Court, WALL ST. J., Apr. 30, 1999, at 81 (calling Los Angeles Superior Court Judge Lewin “one of a handful of state judges who have persisted in using tape recording despite persistent protests from the [Judicial Council] and the stenographers’ trade group”).

13. See Letter from Pat Hill, Executive Director, Civil Operations and Special Services, Orange County Superior Court, to author (Aug. 13, 1999) (on file with author). The practice in these 13 courtrooms is to use “electronic recording in general jurisdiction civil cases when neither party objects.” Id.

14. See Memorandum from Kathleen E. O’Leary, Presiding Judge, Orange County Superior Court, to Judges Bauer et al. (Sept. 21, 1999) (on file with author). A telephone
paid $80.00 for a full day of video recording instead of $357.00 for a full day of shorthand reporting.  

The Orange County Superior Court pulled the plug on electronic recording to make the "official verbatim record" in response to a "formal request" by the Judicial Council, which was contained in a September 15, 1999 letter from the Administrative Director of the Courts, William Vickrey, to the Presiding Judge of Orange County Superior Court, Kathleen O'Leary. In that letter, the Administrative Director stated that Orange County Superior Court's practice of funding electronic recording through local user fees—not state funds allocated by the Judicial Council—violated the trial court's injunction in CCRA II restraining the Judicial Council from "authorizing or causing the expenditure of 'public funds'" to support electronic recording to make the official record.  

The survey of the superior courts in each county in California, conducted by research assistants John Palmer and Richard Helms, revealed that superior courts in an overwhelming majority of counties do not electronically record general jurisdiction proceedings. This survey was completed on September 1, 1999, before the Orange County Superior Court terminated its use of electronic recording to make an official record in general jurisdiction and felony proceedings on September 27, 1999. According to the survey, superior courts of the following counties do not currently employ electronic recording to make a verbatim record (those with an asterisk having used electronic recording as part of an electronic recording demonstration project—discussed infra notes 85-96—that terminated on January 1, 1994): Alameda,* Alpine, Butte, Calaveras, Colusa, Contra Costa,* Del Norte, El Dorado, Fresno, Humboldt, Imperial, Inyo, Kern, Lake, Los Angeles,* Madera, Marin, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Riverside,* San Benito, San Diego,* San Francisco, San Joaquin,* San Luis Obispo, San Mateo,* Santa Barbara, Santa Clara,* Santa Cruz,* Shasta, Sierra, Siskiyou, Solano,* Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Ventura, Yolo, and Yuba. The Lassen County Superior Court tapes proceedings for the clerk and the judge; parties can obtain a copy for $10. In the superior courts of Amador and Kings counties, the court has the discretion to grant the petition of the parties to electronically record proceedings. The use of electronic recording in San Bernardino County Superior Court varies by department. Until September 27, 1999, 13 courtrooms in Orange County Superior Court used electronic recording to make the verbatim record if neither party objected. The researchers could not connect with court personnel in Glenn County. Survey results are on file with the author.  

16. See Letter from William C. Vickrey, Administrative Director of the Courts, Judicial Council of California, to Kathleen E. O'Leary, Presiding Judge, Orange County Superior Court (Sept. 15, 1999) (on file with author).  
17. Id. at 2 (paraphrasing CCRA II, 69 Cal. Rptr. 2d 529, 531 (Ct. App. 1997)).  
18. See Letter from William C. Vickrey, supra note 16, at 1-2. Vickrey wrote: Your letter states that the court is paying for electronic recording with funds other than the monies allocated by the Judicial Council, including funds from the sale of videotapes and a portion of filing fees received by the court.
Sacramento County Superior Court still uses electronic recording in Family Law, and Civil Law, and Motion proceedings, including general jurisdiction cases.19

This Article explores the authority of superior courts to use electronic recording technology to make a verbatim record of superior court proceedings—without express statutory authorization—in the aftermath of the CCRA decisions. Rather than just arguing that the CCRA decisions were wrongly decided,20 this Article explores ways to narrowly construe the CCRA opinions to permit superior courts and their litigants to use rapidly evolving electronic recording technologies as an alternative to traditional stenographic court reporting.

Part II articulates the challenging statutory interpretation problem raised by the CCRA decisions. The California Court Reporters Association (CCRA) maintains a powerful lobby in the California Legislature that has blocked numerous efforts to update nineteenth century court reporting statutes by expressly authorizing the courts to

Your letter asks that we let you know if we believe that this use of funds violates the council’s directives on this issue.

As you know, the council has issued a directive that “superior courts may not use any funds allocated by the Judicial Council for electronic recording to make the official verbatim record, except in limited civil cases, misdemeanors, and infractions, as allowed by Government Code section 72194.5.” The council’s directive also states that this prohibition applies even if the amounts involved are small, “and even if the funds are recouped through charges to the litigants or payments by a county or other source.”

Based on your description of your court’s activities in this area, we conclude that those activities are of necessity linked with activities paid for by state trial court funding, and, hence, are not in compliance with the council’s directive.

In addition, please note that the judgment states that the council is enjoined from authorizing or causing the expenditure of “public funds” for the prohibited uses of electronic recording.

Thus, the use of any public funds for these purposes is inconsistent with the judgment, and the council could not and does not authorize or approve of your court’s use of public funds for these purposes.

Id. (citation omitted).

19. See Telephone Interview with Mike Roddy, Chief Executive Officer, Sacramento County Superior Court (Nov. 30, 1999).

20. For a detailed discussion of the errors in the CCRA opinions, see generally Glenn S. Koppel, When Push-Comes-to-Shove Between Court Rule and Statute: The Role of Judicial Interpretation in Court Administration, 40 SANTA CLARA L. REV. 103 [hereinafter Koppel, Push-Comes-to-Shove]. The article argues that the CCRA court made two significant errors. First, the court interpreted too broadly the text of article VI, section 6 of the California Constitution, which defines the Judicial Council’s rulemaking power. See id. at 140-70. Second, the court interpreted too broadly the text of various applicable statutes. See id. at 170-85. The CCRA I court had characterized these statutes as comprising a “statutory scheme . . . [that] suggest[s] that the Legislature implicitly intended that [the official] record be made by certified shorthand reporters rather than by electronic recording.” CCRA I, 46 Cal. Rptr. 2d 44, 51 (Ct. App. 1995).
use twentieth century electronic court recording technologies in general jurisdiction proceedings.21 A cursory reading of these statutes makes it appear as though the Legislature has thoughtfully considered—and rejected—the use of newer, cutting edge technologies to make the court record. Part II then surveys the statutory and case law landscape to lay a foundation for Part III’s analysis of the current legal status of electronic recording in California superior courts. Finally, Part II explores the unintended role played by the advent of state court funding—accomplished by a 1997 statute22—in shutting down electronic recording in Los Angeles Superior Court and thereby undermining judicial self-governance.

Part III analyzes the current legal status of electronic recording in superior courts in California. The Article concludes in Part IV that the practice of videotaping superior court proceedings in Orange County was not inconsistent with applicable statutes. This Article steers clear of the debate whether shorthand or electronic recording is the better method for making the verbatim record. Studies indicate that there is no superior method; each has its plusses and minuses.23 Indeed, there is no perfectly reliable means of making a verbatim record. As observed by the Second District Court of Appeal in 1998, “In fact, the battle over use of certified shorthand reporters versus electronic recording appears to be more political than factual.”24

21. See Dan Walters, Luddites in the Court: Are Reporters Losing Their War Against Machines?, L.A. DAILY J., Dec. 21, 1993, at 6. The reporter stated:

The California Court Reporters Association has become one of the Capitol’s most effective single-purpose lobbying groups, [its] lone goal being to keep tape out of the state’s courtrooms.

Frank Murphy, a one-time Republican assemblyman from Santa Cruz who has lobbied for the court reporters for years, is famous for his ability to sniff out and kill any bill that would bring electronic recording to the courtroom.

Id.


23. See Memorandum from Rae Lovko and Susan Myers, National Center for State Courts, Institute for Court Management (Mar. 15, 1994) (on file with author) (“The findings reported in 20 evaluations of electronic court reporting reveal that while no technology is unquestionably superior in all respects or under all circumstances, audio recording and video recording are viable court reporting methods.”); see also INFORMATION SERVICE OF THE NATIONAL CENTER FOR STATE COURTS, SUMMARY OF LITERATURE ON ELECTRONIC COURT REPORTING (1994).

This Article addresses the key question: Who should decide what role technology should play (1) in court administration generally, and (2) more specifically, in making the court record? The decision should not be made by persons with a vested interest in status quo technology—persons who, by virtue of their entrenched position in that technology, have the political power in the Legislature to take away the courts' and litigants' power to choose.

II. THE LEGAL LANDSCAPE OF ELECTRONIC RECORDING IN CALIFORNIA COURTS

A. The Government Failure Problem: Court Reporters Have Used Legislative Lobbying Leverage to "Fossilize" by Statute the Shorthand Method, Thereby Depriving the Courts and the Public of Their Power to Choose New Technologies to Make the Record

Technology for preparing a verbatim record of court proceedings has come a long way from the 1860s when routine court reporting made its debut in American courtrooms. At that time, the first court stenographers used the quill pen to take down notes in shorthand.

25. This Article's answer corresponds to that offered in the Final Report of the Legislature's Electronic Recording Project Advisory Committee—ironically, a document written by persons appointed at the insistence of the California Court Reporters Association. See SENATE COMM. ON JUDICIARY, ELECTRONIC RECORDING/VIDEO TAPING—EXPERIMENTAL USE IN SUPERIOR COURT 5, 1985-1986 LEG., REG. SESS. (CAL. 1986) (A.B. 825); see also HEARING ON A.B. 825 BEFORE THE ASSEMBLY COMM. ON JUDICIARY, 1985-1986 LEG., REG. SESS. (CAL. 1995). The Final Report of the Legislature's Electronic Recording Project Advisory Committee concluded: "In civil litigation, a litigant should be able to choose the record making system at the litigant's cost. . . . In civil litigation, it should be the litigant's decision which method (ER or CSR) will be used to make the record." ELECTRONIC RECORDING PROJECT ADVISORY COMMITTEE, FINAL REPORT OF THE ELECTRONIC RECORDING PROJECT ADVISORY COMMITTEE 1, 7 (1992) (ON FILE WITH AUTHOR).

26. See Harry M. Scharf, The Court Reporter, 10 J. LEGAL HIST. 191, 209 (1989). Scharf's article includes the following quotation: The early shorthand writer, of course, wrote with quill pens. Of these he carried into court with him a goodly supply in a leather case, and also an ink bottle in a metal case covered with leather. Part of the equipment of his chambers was a proper penknife and a hone, for he had to cut his pens to suit his hand. Id. (quoting TREMAINE WRIGHT, THE TWO ANGELS); see also Brian Miller, Court Reporting: From Stenography to Technology, GOV'T TECH. 1 (MAR. 1996) <http://www.govtech.net/publications/gt/1996/mar/courts/courts.shtm> ("[The court reporters'] tools have changed over the centuries from inkwells to stenograph machines, and more recently to today's computer-aided transcription, or CAT.").

27. Stenographers were rarely used as court reporters to make a verbatim record of
During the last twenty years, sophisticated electronic court reporting technology has evolved rapidly. Currently, court proceedings are routinely recorded in many American courtrooms through the medium of multi-track audio and videotape, as well as cutting-edge, digital technology. Moreover, voice recognition computer technology that will translate voice to text is on the horizon. As courts throughout the

trial proceedings in American courtrooms until the mid-nineteenth century. See Jim Haviland, Philander Deming's Role, NAT'L L.J., Apr. 12, 1982, at 15 (“Until just after the Civil War, testimony wasn’t recorded in trials. This led to considerable wrangling over the different recollections of what had been said by witnesses in court.”).

28. According to a 1993 survey prepared jointly by the Conference of State Court Administrators and the National Center for State Courts, 45 state court systems, the District of Columbia, Puerto Rico, and the federal courts either “allow” or “require” the use of audio tape to record some or all trial proceedings. Video tape is “allowed” in 17 state jurisdictions, “prohibited” in 7 state jurisdictions, and “experimental for some or all types of cases” in 10 state jurisdictions and in the federal courts. DAVID B. ROTTMAN ET AL., STATE COURT ORGANIZATION 1993, tbl.31 (1995).

29. Thirteen courtrooms in Orange County Superior Court are equipped with videotape recording equipment. See supra note 13 and accompanying text. William E. Hewitt, Senior Court Research Associate for the National Center for State Courts in Williamsburg, Virginia, describes video court reporting as follows:

Video court reporting captures the sights and sounds in a courtroom on videotape, without a camera operator. In a typical courtroom five to seven cameras and about the same number of microphones are required to record the proceedings. The cameras are mounted on the walls or ceilings. They are unobtrusive—no special lighting is required. The cameras are “sound activated” and controlled by a computerized mixing device. This “brain” of the system... adjusts the sound level of the audio output and determines which microphone and camera position will have precedence at any one time. It allows the camera to switch between speakers. A video court reporting system includes a “date/time generator,” which displays the current date and time on the monitor and on the tape. The display of the date and the time of day is used in place of transcript page and line numbers to locate and refer to portions of the record.

Hewitt, supra note 10, at 3.

30. A commentator explains:

[Digital technology permits mi]icrophones at the podiums, the judge's chair, attorneys’ tables, and in the ceiling [to] record high-quality digital sound straight to a computer hard drive on separate tracks. Court reporters register who is speaking with a keystroke, creating an annotated log that's stored with the audio record. When a judge asks for a statement to be replayed for a court, a few keystrokes accomplish the task in seconds.

John Southerst, Digital Court Recording: Trial Without Error, CT. TECH. BULL., Mar.-Apr. 1998, at 1, 8.


Does the future hold automated voice and speech recognition systems in
nation seek to infuse court operations with cost-cutting, cutting-edge technology to cope with tight fiscal restraints, the court reporting profession resists, with varying success, non-stenographic inroads on the court record.  

The California Legislature has proven to be a particularly hospitable environment for court reporters to promote their professional interests.  

which the reporter's duties are primarily to assure the proper functioning of the system? Logic suggests that this is likely, but technology advances in this area have been slower than anticipated. The task necessary to achieve an automated system is tremendous. We must have a computer that not only can recognize a huge number of words but which can handle similar sounding words, accents, colds, and unusual speaking patterns—to mention only a few factors. Professor Lederer, the Director of Courtroom 21, has predicted that science and engineering will one day achieve this goal, and that then reporters will likely expand their duties to become courtroom technologists as well. This may be, but the task facing voice and speech recognition specialists is so great that even if he is correct, that time will not likely come for many years indeed.

Id; see also Frederick K. Grittner, The Recording on Appeal: Minnesota's Experience with Videotaped Proceedings, 19 WM. MITCHELL L. REV. 593, 607 (1993). Grittner writes:

The continued development of technology should be treated as a fundamental assumption. Voice recognition computer systems appear attainable. Voice-activated computers are now marketed to doctors and to attorneys as a means of bypassing secretaries and transcribers. Although these systems require a user to dictate hundreds of phrases so the machine can analyze the voice pattern, engineers are continuing to improve speech recognition.

Id.

32. Court reporter lobbying is a national phenomenon. See Jacobs, supra note 12, at B1 ("Last year alone, the National Court Reporters Association spent $320,000 on lobbying."). Such lobbying is a manifestation of a larger problem of the erosion of judicial independence by political interference in court administration, the rule-making process, and judicial decision-making. See John M. Greacen, Court Rules and Technology (visited July 15, 1999) <http://www.ncsc.dni.us/ncsc/tis/ctc5/106.htm>. Greacen wrote in preparation for the Fifth National Court Technology Conference (CTC5) of the National Center for State Courts:

[The determination of California's court reporters to fight by every means at their disposal the introduction of electronic recording—which threatened the existence of their profession—is instructive. Other states should anticipate strong opposition from court reporters to the introduction of electronic and videotape recording or the use of voice recognition software not only to record testimony but to translate it into written form. Perhaps we should be prepared for the possibility that other groups of court employees may organize to oppose other technologies that they perceive as threatening to their job security. For instance, file clerks might oppose electronic filing technology because there would no longer be any paper files for them to manage. Microfilm operators might join them. When we develop advanced court security technologies, we may anticipate opposition from bailiffs if their jobs are threatened.

Id; see also Hewitt, supra note 10, at 5 ("From a political perspective, the disadvantages [of video court reporting] are obvious: significant resistance and controversy generally ensue where court reporters are well organized and influential, as they are in many states and cities.")

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California is one of the few remaining states where the legislature plays the dominant rulemaking role in court administration, practice, and procedure. The highly effective court reporter lobby has caused the defeat of virtually every bill that would have expressly authorized the electronic recording of superior court proceedings. California statutes, derived from a single progenitor statute enacted in 1861, have—with minor exceptions—failed to keep pace with rapidly evolving

33. See Greacen, supra note 32. Greacen writes:
California is one of only a handful of states that takes the federal view that the legislature has plenary authority to enact court rules if it wishes to do so. The rule-making authority of the California Judicial Council is limited to rules consistent with state statute. Most states take the contrary view—that rule making is the exclusive province of the judiciary.

Id. New York is another state where legislature and courts concurrently exercise rule-making authority. See Bloom v. Crosson, 590 N.Y.S.2d 328, 330 (App. Div. 1992) ("Under our State constitutional scheme, the authority to regulate the courts is split between the Legislature and the Chief Judge."). Heavy lobbying by the New York State Court Reporters Association ("NYSCRA") in the New York State Legislature has kept electronic recording to an "experimental" program that began in 1992. In 1997, the Legislature extended the electronic recording experiment two more years, rejecting the court administrators' recommendation "to give the court system expanded authority to use tape recorders in place of court stenographers in all state-funded trial courts." Daniel Wise, Expanded Use of Tape Recorders Is Urged, N.Y.L.J., Mar. 10, 1997, at 1; see Gary Spencer, Legislature Budgets $952.2 Million for Courts, N.Y.L.J., Aug. 5, 1997, at 1.


[T]he CCRA no doubt would rank with the greatest shot blockers in history. The record shows that when it comes to legislation detrimental to its members' financial and professional interests, the association can kill with the best of them.

Assembly Judiciary Committee Chairman Phil Isenberg puts a slightly different spin on the historical record.

"The Legislature has kowtowed to court reporters in a shameless fashion," said the Sacramento Democrat who has lost several duels to what he calls the "court reporter monopoly."

Id.

35. The following are two exceptions: (1) the statutory authorization of electronic recording in municipal court, see infra notes 66-73 and accompanying text, and (2) the electronic recording authorized in selected superior courts under a demonstration project, which expired in January 1994. See infra notes 82-91 and accompanying text.

36. Court reporting statutes have been updated to reflect technological advances in shorthand. For example, "[t]ranscription by typewriter or other printing machine was authorized in 1903." CAL. CIV. PROC. CODE § 269 historical note (West 1982) (current version at CAL. CIV. PROC. CODE § 269 (West Supp. 1999)). The Legislature added subsection (c) to section 269 of the California Code of Civil Procedure in order to reflect advances in computer-aided transcription technology. See CAL. CIV. PROC. CODE § 269
developments in electronic recording technology because the court reporting profession has used its considerable leverage in the Legislature to protect its vested interest in shorthand.

Until the use of electronic recording technology to prepare the court record became a fact of life in American courtrooms during the last two decades, shorthand was the only available means to make a verbatim record. The history of modern courtroom recording goes back to the mid-nineteenth century, when a small cadre of stenographers were able to adapt shorthand to the verbatim reporting of court proceedings. Beginning in the 1860s, legislatures enacted statutes that authorized courts to appoint official court reporters to take advantage of this cutting-edge phenomenon. When these first court reporting statutes were enacted, the court reporting profession was in its infancy and qualified court stenographers were scarce—especially in frontier California. California's first court reporting statute was enacted in 1861 following the enactment of a similar statute in New York State in 1860. While no legislative history survives, it is reasonable to infer that the problem addressed by the original 1861 California court reporting statute was the lack of assured, quality access by judges and litigants to the only available technology to make a verbatim record—shorthand court reporting. In California, this nineteenth century statute remains on the books remarkably intact despite the emergence of twenty-first century non-stenographic court reporting alternatives.

Having prevailed in the legislature, the California Court Reporters Association later scored two big victories in the judicial arena. First, it persuaded the First District Court of Appeal to strike down the Judicial Council's Electronic Recording Rules. Accordingly, the court's 1995 decision in California Court Reporters Ass'n v. Judicial Council of California (CCRA I) held that these rules of court were "inconsistent

(West Supp. 1999).

37. See generally Oswald M.T. Ratteray, Verbatim Reporting Comes of Age, 56 JUDICATURE 368 (1973) (discussing the origins of official court reporting in the 1860s).
39. See Ratteray, supra note 37, at 368 ("Many transcripts of this [early to mid-19th century] period ... show evidence of considerable condensation and gaps in the reporter's notes that were subsequently filled in. In many instances the reporters were probably just not skilled enough to record every word.") (footnote omitted). A writer for an 1884 Department of the Interior survey on shorthand reporting in the United States wrote: "Since the introduction of phonography in 1845, the dissemination of the art has gone steadily forward, and its use during the last five years has been greatly on the increase." ROCKWELL, supra note 38, at 23.
41. See ROCKWELL, supra note 38, at 46.
42. 46 Cal. Rptr. 2d 44 (Ct. App. 1995).
with statute" and, therefore, their promulgation exceeded the power of the Judicial Council under article VI, section 6 of the California Constitution.\footnote{43} Two years later, the first appellate district issued its second opinion in the California Court Reporters litigation, \textit{CCRA II},\footnote{44} which upheld a sweeping judgment by Judge Garcia of the Alameda County Superior Court issued pursuant to \textit{CCRA I}.\footnote{45} The superior court judgment not only declared the Judicial Council's Electronic Recording Rules invalid, but it further declared that "the use of nonstenographic methods for producing the OFFICIAL verbatim record of superior court proceedings are contrary to the intent of the Legislature."\footnote{46} Accordingly, the superior court enjoined the Judicial Council and the Alameda County Superior Court from "authorizing and from causing the expenditure of public funds for the maintenance of or creation of a nonstenographic method and system for preparing the official verbatim record of superior court proceedings."\footnote{47}

Pursuant to the injunction, the Judicial Council, in January 1997, directed "each superior court not to expend any of the upcoming [fiscal year] 96-97 third quarter state funding distribution on the maintenance or creation of nonstenographic methods for preparing the official verbatim record of superior court proceedings."\footnote{48} Two years later, the council expansively interpreted the portion of the injunction that restrained the council from "authorizing and from causing the expenditure of public funds" to include local user fees and county funds that are not included in the state funds allocated by the Judicial Council to local superior courts.\footnote{49}

\begin{footnotes}
\item[43] \textit{Id.} at 56 (quoting \textit{CAL. CONST.} art. VI, § 6).
\item[44] \textit{CCRA II}, 69 Cal. Rptr. 2d 529 (Ct. App. 1997).
\item[45] \textit{See id.} at 531.
\item[47] \textit{Id.}
\item[48] Memorandum from William C. Vickrey to All Presiding and Sole Judges of the Superior Courts et al., \textit{supra} note 9, at 2.
\item[49] By letter dated January 14, 1999, the council directed that "superior courts may not use any funds allocated by the Judicial Council for electronic recording to make the official verbatim record." Letter from William C. Vickrey to Kathleen E. O'Leary, \textit{supra} note 16, at 1. The prohibition was to apply "even if the funds are recouped through charges to the litigants or payments by a county or other source." \textit{Id.}
\end{footnotes}
B. The Statutes: California's "Permissive" Statutory Structure for Making a Verbatim Record Dates Back to the Original 1861 Court Reporting Statute

1. The 1861 Statute

The original court reporting statute,\(^{50}\) from which current code sections are derived,\(^{51}\) was permissive in that it only authorized, but did not require, courts to appoint shorthand reporters and did not require that courts maintain a verbatim record. This statute gave judges the option to hire court reporters and gave judges and litigants the option to request a verbatim record and a readily available means for creating that record.\(^{52}\)

The 1861 statute sprang from a public-regarding\(^{53}\) purpose to create—not to restrict—technological options for courts and litigants who chose to make a verbatim record. The original legislative decision to authorize the courts to appoint official court reporters was not a decision to exclude other, non-existent, means of making a verbatim record.\(^{54}\) Nor

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52. The Act states in part:
   
   SECTION 1. The District Judge of each of the Fourth, Sixth, Seventh, Tenth, Twelfth, and Fifteenth Judicial Districts, is hereby authorized to appoint a competent Short Hand Reporter, who shall, at the request of either party in a civil case, or in criminal cases, triable in the District Court, at the request of the court, take down in short hand, the rulings of the court, the exceptions taken, and the testimony, and shall within five days after the trial of such case, write out the same in plain, legible, long, handwriting, and file it, together with the original short handwriting, with the Clerk of the court in which the cause was tried.

   SEC. 2. Such report, written out in long handwriting, as aforesaid, shall be deemed prima facie a correct statement of the evidence and proceedings therein contained.

Ch. 434, 1861 Cal. Stat. 497, 497-98 (first and second emphasis added).

53. The term "public-regarding" is attributed to Jerry L. Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849, 868 (1980). A subsequent article explains the concept as follows: "If the statute in question is the result of a reified, deliberative congressional process in which conceptions of the public good were considered, then the statute is public-regarding. If, however, the statute simply represents legislative acquiescence to raw political power, it is not public-regarding." Jonathan R. Macy, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 229 n.29 (1986).

54. A previous article argues that the CCRA I court, through expansive statutory interpretation, transformed what began as public-regarding statutes into rent-seeking statutes that grant a monopoly to a powerful special interest group to make the record of superior court proceedings. See Köppel, Push-Comes-to-Shove, supra note 20, at 170-72, 174.
was the decision intended to preempt the Judicial Council—which did not exist until 1926—from exercising its own rulemaking power over court administration to authorize superior courts to use emerging technologies as they evolved.55

The 1861 Legislature apparently rejected a mandatory approach that would have required a shorthand reporter to take down stenographic notes of every proceeding.56 California emulated New York’s original court reporter statute, enacted on April 16, 1860, that provided for the selective verbatim reporting of court proceedings. However, while New York’s Legislature abandoned this permissive approach three years later, amending its statute to require court reporters to take “full stenographic notes of all proceedings in every trial,”57 California did not. California’s

55. The Judicial Council and the Legislature exercise concurrent rulemaking authority over practice, procedure, and court administration. The Council’s rulemaking authority is limited to promulgating rules that are “not inconsistent with statute” and is, therefore, secondary to that of the Legislature. CAL. CONST., art. VI, § 6. CCRA I broadly interpreted “not inconsistent with statute” to mean, in effect, consistent with an unarticulated legislative intent suggested by an implied statutory scheme. See CCRA I, 46 Cal. Rptr. 2d 44, 51 (Ct. App. 1995). The court wrote:

[W]e conclude that when evaluating whether a rule of court is “not inconsistent with statute”... a court must determine the Legislature’s intent behind the statutory scheme that the rule was intended to implement and measure the rule’s consistency with that intent...

... We must determine whether the statutory scheme addresses the making of the official record in such a manner as to suggest that the Legislature implicitly intended that this record be made by certified shorthand reporters rather than by electronic recording.

Id. CCRA I’s broad construction of “not inconsistent with statute” invites courts to presume legislative preemption of judicial authority over court administration and, thereby, threatens to undermine judicial self-governance that is the key to judicial independence in the twenty-first century. See Koppel, Push-Comes-to-Shove, supra note 20, at 145, 149, 160-62, 164.

56. The text of a pre-enactment version of the 1861 statute read as follows:

Section 2: The duties of such Reporter shall be to attend in person the sittings of the District Court within his district, and to take down in stenographic or phonographic hand during the trial of every cause in such Court the testimony of the witnesses and the proceedings had pending the trial of such cause; and immediately thereafter, to write out at length in a plain, legible hand a correct and complete report of such testimony, and all the proceedings in the cause, state the testimony as nearly as possible in the exact words of the witnesses, or interpreter as given at the trial, and with like exactings the questions asked the witnesses; objections stated; rulings of the Court, and the exceptions taken. Such report when prepared shall be filed with the papers in the cause, and shall constitute a part of the record thereof.

Act of May 17, 1861, ch. 434, § 2 (handwritten draft) (emphasis added) (on file with author).

57. ROCKWELL supra note 38, at 46 (emphasis added).
current court reporter statutes retain this essential permissive structure while New York's court reporter statutes retain their mandatory structure.38

2. **Current Statutory Law Pertaining to Court Reporting Authorizes, but Does Not Require, the Appointment of Official Court Reporters and the Preparation of a Verbatim Record**

No statute expressly mandates that an official superior court record be made by shorthand reporters nor expressly prohibits using non-stenographic means to make a verbatim record.59 Current statutory law does not even require the creation of a verbatim court record. Moreover, section 69941 of the California Government Code continues to authorize—but not require—superior courts to appoint official reporters.60 Section 269(a) of the California Code of Civil Procedure continues to confer upon the parties and the court the option to create—or not create—a verbatim record.61 In the event a superior court appoints

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58. See N.Y. JUD. LAW § 295 (McKinney 1983) (“Each stenographer . . . must take full stenographic notes of the testimony and of all other proceedings in each cause tried or heard.”) (emphasis added). The California Legislature knows how to require official reporters to prepare verbatim records when it wants to because it has done so in juvenile court hearings conducted by a juvenile court judge. See CAL. WELF. & INST. CODE § 347 (West 1998) (“At any juvenile court hearing conducted by a juvenile court judge, an official court reporter shall . . . take down in shorthand all the testimony and all of the statements and remarks of the judge and all persons appearing at the hearing . . . .”) (emphasis added).

59. The First District Court of Appeal conceded these two propositions in CCRA I, citing an earlier decision involving the Los Angeles CCRA for support. See CCRA I, 46 Cal. Rptr. 2d at 51 (citing Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 345 (Ct. App. 1995)). Nevertheless, the court went beyond express statutory language to inquire whether “the statutory scheme addresses the making of the official record in such a manner as to suggest that the Legislature implicitly intended that this record be made by certified shorthand reporters rather than by electronic recording.” Id. (emphasis added).

60. In California, settled or agreed statements may be used in lieu of verbatim transcripts as part of the appellate record. See CAL. R. CT. 6, 7.

61. Section 69941 reads:

> The judge or judges of any superior court may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and such pro tempore official reporters as the convenience of the court may require. The reporters shall hold office during the pleasure of the appointing judge or judges.

CAL. GOV'T CODE § 69941 (West 1997) (emphasis added).

62. Section 269(a) reads:

> The official reporter of a superior court . . . shall, at the request of either party, or of the court in a civil case other than a limited civil case, and on the order of the court, the district attorney, or the attorney for the defendant in a felony case, take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, all arraignments, pleas, and sentences of defendants in felony cases, arguments of the prosecuting attorney to the jury,
an official reporter, statutes prescribe the duties of that official reporter and regulate administrative matters like fees and salary. An official court reporter of a superior court to "take down in shorthand all the testimony" arises only if his services are requested by either party or the court. The basic "permissive" —option-creating—statutory structure enacted in 1861 remains essentially intact in California's contemporary court reporting statutes. Also consistent with the 1861 statute, the court reporter's certified transcript constitutes "prima facie evidence of [the] testimony and proceedings" in the case.

and all statements and remarks made and oral instructions given by the judge. If directed by the court, or requested by either party, the official reporter shall, within such reasonable time after the trial of the case as the court may designate, write the transcripts out, or the specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify that the transcripts were correctly reported and transcribed, and when directed by the court, file the transcripts with the clerk of the court.

CAL. CIV. PROC. CODE § 269(a) (West Supp. 1999) (emphasis added).

63. Originally, in 1861, fees were not fixed by statute but negotiated privately between the Reporter and the parties. See Act of May 17, 1861, ch. 434, 1861 Cal. Stat. 497, 498 ("SEC. 3. Such Reporter shall receive such compensation for his services as may be agreed upon between the said Reporter and the parties, or counsel, in the cause, and in case of failure to agree, between the said parties, then the amount may be fixed by the court."). Fees are now fixed by statute under the following sections of the California Code of Government: section 69947 ("Except in counties where a statute provides otherwise, the official reporter shall receive for his services the fees prescribed in this article."), section 69948 (fee for reporting contested cases), section 69948.5 (rate of compensation for court reporters in Modoc County), section 69949 (reporting defaults or uncontested matters), section 69950 (transcription; originals and copies), section 69951 (transcription in civil cases; additional fee), and section 69954 (compensation for transcripts prepared with computer assistance). CAL. GOV'T CODE §§ 69947, 69948, 69948.5, 69949, 69950, 69951, 69954 (West 1997). In 1993, section 68086 of the California Code of Government was amended to authorize superior courts to charge the parties in a civil case, who use a court reporter's services, a user fee equal to the "actual cost of providing that service." CAL. GOV'T CODE § 68086 (West Supp. 1999). In addition to fees, court reporters are paid salaries that are also fixed by statute. See CAL. GOV'T CODE §§ 69994.2-70063 (West 1997).

64. CAL. CIV. PROC. CODE § 269(a) (West Supp. 1999).

65. CAL. CIV. PROC. CODE § 273 (West Supp. 1999). An earlier draft of the section of the 1861 statute from which section 273 is derived had provided that the court reporter's "report" of testimony was, "for the purposes of making a statement upon motion for new trial or appeal . . . conclusive of the facts therein stated." Act of May 17, 1861, ch. 434, § 4 (handwritten draft) (emphasis added) (on file with author). The word "conclusive" presumably would have foreclosed a party on appeal from disputing the accuracy of the court reporter's transcript. The statutory presumption of accuracy created by section 273 can be rebutted by an electronic recording of the same proceedings. See infra note 250.
The only express statutory authorization for the electronic recording of court proceedings is limited to municipal courts—but only where an official reporter is “unavailable.” However, in the fifty-four out of fifty-eight counties that have voted to unify their trial courts under Proposition 220, municipal courts no longer exist. For this reason, section 72194.5 of the California Government Code was amended in 1998 to permit “a court” to order electronic recording of “court” proceedings in a “limited civil case, or a misdemeanor or infraction case” where an official reporter is unavailable.

Section 72194.5 of the California Government Code is an exception to section 274c of the California Code of Civil Procedure. Section 274c, the municipal court “analogue” to section 269(a) of the California Code of Civil Procedure, requires a court reporter to record municipal court proceedings upon the request of a party or the court.

The Legislature enacted section 72194.5 to address a critical shortage of court reporters in municipal court. The Judicial Council, as section 72194.5’s sponsor,

66. CAL. GOV’T. CODE § 72194.5 (West 1997) (prior to 1998 amendment) (“Whenever an official court reporter . . . is unavailable to report an action or proceeding in a municipal . . . court . . . , the municipal . . . court may order that the action . . . be electronically recorded . . . ”).

67. See News Release, supra note 8.


Nothing in this act is intended to change the extent to which court reporter services or electronic reporting may be used in the courts. It is the intent of this act to provide for court reporter services and electronic reporting in a county in which there is no municipal court to the same extent as otherwise provided by law in a county in which there is a municipal court.

Ch. 931, sec. 507, 1998 Cal. Legis. Serv. at 5308.

69. Section 274c says: “Official reporters shall, at the request of either party or of the court in a limited civil case, . . . take down in shorthand all the testimony . . . .” CAL. CIV. PROC. CODE § 274c (West Supp. 1999).

70. See Los Angeles County Court Reporters Ass’n v. Superior Court, 37 Cal. Rptr. 2d 341, 374 (Ct. App. 1995). The court wrote:

It appears to us that Government Code section 72194.5 . . . merely authorizes . . . an exception to the command in section 274c, the municipal and justice court analogue to section 269, that an official reporter record those civil proceedings in municipal or justice courts for which the judge or a party requests the presence of an official reporter.

Id. (footnote omitted).


Under the direction of the Judicial Council, the Administrative Office of the Courts (AOC) in 1974 conducted a study of court reporting in California municipal courts to determine whether electronic recording could be used in courts without certified shorthand reporters.
made no attempt to extend authorization of electronic recording to superior court. The court reporters did not actively oppose this bill "because—with the exception of felony preliminary hearings—business is sparse in municipal court. . . . Because few parties appeal municipal court decisions, most parties do not order transcripts in municipal court proceedings."

3. Repeated Attempts to Update Court Reporting Statutes Blocked by Powerful Court Reporter Lobby

When the electronic recording of court proceedings became feasible in the early 1970s, California courts were uncertain whether the use of electronic recording of court proceedings satisfies the defendant's constitutional right to a "verbatim record of sufficient completeness permitting proper consideration of an appeal." In re Armstrong, 178 Cal. Rptr. 902, 908 (Ct. App. 1981). The Armstrong court rejected appellant's argument that electronic recording would not provide him with an adequate verbatim record, stating: "If the claimed inadequacies of electronic recording shall hereafter be established by judicial experience, or otherwise, the constitutional requirement will not have been met." Id. Recently, the Second District Court of Appeal rejected appellant's reliance on Armstrong to support his contention that "electronic recording has now been found by judicial experience construing statutory requirements to be inadequate in felony trials conducted in Superior Court when an objection has been made." People v. Turner, 79 Cal. Rptr. 2d 740, 745 (Ct. App. 1998). The Turner court explained, "Armstrong does not purport to decide whether electronic recording is inferior to certified shorthand reporting." Id.

At the time of the study, municipal courts did not uniformly maintain records of all proceedings. Some courts provided a stenographic reporter for all proceedings, others employed reporters only for felony preliminaries, and a range of other practices existed between these two extremes.

In the absence of stenographic reporters, the majority of municipal courts relied on the handwritten minutes of courtroom clerks to make court records. The AOC study indicated that electronic recording could be used to make court records or to supplement existing court record-making systems.

The study led to . . . . Government Code section 72194.5, which authorizes electronic recording in municipal and justice courts under certain circumstances . . . .
this technology required express statutory authorization. Existing court reporting statutes that originated in the 1860s, when shorthand was the only verbatim recording technology, naturally referred only to shorthand court reporters. Before 1975, no statute expressly authorized electronic recording in any California state court. Since shorthand court reporting is expressly authorized by statute, it might seem, upon superficial analysis, that electronic recording also requires express statutory authorization and that, without it, courts are powerless to electronically record their proceedings.

Understandably reluctant to use its own rulemaking authority over court administration, and, desiring the electronic recording option, the Judicial Council chose the politically safer course of seeking express statutory authority from the Legislature. From 1971 to the present,
numerous bills have been introduced in the Legislature that would have expressly authorized electronic recording of proceedings in superior courts and administrative hearings throughout the state. The court

Supreme Court upheld legislative term limits, so the Legislature slashed the Court's budget. Id., available in LEXIS. California's judiciary is acutely cognizant of the populist political culture of this state, inherited from its frontier past, in which courts must not appear to usurp the democratic prerogatives of the Legislature by making politically sensitive decisions that may offend powerful interest groups like the court reporters. See Koppel, Push-Comes-to-Shove, supra note 20, at 149-51. Legally, the limits of the Judicial Council's rulemaking power are ill-defined. Under article VI, section 6 of the state constitution, the Council's rules of court may not be "inconsistent with statute." CAL. CONST. art. VI, § 6. This, of course, is an ambiguous phrase. Given the ambiguity of the constitutional limits on the court's rulemaking authority and of out-of-date court reporting statutes, the Council may have preferred to avoid, if possible, the risk of unnecessarily promulgating rules that could be struck down by the courts—a risk that became reality in the CCRA decisions.

79. See generally Dresslar, supra note 34, at 1. Dresslar wrote:
Occasionally, bills establishing or modifying electronic pilot projects have slipped through the Legislature and become law. But the more far-reaching proposals—even those that protected the jobs of current reporters—have gone down to ignominious defeat.

Some examples:

- AB626, carried by then-Assemblyman William Filante in the 1981-82 session, would have allowed electronic recording upon the stipulation of both parties. It died at its first committee hearing.
- AB586, carried by Assemblyman Robert Frazee in the 1983-84 session, would have allowed electronic recording in judicial proceedings. It didn't even get a hearing.
- AB1523, carried by then-Assemblyman, now-Sen. Tim Leslie in the 1987-88 session, would have established a pilot project for use of video recording of judicial proceedings. It never reached the Assembly floor.
- AB3112, carried by Assemblyman Curt Pringle in the 1989-90 session, would have allowed [administrative hearings conducted by the Office of Administrative Hearings to be reported electronically at the option of the administrative law judge without the parties' prior consent]. Pringle dropped it without even taking it to a hearing.
- AB2937, carried by Isenberg in the 1991-92 session, would have allowed electronic recording of judicial proceedings. Isenberg was the only "yes" vote in his own committee. Not only did Isenberg get hammered, but the Judicial Council got embarrassed. It supported the measure, but reporters persuaded individual judges to write letters to committee members opposing it.
- SB211, introduced by Sen. Milton Marks [in 1993], would allow Marin County courts to use electronic recording in all judicial proceedings except death penalty cases. It is languishing in the Senate Rules Committee, where it probably will die without a policy committee hearing.
- Sometimes the association kills ideas even before they get into bills. Another proposal by Isenberg—carried [in 1993] on behalf of the
reporter lobby blocked each of these bills. The Council's repeated defeat in the Legislature laid the groundwork for its defeat in the First

Sacramento Superior and Municipal Courts—provides a prime example.

*Id.* at 1. This Article's research adds to the defeated list as follows:

- S.B. 851, 1978-1979 Leg., Reg. Sess. (Cal. 1979) (introduced by Assemblyman Philip Wyman on Mar. 12, 1979, would have permitted state agencies to reduce costs by permitting them to record administrative hearings through multi-track audio recording devices in lieu of shorthand reporters).
- S.B. 1050, 1978-1979 Leg., Reg. Sess. (Cal. 1979) (introduced by Senator Holmdahl on April 2, 1979, would have amended section 269 of the California Code of Civil Procedure to require official reporters in superior courts to take down testimony "in shorthand, or by electronic recording device at the judge's discretion").
- A.B. 1354, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (introduced by Assembly Member Lampert on Feb. 26, 1999 to "state the intent of the Legislature to enact provisions permitting the use of electronic recording of court proceedings in participating counties").

District Court of Appeal in the *CCRA I* decision. Although the *CCRA* court disclaimed any formal reliance on the failure of the Legislature to enact express authorization for electronic recording, the court interpreted the Judicial Council’s strategic choice to seek express legislative authorization as an implied admission by the Council that it lacked rulemaking authority to expressly authorize electronic recording.\textsuperscript{81}

In 1986, the Legislature enacted Assembly Bill 825—codified as section 270 of the California Code of Civil Procedure—that required the Judicial Council to “establish a demonstration project to assess the costs, benefits, and acceptability of utilizing audio and video recording as a means of producing a verbatim record of proceedings” in a limited number of superior court departments.\textsuperscript{82} Assembly Bill 825 contained a built-in “sunset” provision. The project self-destructed on January 1, 1994\textsuperscript{83} and was not renewed in spite of the following recommendation of the legislatively-appointed Electronic Recording Advisory Committee: “In civil litigation, it should be the litigant’s decision which method (ER or CSR) will be used to make the record.”\textsuperscript{84}

Assembly Bill 825 was the product of a political compromise between the Judicial Council and the CCRA.\textsuperscript{85} As originally introduced, Assembly Bill 825 would have provided blanket and temporally

\textsuperscript{81} See infra notes 147-49 and accompanying text.


\textsuperscript{83} See id. (terminating on Jan. 1, 1992); Act of Sept. 22, 1989, ch. 678, sec. 1, 2, §§ 270(a), 72194.5, 1989 Cal. Stat. 2134, 2135, 2136 (A.B. 1854) (extending the life of the demonstration project another two years and expanding the number of superior court departments authorized to participate in the project).

\textsuperscript{84} ELECTRONIC RECORDING PROJECT ADVISORY COMMITTEE, supra note 25, at 7.

The court reporters insisted upon the formation of the legislative advisory committee as part of the price for lifting their opposition to the demonstration project bill, Assembly Bill 825. See SENATE COMM. ON JUDICIARY, supra note 25, at 5. According to the Senate Committee on Judiciary, “[The court reporters] questioned the objectivity of the Judicial Council in reviewing the use of electronic recording, as the Council sponsored the bill in the first place. This dual review . . . is a compromise meant to ensure that all parties involved have input into the Legislature’s evaluation.” Id.

\textsuperscript{85} See SENATE COMM. ON JUDICIARY, supra note 25, at 5. This report states:

Last year this measure arrived before this Committee in a significantly different form, establishing a pilot project in Los Angeles County and providing a blanket authorization for electronic recording devices in rural counties. Proponents and opponents agreed to undertake negotiations in order to determine if a compromise could be found. After months of work, they successfully developed the current language and are now in delicate agreement.

Id. at 4.
unlimited authorization to electronically record proceedings in all superior courts. Through intense opposition and lobbying, the CCRA succeeded in limiting the scope and duration of electronic recording in superior court and, ultimately, killed it.\textsuperscript{86}

As a result of the demonstration project, "about 15\% of superior courtrooms [were] equipped for video and audio recording" as of May 15, 1996.\textsuperscript{87} In 1987, "demonstration" courtrooms in Los Angeles County Superior Court were equipped with sound recording technology.\textsuperscript{88} Between 1990 and 1992, demonstration courtrooms in ten additional counties were established.\textsuperscript{89} Of these ten additional counties, five implemented audio recording\textsuperscript{90} and five—including Orange County—installed video recording technology.\textsuperscript{91}

The doomed fate of electronic recording in superior court under the demonstration project was a foregone conclusion. Anticipating the January 1, 1994 "sunset" of the demonstration project, the Judicial Council sponsored Assembly Bill 2937, introduced on February 19, 1992 by Assembly Judiciary Committee Chair Phil Isenberg.\textsuperscript{92} This bill would have given any court, including superior courts, the discretion to "utilize audio or video recording as the means of making a verbatim record of any hearing or proceedings."\textsuperscript{93} Notwithstanding California's seventeen-year experience with electronic recording in municipal courts\textsuperscript{94} and six-year experience in selected superior courts under the demonstration project,\textsuperscript{95} as well as a favorable evaluation of the demonstration project in the Judicial Council's report to the Legislature,\textsuperscript{96} the bill died in committee on its first hearing. The
committee chair, Phil Isenberg, cast the only "aye" vote.97

Since the defeat of the Isenberg bill, five other electronic recording bills have been introduced into the Legislature. Senate Bill 211 died in committee.98 Assembly Bill 2113 was defeated on the Assembly floor by forty-one percent of the total Assembly's membership.99 Assembly Bill 128 also died in committee.100 Assembly Bills 1023 and 1354, introduced in early 1999, both dropped off the legislative radar screen at the time of this Article's publication.101 But, despite the apparent clout of the CCRA, the Legislature has stopped short of slamming the door shut on electronic recording. Indeed, the Legislature has never enacted a statute that expressly requires the use of shorthand to make a verbatim record, nor has it enacted a statute that expressly precludes the use of electronic recording technology to make a verbatim record.

97. See Dresslar, supra note 34, at 1.
C. The Cases

1. The View from the Fifth Appellate District: The LACRAA Decision (January 1995)

During the final years of the demonstration project, the superior courts of Los Angeles, Sacramento, and Orange Counties expanded electronic recording into non-demonstration courtrooms—i.e., into a number of superior court departments that exceeded the number prescribed by section 270 of the California Code of Civil Procedure. In non-demonstration courtrooms equipped with electronic recording devices, the practice of the Los Angeles Superior Court was to provide litigants with an official reporter "on request." If neither party requested an official reporter, the court could electronically record the proceedings—and could do so without obtaining any explicit agreement of the parties. Official reporters were unavailable in demonstration courtrooms, as authorized by statute. Alleging that "the use of electronic recording in lieu of official court reporters violated numerous statutory provisions," the Los Angeles County Court Reporters Association (the LACRAA) brought suit (the LACRAA suit) against the Los Angeles Superior Court on February 2, 1993. LACRAA sought to enjoin the use of electronic recording to make a record of proceedings in non-demonstration courtrooms—even where the parties did not request an official reporter under section 269(a) of the California Code of Civil Procedure.

To avoid the appearance of a conflict of interest, the LACRAA suit was transferred to Kern County. Ultimately, superior court Judge Anspach agreed with the court reporters that section 269 "does not provide for the

104. See Los Angeles County Court Reporters Ass’n v. Superior Court, 37 Cal. Rptr. 2d 341, 343-44 (Ct. App. 1995).
105. See CAL. CIV. PROC. CODE § 270(b) (West Supp. 1999) ("In courtrooms operating under the [now-expired] demonstration project, audio or video recording may be used in lieu of the verbatim record prepared by a court reporter . . . ."); see also Blau, supra note 103, at 1 ("But court reporters are provided on request in courtrooms staffed with electronic recording equipment, except for the 35 in the pilot project.").
106. Los Angeles County Court Reporters Ass’n, 37 Cal. Rptr. 2d at 343.
107. See id. at 342.
108. See id. at 343.
109. See id.
use of electronic recording in lieu of a court reporter”110 and that, "[a]bsent legislative authority, only an official reporter can transcribe Superior Court proceedings."111 However, Judge Anspach also ruled that the statutes do not preclude the parties from expressly waiving “the required use of a court reporter”112 by "stipulat[ing] to the use of electronic recording."113 Adopting a compromise position that pleased neither the LACRAA nor the Los Angeles Superior Court, the court ordered the Los Angeles Superior Court to

cease and desist from using electronic recording as a means of recordation of judicial proceedings in the Superior Courts of Los Angeles County for proceedings in excess of the number of judicial departments for Los Angeles County authorized to use electronic recording . . . except where the parties and the court do not request a court reporter and the parties agree with the approval of the court to the use of electronic reporting.114

Both parties appealed.115 The LACRAA pressed for an absolute ban on electronic recording in superior court under any circumstances, even if the parties expressly stipulate to the use of electronic recording in a given proceeding.116 The Los Angeles Superior Court argued for eliminating Judge Anspach’s requirement of an express stipulation by the parties.117

During the pendency of the LACRAA appeal, the sun had already set on the demonstration project (on January 1, 1994).118 The Isenberg bill had been defeated almost two years earlier (on April 1, 1992) in committee.119 On November 30, 1993, one month before the expiration of the demonstration project, and while the LACRAA appeal was pending, the Judicial Council promulgated the Electronic Recording Rules120—which the First Appellate District subsequently held to be

110. Id.
111. Id.
112. Id. (emphasis added).
113. Id.
114. Id. (emphasis added).
115. See id. ("The court has appealed and the association has cross-appealed.").
116. See id. at 344.
117. See id.
118. See supra note 83.
120. See ELECTRONIC RECORDING RULES, supra note 3.
invalid in CCRA I.121 The Electronic Recording Rules, effective January 1, 1994, authorized all superior courts to use electronic recording to make the verbatim record under either of two circumstances: (1) when an official reporter is "unavailable,"122 or (2) when the parties proceed in the absence of an official reporter "without objection."123 The Council's rules would have permitted a superior court to electronically record proceedings over the objection of a party who requested a court reporter if the court found that an official reporter was unavailable.124 The Electronic Recording Rules, therefore, gave the superior courts greater discretion to use electronic recording than that discretion afforded under the Los Angeles Superior Court system (challenged in the LACRAA suit), which required the court to provide an official reporter to any party who requested one.

The California Court Reporters Association promptly brought suit against the Judicial Council in December, 1993, seeking to invalidate the Electronic Recording Rules as "inconsistent with statute"125 and, therefore, an unconstitutional exercise of the Judicial Council's rulemaking authority.126 The Fifth District Court of Appeal decided the LACRAA appeal in January of 1995, nine months before CCRA I invalidated the Judicial Council's Electronic Recording Rules. Reversing Judge Anspach, the court sustained the electronic recording

121. See CCRA I, 46 Cal. Rptr. 2d 44, 46 (Ct. App. 1995).
122. CAL. R. CT. 980.3 (1996) (repealed 1997) (emphasis added). Rule 980.3 defined "unavailable" as follows:

An official reporter or official reporter pro tempore is unavailable within the meaning of this rule, among other circumstances: (1) when the person regularly employed or under contract as such fails to appear because of illness or injury, the need to transcribe notes of cases on appeal, or other cause beyond the court's control; or (2) when the court determines that the funds available for reporting services are insufficient to employ a qualified person for the position at the prevailing wage or at the normal per diem rate of compensation; or (3) when the court determines that a reporter will be unavailable based on the court's existing staff of official court reporters, reasonable projections concerning official reporters' vacations, sick leaves, and other approved absences, and reasonable projections as to the workload in each of the court's departments.

124. See id.
125. The phrase "inconsistent with statute" comes from article VI, section 6 of the California Constitution. CAL. CONST. art. VI, § 6.
126. See CCRA I, 46 Cal. Rptr. 2d at 46-47. The California Court Reporters Association joined as additional defendants Patrick O'Connell, Alameda County Auditor-Controller, and Ron Overholt, Executive Officer/Clerk of the Alameda County Superior Court, but failed to join the court administrators of the other county superior courts around the state. See id. at 46 n.2.
practice of the Los Angeles Superior Court, stating:

We therefore arrive at a very narrow holding: the court is not prohibited, by any explicit or implicit legislative command contained in those specific statutes cited by the association, from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269.127

The LACRAA court expressly declined to decide "the purposes, if any, for which the generated electronic recording may be used, because this question is outside the scope of the discrete issue presented by the association's petition and evidence."128 The court was apparently referring to the admissibility of a tape recording of proceedings, or a transcript derived therefrom, as evidence in the appellate record offered "to prove what took place during the proceeding."129 The LACRAA court

127. Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 349-50 (Ct. App. 1995) (emphasis added). In this case, the court addressed the significance of several statutes. The court wrote, "The effect of section 270 was simply to override section 269 insofar as the demonstration courtrooms were concerned." Id. at 345. The court stated "[s]ection 273 does nothing more than create an evidentiary presumption [of accuracy for an official reporter's transcript]." Id. at 346. The court referred to section 274c as "the municipal and justice court analogue to section 269." Id. at 347. The court also said: "It appears to us that Government Code section 72194.5 is in the same class as former section 270, and merely authorizes ... an exception to the command in section 274c ...." Id. Finally, referring to sections 68086(a), 68086(b), 69941, 69942, 69952, and 69953 of the California Code of Government and to various sections of the California Code of Business and Professions beginning with section 8015, the court stated:

None of the other statutes cited by the association are of consequence. . . . These statutes are perfectly compatible with section 269. They all either relate to the office of official reporter for purposes of section 269 or apply when a request is made in a civil case for the services of an official reporter within the scope of section 269. If no such request is made, these statutes, like section 269, are inapplicable.

Id. at 347-48.

128. Id. at 350.

129. Id. at 344. The court wrote:

The decision by the parties not to insist upon the presence of an official reporter may have certain consequences if it later becomes necessary to prove what took place during the proceeding, such as when the unsuccessful party wishes to appeal or move for a new trial, but these are concerns which the parties should consider when deciding whether to take advantage of section 269.

Id. (footnotes omitted). In an unpublished 1998 opinion, the fourth appellate district, division three, whose jurisdiction includes Orange County, rejected an appellant's "paradoxical" argument that electronic recordings cannot be used in "the creation of official reporter's transcripts for the purposes of appeal," Gandall v. Grimes, No. 6017121, slip op. at 3 (Cal. App. Ct. Aug. 26, 1998). In Grimes, a certified transcript
also expressly declined to rule on the validity of the Judicial Council's Electronic Recording Rules.  

2. The View from the First Appellate District: CCRA I (October 1995) and CCRA II (December 1997)  

   a. CCRA I  

On October 17, 1995, nine months after the LACRAA decision, the First District Court of Appeal delivered its opinion in CCRA I. The CCRA court interpreted substantially the same statutes that were reviewed by the LACRAA court—the same statutes found by the LACRAA court not to prohibit, expressly or implicitly, the electronic recording practice of the Los Angeles superior court. The CCRA I court, however, interpreting these statutes broadly, determined that the Judicial Council's Electronic Recording Rules were "inconsistent with statute." The fact that the Legislature has by statute authorized electronic recording in some contexts suggests strongly that—unless the existing statutory scheme providing for the official record to be taken down in shorthand is amended—the Legislature does not intend that electronic recording of superior court proceedings be the method of creating an official record. Although the statutes do not expressly prohibit electronic recording of superior court proceedings, 

was prepared from tape by "a duly designated court transcriber." Id. at 5 (emphasis added); see infra notes 167-77 and accompanying text.

130. See Los Angeles County Court Reporters Ass'n, 37 Cal. Rptr. 2d at 350. After the filing of the parties' reply briefs, the CCRA filed an amicus curiae brief that made the following arguments not raised by the Los Angeles County Court Reporters Association:

1. [R]ule 980.3 is invalid because it is "inconsistent with the comprehensive statutory scheme that provides for the making of the superior court record;" (2) the court improperly expended public funds to install, maintain and operate the electronic recording devices in the various courtrooms . . . (4) the court improperly made it a practice to offer to sell copies of the electronic tapes to the parties involved in the civil proceedings for use in connection with motions for new trial and appeal.

Id. Noting the "limited case made by the [Los Angeles Court Reporters A]ssociation," the court declined the CCRA's "invitation" to the court "to address all these arguments in the interests of efficiency and finality, in order to resolve the entire controversy between the parties." Id.

131. 46 Cal. Rptr. 2d 44 (Ct. App. 1995).

132. See id. at 61-55. These statutes were sections 269(a), 270, 273, and 274c of the California Code of Civil Procedure and sections 68086(a) and (b), 69941, 69948, 69952(b), 70044.5-70064, and 72194.5 of the California Code of Government. See id.

133. See Los Angeles County Court Reporters Ass'n, 37 Cal. Rptr. 2d at 343-51. For example, the court wrote, "We fail to see in section 273 an expression, explicit or implicit, of a legislative intent to forbid all means of making a verbatim record of civil proceedings in superior courts except by the use of official shorthand reporters." Id. at 346.

134. CCRA I, 46 Cal. Rptr. 2d at 56.
they nevertheless lead to one conclusion—that the Legislature intended that such proceedings be stenographically recorded by official shorthand reporters.\footnote{Id. at 55 (emphasis added).}

In \textit{CCRA I}, the court's statutory analysis began with section 269(a) of the California Code of Civil Procedure,\footnote{See id. at 51.} which requires the official reporter to prepare a verbatim record "at the request of either party, or of the court,"\footnote{Id. (quoting \textsc{Cal. Civ. Proc. Code} § 269(a) (West Supp. 1994) (current version available at \textsc{Cal. Civ. Proc. Code} § 269(a) (West Supp. 1999))).} rather than with section 69941 of the California Government Code, which authorizes superior court judges to appoint official reporters.\footnote{See \textsc{Cal. Gov't Code} § 69941 (West 1997).} The court considered section 269 as the keystone of the "statutory scheme of making an official record"\footnote{\textit{CCRA I}, 46 Cal. Rptr. 2d at 51. The court did acknowledge that the \textit{LACRAA} court "held that section 269 does not require that the official reporter make the record of superior court proceedings, unless requested by a party or the judge." Id. at 52. However, the court did not squarely address the inconsistency between the \textit{LACRAA} court's narrow view of section 269 and the court's broad view that places the emphasis on the mandatory aspects of section 269. The \textit{CCRA I} opinion merely stated, "This conclusion is consistent with the opinion of the Legislative Counsel holding that section 269 requires that superior court proceedings be taken down by an official shorthand reporter if a request is made." Id.} and, therefore, began its statutory survey with this code section.\footnote{See id. at 51 ("Several statutes comprise the statutory scheme of making an official record. Subdivision (a) of section 269 sets out the basic provisions for requesting an official superior court record."). Based upon the original 1861 statute from which these two code sections derive, statutory analysis should begin with section 69941 of the California Code of Government. All other code sections relied upon by the court are applicable only if the superior court decides, in its discretion, to appoint an official reporter. This view is consistent with Judge Staniforth's trial court opinion that the first appellate district court reversed in \textit{CCRA I}. See id. at 47.} The pivot of the court's reasoning is the incorrect premise that statutory law lays down a general requirement that something called the "official record" be taken down exclusively by official reporters.\footnote{The court referred to an "existing statutory scheme providing for the official record to be taken down in shorthand," and to a legislative intent that "[superior court] proceedings be stenographically recorded by official shorthand reporters." Id. at 55. The flaw in the court's reasoning is that none of the statutes relied upon by the court to support its inference of a "statutory scheme providing for the official record to be taken down in shorthand" refers to an "official record." Rather, the statutes refer to an "official reporter." See, e.g., \textsc{Cal. Civ. Proc. Code} § 273 (West Supp. 1999) ("The report of the official reporter . . . of any court, . . . when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings."). There is no general statutory requirement that} According to the court, the fact
that the Legislature has enacted statutory exceptions to this general requirement—authorizing electronic recording in “certain” limited circumstances \(^{142}\)—indicates a legislative intent to preempt the Judicial Council and the courts from using electronic recording unless expressly authorized by the Legislature.\(^{143}\) The CCRA court discerned a “legislative pattern [that] suggests that while electronic recording is sometimes proper, the normal practice is that a shorthand reporter is to create the official record unless statutory law provides otherwise.”\(^ {144}\)

The CCRA I decision involved questionable reasoning in at least three respects. First, the court drew upon inapposite administrative agency case law that considers legislative rejection of an agency proposal identical to the challenged agency regulation as “persuasive” evidence that the regulation is not “consistent with controlling legislation.”\(^{145}\) Thus, the court concluded, “In our case, the Judicial Council’s attempt to obtain legislative amendment of the existing statutory scheme suggests that its present interpretation of that scheme as consistent with the rules it promulgated after rejection of the amendments is shaky, at best.”\(^{146}\) Second, the court determined that the Judicial Council’s unsuccessful legislative efforts to secure the enactment of express blanket authorization amounts to an implied admission by conduct “that legislative authorization is needed before electronic recording of superior court proceedings may be made.”\(^ {147}\) The court reached this

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142. CCRA I, 46 Cal. Rptr. 2d at 54.
143. See id. For an expanded critique of the court’s reasoning, see Koppel, Push-Comes-to-Shove, supra note 20, at 170-85.
144. CCRA I, 46 Cal. Rptr. 2d at 54 (emphasis added).
145. Id. at 56.
146. Id. (emphasis added). The court’s reasoning is flawed for two reasons. First, the Judicial Council is not an administrative agency created by the Legislature whose rules of court must be “consistent with controlling legislation.” The Council is a constitutionally-constituted administrative agency of the California judiciary vested with the power to promulgate rules of “court administration, practice and procedure, not inconsistent with statute.” CAL. CONST. art. VI, § 6 (emphasis added). Second, the challenged rules of court were more limited in scope than the rejected amendments mentioned by the court. CCRA I, 46 Cal. Rptr. 2d at 56. Whereas the authorization conferred on superior courts by the Council’s Electronic Recording Rules was limited to two circumstances (where neither party objected or where an official reporter was “unavailable”), the authorization contained in the Isenberg bill (A.B. 2937) was not so limited. See Koppel, Push-Comes-to-Shove, supra note 20, at 173.
147. CCRA I, 46 Cal. Rptr. 2d at 56. The court’s reasoning fails to consider that the Council and the Legislature exercise concurrent rulemaking power over court administration. In the absence of clear statutory indication that electronic recording of proceedings is forbidden in superior court, the Judicial Council has the power—concurrent with the Legislature—to promulgate rules that provide the courts with
dubious conclusion despite its concession that, "[a]s evidence of legislative intent, unadopted proposals have been held to have little value."[^148] Third, although the court acknowledged "the difficulties of determining the meaning of legislative rejection of proposed amendments to existing statute," it nevertheless relied upon such "legislative rejection" to reinforce its "interpretation of the existing statutory scheme."[^149]

b. CCRA II

Upon remand from CCRA I, Judge Garcia of the superior court in Alameda County enjoined the use of any public funds for any "nonstenographic method"[^150] of court recording.[^151] The Judicial Council appealed Judge Garcia's judgment, contending that the injunction exceeded the scope of CCRA I, which invalidated the Electronic Recording Rules but did not prohibit electronic recording under any circumstances.[^152] The court in CCRA II affirmed Judge Garcia's express authorization to use electronic recording. See Koppel, Push-Comes-to-Shove, supra note 20, at 142-45, 164-65. The existence of legal authority in the Council to act on its own does not mean that the Council should exercise that power unnecessarily. The delicate political relationship between the courts and the Legislature, upon which courts are dependent for funding, may counsel a diplomatic deference to the Legislature in the spirit of comity. See supra note 78.

[^148]: CCRA I, 46 Cal. Rptr. 2d at 55.
[^149]: Id. at 56 ("However, we cannot ignore the fact that the Legislature's rejection of the Judicial Council's proposed amendments is in accord with our interpretation of the existing statutory scheme."). To the extent that the court's reasoning relies on legislative rejection of electronic recording statutes, that reasoning is flawed because it ignores the legislative dysfunction that enables a single-minded interest group to use its inordinate lobbying power to trump the public interest. Public Choice scholarship challenges the myth that competition among interest groups in the Legislature produces public interest legislation. See Koppel, Push-Comes-to-Shove, supra note 20, at 138-40.

[^150]: CCRA II, 69 Cal. Rptr. 2d 529, 531 (Ct. App. 1997).
[^151]: See id. at 530-31.
[^152]: See id. at 531. In CCRA I, plaintiff CCRA accomplished service of process upon only three parties as defendants: the Judicial Council and two administrative officers. Upon remand (after the CCRA I decision in favor of CCRA) to Judge Garcia for entry of judgment, plaintiff CCRA moved to join as additional defendants the other county superior courts in order that these courts would be directly bound by Judge Garcia's judgment. See Notice of Motion to Vacate Judgment and for Leave to File Amended Petition, CCRA I (No. 728173-6). Although Judge Garcia denied the CCRA's motion, see Order Denying Petitioners' Motion to Amend, CCRA I (No. 728173-6), his ultimate judgment enjoined the Judicial Council "from authorizing and from causing the expenditure of public funds for the maintenance of or creation of a nonstenographic method and system for preparing the official verbatim record of superior court proceedings," thereby resolving the entire case as pled in the original petition.
sweeping injunction and broadly construed its own holding in CCRA I, stating, "The holding of CCRA I is a simple one: the Legislature has not authorized the creation of an official superior court record by electronic means under any circumstances."

The court then concluded with a sharply worded rebuke to the Judicial Council for arguing a narrow interpretation of the CCRA I holding, writing:

"Given this clear ruling, we are at a loss to determine why the Judicial Council continues to dispute the obvious implications of it—that it has no justification to permit electronic recording as a method of creating the official record of superior court proceedings, no authority to promulgate rules authorizing such recording and no power to spend taxpayers' funds to do that which has been held to be inconsistent with the Legislature's intent." 

3. The View from the Second Appellate District: People v. Turner (November 1998)

In People v. Turner, a criminal defendant argued on appeal that the preparation of a verbatim record of his superior court trial through electronic recording technology, rather than by a certified shorthand reporter, violated his rights under the Equal Protection Clause and the Due Process Clause of the United States Constitution, and under section 269(a) of the California Code of Civil Procedure. In this case, the second appellate district found "no error in the [trial court's] use of the electronic recording device." Addressing the appellant's statutory argument, the court saw "no need to independently analyze the correctness of the result reached in [CCRA I]" because the court found that Turner had expressly waived at trial whatever statutory right he had "to have the proceedings recorded and prepared by a certified shorthand

Judgment, CCRA I (No. 728173-6) (stating decision of Hon. David A. Garcia, Judge of the Alameda County Superior Court, dated Nov. 1, 1996). On appeal, the Judicial Council argued that this judgment—restraining the expenditure of public funds by superior courts to finance any use of electronic recording—exceeded the holding in CCRA I, which holding merely invalidated the challenged Electronic Recording Rules. See Opening Brief of Appellant at 13, CCRA II (No. 728173-6). In support, the Judicial Council pointed out that "the Court's Opinion [in CCRA I] expressed no disagreement with the holding of the Court of Appeal in the LACRAA case." Id.

153. CCRA II, 69 Cal. Rptr. 2d at 531.
154. Id.
155. 79 Cal. Rptr. 2d 740 (Ct. App. 1998).
156. See id. at 743.
158. Id.
160. Turner, 79 Cal. Rptr. 2d at 745.
161. Id. at 744.
The Turner decision is significant for two reasons. First, the court held that whatever right a party has to a certified shorthand reporter under CCRA I's interpretation of section 269(a) can be expressly waived by that party, thereby enabling the superior court to legally record the proceedings electronically. Because appellant Turner had expressly waived his statutory rights under section 269, there was no need for the court to consider the question, addressed in the LACRAA decision, whether a party's failure to request an official reporter would similarly permit a superior court to make an electronic record. Second, the Turner decision is important for the words it chose to describe the CCRA I opinion, clearly calling into question the "correctness of the result" in CCRA I. The court wrote:

In reaching this decision [in CCRA I], the court and the California Court Reporters Association each conceded "that there is no statute expressly prohibiting a superior court from making an official record by electronic means, rather than by using certified shorthand reporters or expressly mandating that the official superior court record be made by shorthand reporters." [The] result [in CCRA I] was based on a statutory interpretation by the court that the Legislature "implicitly" intended that the record be made by certified shorthand reporters rather than by electronic recording.

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162. Id.
163. See id. The Turner opinion, issued November 20, 1998, does not indicate the date of the superior court proceeding that appellant claimed was electronically recorded in violation of his constitutional and statutory rights. For purpose of context, recall the chronology: CCRA I was decided on October 1995, Judge Garcia issued his injunction in November 1996, the Judicial Council repealed the Electronic Recording Rules and issued its directive prohibiting the expenditure of state funds to operate and maintain electronic recording equipment to make the official superior court record in January 1997, and CCRA II affirmed Judge Garcia's injunction on December 3, 1997. See supra Part II.C.1-2.
164. The Turner court noted that a criminal defendant appearing in propria persona must be apprised of his right, under In re Armstrong, 178 Cal. Rptr. 902 (Ct. App. 1981), to a verbatim record—but not necessarily to a verbatim record prepared by shorthand. See Turner, 79 Cal. Rptr. 2d at 743 ("We conclude that appellant has failed to demonstrate a violation of constitutional proportions merely because an electronic recording device was employed instead of a certified shorthand reporter."). The court pointed out, however, that "a verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised." Id. at 745.
165. Id. at 744.
166. Id. (citations omitted).

In Gandall v. Grimes, an unpublished opinion decided eight months after CCRA II, the Fourth District Court of Appeal upheld the use of electronic recording to make a verbatim record in a civil case in Orange County Superior Court, relying squarely on the fifth appellate district's LACRAA decision. Gandall was the plaintiff in a malpractice action. After losing at trial, Gandall argued "paradoxical[ly]" on appeal essentially that he could not appeal—this because "the keeping of the trial record via electronic recording deny[d] him his right to appeal." Gandall claimed that he had agreed to the electronic recording of the trial proceedings in reasonable reliance on the Judicial Council's Electronic Recording Rules without knowing that the Rules had been invalidated in CCRA I. The Fourth District Court of Appeal both affirmed the lower court ruling and "reject[ed] [the] plaintiff's efforts to torpedo his own appeal." The court also stated that, notwithstanding CCRA I, the electronic recording was "permissible" under the fifth appellate district's LACRAA decision, since "[n]either the litigants nor the court here requested shorthand reporting under Code of Civil Procedure section 269 or otherwise." The court further held that "nothing in the rules of appellate practice, as best we can discern, precludes the use of electronic recordings in the production of reporter's transcripts for purposes of appeal."

The Gandall decision represents a rather bold statement about electronic recording. Note that the CCRA I opinion was rendered after Gandall's trial but before his appeal. Therefore, the Fourth District

168. In California, not all appellate opinions are published. A court of appeal may decide not to certify an opinion for publication because it fails to meet the requirements for publication set forth in Rule 976 of the California Rules of Court. An unpublished opinion may "not be cited or relied on by a court or a party in any other action" except as otherwise provided in Rule 977(b). CAL. R. CT. 977(a). Opinions that a court of appeal certifies for publication may be depublished by order of the California Supreme Court pursuant to Rule 976(c) and 979. CAL. R. CT. 976(c), 979. For a critical analysis of the Supreme Court's depublication practice, see generally Stephen R. Barnett, Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court, 26 LOY. L.A. L. REV. 1033 (1993).
169. Gandall, slip op. at 3.
170. Id. at 2.
171. See id. "[Gandall's attorney] [did] not question the accuracy or veracity of the reporter's transcripts" that were derived from the videotape. Id. at 5.
172. Id.
173. Id. at 4.
174. Id. at 5.
175. See id. at 3.
Court of Appeal could have affirmed the trial court’s use of electronic recording on a narrow basis that avoided any reliance on LACRAA. The trial court had electronically recorded Gandall’s trial proceedings pursuant to the authority granted superior courts by the Judicial Council’s Electronic Recording Rules which had not yet been invalidated by the CCRA I decision. The court of appeal could have simply refused to apply CCRA I retroactively. Instead, the fourth appellate district court chose to make a statement—albeit an unpublished one—about the legality of using electronic recording in superior court in the aftermath of CCRA I and II and the repeal of the Electronic Recording Rules. Indeed, the court characterized CCRA I as a “dubious” decision and narrowly confined its holding, writing:

The precise holding in the dubious [CCRA I] decision is simply that the Judicial Council lacked authority to promulgate rules concerning electronic reporting once Code of Civil Procedure section 270 (which mandated the temporary experimental use of electronic recording [under the “demonstration project”] in certain superior courts) expired on January 1, 1994. 177

D. The Coincidence of the CCRA II Decision and the Advent of State Funding of California Trial Courts Finally Silences Electronic Recording in the Los Angeles County Superior Courts

By the end of 1997, all sound recording of proceedings in Los Angeles County Superior Court ceased, except in one courtroom.178 That Los Angeles County—of all counties in California—has effectively “thrown in the towel” on electronic recording is ironic. The 1995 LACRAA decision, based on the same statutes reviewed by the CCRA court, expressly held that the Los Angeles County Superior Court practice of

176. Id. at 4.
177. Id. In an unpublished 1997 decision, rendered after the Judicial Council issued its January 1997 directive but before the first appellate district decided CCRA II, the Fourth District Court of Appeal rejected an attack—based on CCRA I—on the use of electronic recording in Orange County Superior Court. See Garrett v. Superior Court, No. G021612 (Cal. Ct. App. filed May 22, 1997). In Garrett, the Court denied, without opinion, a petition for a writ of mandate to compel an Orange County Superior Court judge, during a videotaped trial, “to perform [her] duty to maintain a proper record by a court reporter,” rather than by videotape. Petition for Writ of Mandate to Compel Enforcement During Trial of the Legal Duty to Maintain a Proper Record by a Court Reporter, or Other Appropriate Writ; Memorandum of Points and Authorities in Support Thereof at 3, Garrett (No. G021612).
178. See Jacobs, supra note 12, at B1.
using electronic recording to make a record of general proceedings, where neither party nor the court requested a certified shorthand reporter, is not prohibited by statute. Electronic recording of superior court proceedings in Los Angeles County survived the sunset of the demonstration project in January 1994, survived the 1995 CCRA I decision, survived Judge Garcia’s November 1996 injunction, survived the 1997 CCRA II decision, and even survived the Judicial Council's January 1997 directive ordering superior courts to cease spending state funds to support electronic recording to make the "official" record. As discussed below, the straw that finally broke the back of electronic recording in Los Angeles County Superior Court was the enactment of the landmark Lockyer-Isenberg Trial Court Funding Act of 1997.

Eight months after the Judicial Council directed the superior courts to cease spending state funds to maintain and operate electronic recording devices, the Legislature enacted Assembly Bill 233 (the Lockyer-Isenberg Trial Court Funding Act of 1997). The Act effectively shifted responsibility for the funding of court operations from the counties to the state effective July 1, 1997. Prior to this change, the costs of court...

179. As late as July 1996, the Los Angeles County Board of Supervisors “approved four three-year contracts awarded by the Los Angeles Superior Court to firms that currently provide electronic recording services in lieu of traditional shorthand court reporters.” Greene, supra note 11, at 5. Greene explains, “The board voted unanimously to approve the contracts for as-needed services over the objections of Los Angeles Superior Court Reporters Association representatives, who asserted that the action puts the county’s ‘imprimatur’ on illegal expenditures of public funds.” Id.

180. Ch. 850, 1997 Cal. Legis. Serv. 4737 (West) (A.B. 233); see Rebecca Liss, Court Workers Face Layoffs by New Year’s, L.A. DAILY J., Nov. 21, 1997, at 1 (“The recent landmark reform in the state's trial court funding system may result in the elimination of electronic recording of proceedings in Los Angeles Superior Courts come January 1, and the layoff of approximately 80 monitors who operate the equipment.”). The Judicial Council urged the Legislature to enact state funding to promote judicial self-governance. See Ronald M. George, Message from the Chief Justice (visited Apr. 15, 1998) <http://www.courtinfo.ca.gov/courtnews/10961196/message.htm>. The Chief Justice wrote:

Since I became Chief Justice five months ago, I have focused on many critical issues. . . . My top priority, however, has been the establishment of a stable and adequate funding source for the California trial courts that will permit our justice system to effectively serve the people of this state.

. . . . [T]he Judicial Council is taking every possible step to turn state trial court funding into a reality this year. . . .

Id.; see also Ronald M. George, Message from the Chief Justice: Courts Are Leading the Move to Restore Public Confidence in the Judicial System, CT NEWS—JUD. COUNCIL OF CAL., Feb.-Mar. 1997, at 2 (“Funding and self-governance: As we enter the 21st century, the most crucial issue looming before the judiciary is stable funding for the trial courts, which is inexorably linked to the courts’ ability to be independent and self-governing.”). An unintended consequence of state funding was to undermine judicial self-governance to the extent that state funding deprived courts of the ability to control their own record.

181. See Lockyer-Isenberg Trial Court Funding Act of 1997, ch. 850, sec. 46, art. 3,
operations were shared between the state and the counties. In essence, Assembly Bill 233 "relieves counties of any direct responsibility to fund trial court operations costs."

The mechanism of the Act is somewhat elaborate. First, each county is required to remit to the state a set amount of money which is "based on an amount expended by the respective county for court operations during the 1994-95 fiscal year." The funds so remitted by the counties to the state are deposited in the State Trial Court Trust Fund. After the Legislature makes its annual appropriation to the Judicial Council, "based on the recommendations of the Trial Court Budget Commission, as approved by the Judicial Council," the Judicial Council allocates appropriated funds among the respective counties. Each county then deposits the state funds into a special Trial Court Operations Fund, within the county treasury, "which ... operate[s] as a special revenue fund." Ultimately, these state-allocated funds cover the costs of local court operations.

In the aftermath of the funding legislation, the County of Los Angeles reassessed the practice of electronic court reporting. The County, facing various limitations imposed by the new funding system, expressed concern over the high cost of salaried persons called "monitors" used in the sound recording process. At some point, the Los Angeles County

§ 77200, 1997 Cal. Legis. Serv. at 4754 ("Article 3 ... is added ... to read ... § 77200. On and after July 1, 1997, the state shall assume sole responsibility for the funding of court operations ... ").

182. See ch. 850, sec. 27, § 68073, 1997 Cal. Legis. Serv. at 4745. This document reads:
   Section 68073 of the Government Code is amended to read:
   ... Commencing July 1, 1997, and each year thereafter, no county or city
   and county shall be responsible to provide funding for 'court operations' as
   defined in Section 77003 and Rule 810 of the California Rules of Court as it
   read on July 1, 1996.

Id.

183. ADMINISTRATIVE OFFICE OF THE COURTS, ASSEMBLY BILL 233 COMMENTARY
48 (1997).

184. Id. at 49.
185. Ch. 850, sec. 46, art. 3, § 77201, 1997 Cal. Legis. Serv. at 4754.
186. Ch. 850, sec. 46, art. 3, § 77202, 1997 Cal. Legis. Serv. at 4761.
187. See ch. 850, sec. 46, art. 3, § 77207, 1997 Cal. Legis. Serv. at 4763 ("The Legislature shall appropriate trial court funding. The Controller shall apportion trial court funding payments to the courts pursuant to an allocation schedule adopted by the Judicial Council in four quarterly installments.").
188. Ch. 850, sec. 44, § 77009, 1997 Cal. Legis. Serv. at 4753.
189. See Liss, supra note 180, at 1 ("If we don't find a way to pay for the electronic recording monitors with money other than that from the state, we will have to
Board of Supervisors apparently became unwilling to appropriate the two million dollars in excess of the county’s required contribution to the State Trial Court Trust Fund to continue the practice of electronic recording in superior court. Los Angeles County superior court administrators also believed that Judge Garcia’s injunction and the Judicial Council directive forbade them from spending state funds to finance electronic recording and, after July 1, 1997, state monies became the only available source of funding for the courts in Los Angeles County. For these reasons, in 1998 the Los Angeles County Superior Court hired fifty additional court reporters to replace electronic recording equipment.

Interestingly, Orange County took a different path, choosing to continue to utilize electronic court reporting. Why is the situation different in Orange County? The answer is that video, rather than sound, recording equipment was installed in Orange County superior courts in the waning years of the demonstration project. Video recording equipment is cheaper to operate than sound recording equipment because it does not require the use of salaried court monitors—this because speakers in court are visually self-identified without the need of a monitor to keep a log. As long as the video recording equipment does not break down, its operation is affordable enough to be supported by county funds and user fees.

190. See id. at 1. Liss reported:

In order to continue using the electronic recording systems for the remainder of the fiscal year, the court needs to come up with $2 million in funds not supplied by the state, according to Los Angeles Superior Court Presiding Judge Robert W. Parkin. Parkin said . . . that unless the money is found in the next six weeks, 35 county workers and an additional 45 contract workers will lose their jobs by New Year’s Day.

. . . The [electronic recording] system costs approximately $4 million per fiscal year to operate in 80 courtrooms.

191. See Telephone Interview with Juanita Blankenship, Administrator, Litigation Support Services, Los Angeles Superior Court (Jan. 5, 1999).

192. See Ruling Barring Electronic Court Reporting Will Cost Superior Court $5.5 Million Annually, METROPOLITAN NEWS-ENTERPRISE; CAPITOL NEWS SERVICE, Jan. 16, 1998, at 1.

193. See Miller, supra note 26, at 1 (“The California Judicial Council, in a 1992 report to the Legislature on several pilot projects, estimated that each video-recorded courtroom could save about $41,000 per year, and each audio-recorded courtroom—which requires an employee to monitor the equipment—could save about $28,000 annually.”).

194. See Memorandum from Alan Slater, Executive Officer, Clerk of the Orange County Superior Court, to Hon. Kathleen E. O’Leary, Presiding Judge et al. (Jan. 7, 1998) (on file with author). Slater wrote:
On September 27, 1999, Orange County Superior Court terminated the use of electronic recording equipment to make the official verbatim record in general jurisdiction proceedings, but not because it believed electronic recording of superior court proceedings is illegal. In August 1999, the Judicial Council made the court an offer it could not refuse in the form of a $1,132,176 subsidy to re-hire sixteen court reporters to replace electronic recording equipment that has been functioning well in thirteen Orange County courtrooms for almost a decade. The Judicial Council has in fact, based on the opinion in CCRA I, expressly forbidden the use of State funds to support “electronic recording” (ER). In response to this directive this court has relied on county funds to support our ER program. Despite the shift from primary county funding to primary state funding which has now occurred with the passage of AB233, it is my opinion that sufficient funding from local revenue sources will be available to allow this court to maintain current video recording systems. Other trial courts which have employed audio electronic recording monitors (ERMs) to manage their audio electronic systems find themselves in the unfortunate position of having no authorized funds with which to pay the salaries, employee benefits or contract fees of those individuals serving as ERMs, unless a county Board of Supervisors voluntarily opts to continue county funding. Similarly, no authorized funding is available to replace the audio systems with the more cost effective video recording systems. Ironically, funding for the additional use of CSRs to replace ER Systems is not available in the current State allocation for the balance of [fiscal year] 1997/98, nor is it included in the budgets tentatively approved by the Judicial Council and submitted to the Governor for funding in [fiscal year] 1998/99.

Therefore, the current situation regarding the use of our JA VS Video Court Documentation Systems seems quite different than that which other courts might be facing. Since the systems were all previously purchased and we do not employ or need ERMs to operate our video recording systems, I believe we will be able to sustain our video recording systems in their current configuration without using state funds. However, in the future, we may not be able to replace a system if it should fail or need the replacement of critical components.

Id. at 2-3.

195. See Proposed Trial Court Funding Allocations for Fiscal Year 1999-2000 (unpublished table) (on file with author); see also Letter from Marlene Nelson, Executive Director, Fiscal Services, Orange County Superior Court, to author (July 28, 1999) (on file with author).

196. See Proposed Trial Court Funding Allocations for Fiscal Year 1999-2000, supra note 195.
Superior Court was the formal request to the court by California’s Administrative Director of the Courts to “cease its use of any electronic recording for purposes of creating the official verbatim record, except in limited civil cases, misdemeanors, and infractions.”197 The price-tag to California taxpayers for rehiring court reporters to sit in courtrooms wired to electronically record proceedings was $8,009,935.198 The cost in terms of judicial independence is incalculable.

III. THE CURRENT LEGAL STATUS OF ELECTRONIC RECORDING IN CALIFORNIA SUPERIOR COURT

Detailed analysis of the statutes and decisions leads to the conclusion that CCRA I is wrongly decided and should be either disavowed by other courts of appeal or, alternatively, narrowly construed to avoid conflict with LACRAA. This section develops these points in three subsections. First, Part III.A describes the conflict between the holding of CCRA I, as broadly construed in CCRA II, and the LACRAA decision.

Next, Part III.B summarizes an earlier critique of the CCRA

197. Letter from William C. Vickrey to Kathleen E. O’Leary, supra note 16, at 2; see Memorandum from Kathleen E. O’Leary to Judges Bauer et al., supra note 14, at 1-2. Referring to the Judicial Council’s formal request that Orange County Superior Court terminate electronic recording to make the official record in general jurisdiction proceedings, Judge O’Leary states, in part:

This most recent communication [from William C. Vickrey, Administrative Director of the Courts] clearly indicates for the first time that in the opinion of the Executive and Planning Committee, speaking for the Judicial Council pursuant to CCRC, rule 6.11(d), that our current practices with respect to the funding of electronic recording through locally generated revenue is “inconsistent with the judgment” against the Judicial Council in CCRA II. . . .

While reasonable minds can differ as to the propriety of the use of electronic recording and some may believe that the request from the Judicial Council does not constitute a mandate upon the court or any individual judge, I believe that we should comply with the Judicial Council’s request that we cease our use of any electronic recording for purposes of creating the official record, except in limited civil cases, misdemeanors and infractions. . . .

Regardless of the opinion of individual judicial officers as to the propriety of the use of electronic recording, I think all of the judicial officers of this court would agree that the use and funding of electronic recording has long been a source of controversy in our court. I think efforts to prolong the argument and to allow the controversy in our court to continue is not in anyone’s best interest.

Id.

198. See supra note 195. Judge O’Leary acknowledged that many Orange County judges question the wisdom of spending over a million dollars to re-convert Orange County courtrooms to court reporters but noted that “[t]he question as to whether these funds could be put to better use is not ours to answer.” Memorandum from Kathleen E. O’Leary to Judges Bauer et al., supra note 14, at 1.
decisions\(^{199}\) and demonstrates that the superior courts do not require express statutory authorization to use electronic recording to make a verbatim record. Part III.B discusses and endorses the analysis of Judge Staniforth, whose judgment upholding the validity of the Judicial Council’s Electronic Recording Rules was reversed in *CCRA I*. Under this analysis, which uses section 69941 of the California Government Code as its starting point, superior courts are not required to appoint any official reporters. Section 69941 merely *authorizes* superior courts to appoint official reporters. Therefore, superior courts may choose to utilize electronic means to record proceedings whenever an official reporter is “unavailable” or when neither party requests an official reporter. Under this line of reasoning, a superior court retains the option to electronically record proceedings in lieu of an official reporter, even where a party requests an official reporter, as long as the court finds that an official reporter is “unavailable.”\(^{200}\)

Finally, Part III.C provides an alternative approach that reconciles *CCRA I* and LACRAA by narrowly construing the holding of *CCRA I*. This analysis adopts LACRAA’s statutory interpretation of the court reporting statutes, which is a bit broader than Judge Staniforth’s but still much narrower than *CCRA I*’s interpretation. LACRAA’s statutory interpretation, like *CCRA I*’s,\(^{201}\) begins with section 269(a) of the California Code of Civil Procedure but, unlike *CCRA I*, LACRAA interprets section 269(a) literally to “require[] . . . that the official reporter ‘take down’ civil proceedings only if requested by either party or the judge; the official reporter need not ‘take down’ a record when no request is made.”\(^{202}\) Under LACRAA’s statutory analysis, the superior court’s discretion is more limited than under Judge Staniforth’s analysis. LACRAA interprets section 269(a) to oblige the superior court to provide an official reporter when requested by a party. Under LACRAA’s analysis, a superior court cannot use electronic recording to make the record in lieu of an official reporter where one is requested. Nothing in LACRAA, however, prohibits a superior court from using electronic recording in addition to a requested official reporter.

\(^{199}\) For an expanded critique of the *CCRA* decisions, see Koppel, *Push-Comes-to-Shove*, *supra* note 20, at 140-86.

\(^{200}\) Repealed Rule 980.3 defined “unavailability” broadly. *See supra* note 122.

\(^{201}\) *See supra* note 139 and accompanying text.

\(^{202}\) Los Angeles County Court Reporters Ass’n v. Superior Court, 37 Cal. Rptr. 2d 341, 344 (Ct. App. 1995) (emphasis added).
A. The Conflict Between CCRA I, as Construed by CCRA II, and LACRAA

In CCRA II, the first appellate district broadly construed its own holding in CCRA I that places CCRA I in direct conflict with the holding of the fifth appellate district in LACRAA. As construed in CCRA II, CCRA I holds that the use of electronic recording under any circumstances to make the official verbatim record of superior court proceedings is inconsistent with statute. Under LACRAA’s holding, it is not inconsistent with statute for a superior court to make an electronic recording of general proceedings where neither party, nor the court, requests the services of an official reporter.

Both CCRA I and LACRAA are based upon a review of the same statutes. Although the CCRA I court conceded that “there is no statute [that] expressly prohibit[s] a superior court from making an official record by electronic means,” the court proceeded to find a “statutory scheme [which] addresses the making of the official record in such a manner as to suggest that the Legislature implicitly intended that this record be made by certified shorthand reporters rather than by electronic recording.” Such an implied statutory scheme that broadly preempts judicial power over the court record is not articulated in legislative history, and is contrary to the permissive statutory structure established by the original 1861 court reporting statute that makes available to courts and litigants technological options for making the court record.

The implied statutory scheme invented by the CCRA I court squarely conflicts with LACRAA’s narrow, literal, interpretation of the same court reporting statutes. LACRAA holds that there is no explicit or implicit legislative command contained in those specific statutes ... [that prohibits superior courts] from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269.

203. See CCRA II, 69 Cal. Rptr. 2d 529, 531 (Ct. App. 1997).
204. See Los Angeles County Court Reporters Ass’n, 37 Cal. Rptr. at 349-50.
205. See supra notes 132-33 and accompanying text.
207. See supra notes 50-58 and accompanying text.
208. Los Angeles County Court Reporters Ass’n, 37 Cal. Rptr. 2d at 349-50 (emphasis added). For a summary of the LACRAA court’s literal analysis of the same statutes relied upon by the CCRA court, see supra note 127.
B. CCRA I Was Wrongly Decided and Should Not Be Followed in Other Districts

CCRA I erroneously implied a statutory scheme that "suggests" a fictional legislative intent (1) to prevent local superior courts from exercising their inherent power to determine whether and how to prepare a verbatim record of proceedings, and (2) to preempt the Judicial Council's exercise of its constitutional authority to promulgate rules of court that provide a uniform statewide policy regulating the use of electronic recording to make a superior court record.59

Superior courts require no express statutory authorization to use electronic recording to make a verbatim record. No statute expressly prohibits a superior court from using electronic recording technology to make a verbatim record, nor does any statute require the superior court to make an "official record."210 The phrase "official verbatim record" was introduced into California's legal lexicon by California Rule of Court 980.3,211 which rule CCRA I held to be invalid.212 In addition to authorizing electronic recording in superior court, Rule 980.3 imposed on superior courts "an obligation to maintain an adequate record of oral

209. See CCRA I, 46 Cal. Rptr. 2d at 55. The court wrote,

The fact that the Legislature has by statute authorized electronic recording in some contexts suggests strongly that—unless the existing statutory scheme providing for the official record to be taken down in shorthand is amended—the Legislature does not intend that electronic recording of superior court proceedings be the method of creating an official record.

Id.

210. Statutory law does not refer to a verbatim record of proceedings prepared by an official reporter as "the official record." See, e.g., CAL. CIV. PROC. CODE § 269 (West Supp. 1999) ("The official reporter . . . shall . . . take down in shorthand all testimony . . ."); CAL. CIV. PROC. CODE § 273(a) (West Supp. 1999) ("The report of the official reporter . . . is prima facie evidence of [the] testimony and proceedings."); CAL. GOV'T CODE 69952(a) (West Supp. 1999) ("The court may specifically direct the making of a verbatim record . . ."); CAL. GOV'T CODE § 69955(a) (West 1997) ("Reporting notes are official records of the court."). A 1997 amendment to section 273 of the California Code of Civil Procedure, which amendment makes an official reporter's certified transcript "prima facie evidence" of the testimony and proceedings in the case, introduced the phrase "official certified transcript." Act of Aug. 2, 1997, ch. 183, sec. 1, §§ 273(a), (b), 1997 Cal. Legis. Serv. 640, 641 (West) (A.B. 1372). This amendment provides that a rough draft of the official reporter's transcript "shall not be certified and cannot be used . . . as the official certified transcript of the proceedings." Id. (emphasis added). Therefore, it appears that "official certified transcript" means that transcript which is accorded prima facie evidence status under section 273 of the California Code of Civil Procedure.


212. See CCRA I, 46 Cal. Rptr. 2d. at 56.
proceedings [the 'official verbatim record of oral proceedings'] to permit
reference and, when necessary, appellate review.\textsuperscript{213} When the Judicial
Council repealed Rule 980.3, pursuant to Judge Garcia's injunction, the
rule's requirement that a superior court maintain an official verbatim
record died with it.

CCRA I used section 269(a) of the California Code of Civil Procedure
as the keystone of its statutory analysis to suggest greater legislative
intrusion into the field of court recording than is warranted by a literal
reading of the applicable statutes. CCRA I's analysis emphasized the
concept of an "official record"—nowhere required by statute—which
must be made by an official reporter, unless otherwise expressly
provided by statute.\textsuperscript{214} To reinforce this broad statutory scheme, the
CCRA court cited other statutes that regulate aspects of the office of
official reporter, such as fees and salary, and that make the official
reporter's certified transcript \textit{prima facie} evidence (but not \textit{the only}
evidence) of the trial proceedings.\textsuperscript{215} The court interpreted the two
instances of express, but limited, statutory authorization of electronic
recording\textsuperscript{216} as evidence of a legislative intent that any further extension
of electronic recording be expressly authorized by statute.\textsuperscript{217}

The logical starting point for an analysis of the statutory structure
pertaining to court reporting is section 69941 of the California
Government Code. This code section \textit{authorizes—but does not
require}—superior courts to appoint \textit{official reporters} and provides

\begin{itemize}
\item \textsuperscript{213} CAL. R. CT. 980.3(a) (1996) (repealed 1997), \textit{quoted in CCRA I}, 46 Cal. Rptr. 2d at 48 n.12.
\item \textsuperscript{214} See \textit{supra} note 209.
\item \textsuperscript{215} See \textit{supra} note 132.
\item \textsuperscript{216} These two instances are section 270 of the California Code of Civil Procedure
and section 72194.5 of the California Code of Government. Section 270, which expired
on January 1, 1994, authorized the Judicial Council to "establish a demonstration project
to assess the costs, benefits, and acceptability of utilizing audio and video recording
as a means of producing a verbatim record of proceedings in up to 75 superior court
departments" and provided that, in demonstration courtrooms, "audio or video recording
may be used in lieu of the verbatim record prepared by a court reporter except in any
criminal or juvenile proceedings." CAL. CIV. PROC. CODE §§ 270(a), (b) (West Supp.
1999). Section 72194.5, enacted in 1975 to address a critical shortage of court reporters
in municipal court, authorized the municipal courts to use electronic recording
"\textit{whenver an official court reporter or a temporary court reporter is unavailable to
report an action or proceeding.}" CAL. GOV'T CODE § 72194.5 (West Supp. 1999). See
generally notes 65–72, 81–85 and accompanying text.
\item \textsuperscript{217} See \textit{CCRA I}, 46 Cal. Rptr. 2d at 54. The court stated:
  \textit{Whenver the Legislature has intended that electronic recording be
permitted, it has expressed that intent by specific statutory authorization. This
legislative pattern suggests that while electronic recording is sometimes
proper, the normal practice is that a shorthand reporter is to create the official
record unless statutory law provides otherwise.}
\end{itemize}

Id. (citation omitted).
judges and litigants the option to employ the official reporter's services. The applicability of the remaining statutes cited in CCRA I, including section 269(a) (which prescribes the duty of an official reporter to take down proceedings in shorthand upon request of a party or the court), depends upon the court's appointment of an official reporter under section 69941 and upon a party's or the judge's request that an official reporter make a verbatim record.

The two limited instances in which the Legislature has expressly authorized electronic recording are not exceptions that prove the existence of an all-encompassing statutory scheme that requires certified court reporters to make the "official" record. There is no such all-

218. See CAL. GOV'T CODE § 69941 (West 1997); CAL. CIV. PROC. CODE § 269(a) (West Supp. 1999). This approach is consistent with the analysis of Judge Robert O. Staniforth, whose trial court judgment sustained the validity of the Judicial Council's Electronic Recording Rules. Judge Staniforth's judgment was reversed by the First District Court of Appeal in CCRA I. See CCRA I, 46 Cal. Rptr. 2d at 56.


220. Judge Staniforth explained:

The appointment and selection of official reporters is by specific language of the statute a permissive, a discretionary function of the superior court judge. Thus, [section] 69941 should not be read to require the appointment of official reporters as the sole means for making official verbatim reporters [sic] of oral proceedings in the superior court. Had the Legislature intended mandatory appointment, it could have easily done so.

221. LACRAA interpreted section 270 of the California Code of Civil Procedure and section 72194.5 of the California Code of Government as exceptions to the limited statutory requirement in sections 269(a) and 274(c) of the California Code of Civil Procedure, respectively, that "a verbatim record be taken by an official reporter... where the judge or a party requested such a record." Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 345-47 (Ct. App. 1995). LACRAA's literal interpretation of section 270 of the California Code of Civil Procedure is supported by an Informal Opinion of the California Attorney General's Office. This document states:

Nothing in section 270 indicates that the Legislature intended to limit the authority of the courts or departments not engaged in the demonstration project to provide for a record of its proceedings which may be authorized by other provisions of law....
encompassing statutory scheme. Furthermore, the Legislature’s failure to expressly authorize by statute electronic recording in superior court does not, a fortiori, support an inference that the Legislature intends to prevent such practice or intends to preempt the Judicial Council in this area.

**C. Alternatively, CCRA I Should Be Narrowly Confined to Its Facts to Provide Breathing Room for LACRAA**

An alternative to directly disavowing **CCRA I** is to disavow **CCRA II**'s broad construction of the holding in **CCRA I** that conflicts with **LACRAA**. This alternative would allow a court of appeal to align itself with the holding in **LACRAA** that statutory law does not prohibit a superior court from “choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by an official shorthand reporter pursuant to the provisions of section 269.”

Recall that **CCRA II** broadly interpreted **CCRA I**'s holding to prohibit “the creation of an official superior court record by electronic means under any circumstances.” Clearly this broad holding conflicts with **LACRAA**'s holding that the use of electronic recording to make a verbatim record in superior court is permissible when neither the judge nor a party requests an official reporter.

We conclude that there is no requirement for the attendance of a court reporter in any superior court proceeding except a criminal proceeding and a juvenile court proceeding before a juvenile court judge in the absence of a request by a party or an order of the court. Letter from Jack R. Winkler, Assistant Attorney General, Chief of Opinion Unit, Office of John K. Van De Kamp, Attorney General, to Frank S. Zolin, County Clerk - Executive Officer, The Superior Court for Los Angeles County 2-3 (Jan. 4, 1989). The letter was in response to “a request for an Attorney General’s opinion on behalf of the judges of the Personnel and Budget Committee of the Los Angeles County Superior Court.” Id. at 1. 222. *Los Angeles County Court Reporters Ass’n, 37 Cal. Rptr. 2d at 349-50* (emphasis added).


224. Although **CCRA I** acknowledged the **LACRAA** opinion several times, **CCRA I** did not seriously attempt to reconcile the two decisions. Consider, for example, the following language from **CCRA I** referring to the **LACRAA** decision:

One court has held that section 269 does not require that the official reporter make the record of superior court proceedings, unless requested by a party or the judge. This conclusion is consistent with the opinion of the Legislative Counsel holding that section 269 *requires* that superior court proceedings be taken down by an official shorthand reporter if a request is made.

**CCRA I**, 46 Cal. Rptr. 2d 44, 52 (Ct. App. 1995) (citation omitted). Also referring to the **LACRAA** decision, the court wrote:

We are aware that the [fifth] [d]istrict recently considered the propriety of the Los Angeles Superior Court’s practice of using electronic recording
There is a very reasonable and defensible interpretation of CCRA I that is more narrow than that adopted in CCRA II. This more narrow construction is simply that the Judicial Council’s Electronic Recording Rules were inconsistent with statute and, therefore, an invalid exercise of the Judicial Council’s rulemaking power under article VI, section 6 of the California Constitution. The Electronic Recording Rules might be said to have exceeded the superior court’s statutory authorization (as held in LACRAA) on at least two grounds. First, the Electronic Recording Rules arguably exceeded statutory authority by purportedly authorizing electronic recording as a means of making the “official verbatim record of oral proceedings.”

CCRA I and II consistently use the term “official” record to distinguish its holding from IACRAA’s. The term “official” record also circumscribes the scope of both Judge Garcia’s injunction and the Judicial Council’s directive. The Los Angeles County Bar Association … [is] HEREBY ENJOINED and RESTRAINED from authorizing and from causing
Angeles Superior Court’s practice upheld in LACRAA did not employ the term “official” record, and LACRAA’s holding refers to a “record of general civil proceedings” rather than “official record.”

Second, the Electronic Recording Rules arguably exceeded statutory authority by stretching the definition of “unavailability.” The Rules not only authorized the electronic recording of superior court proceedings when “the parties proceed with a hearing or trial in the absence of an official court reporter . . . without objection” (which was consistent with the practice of the Los Angeles Superior Court upheld in LACRAA), but also authorized electronic recording to make the “official verbatim record” of superior court civil proceedings “when an official reporter or official reporter pro tempore is unavailable.” Rule 980.3(b) then broadly defined “unavailability” to include

(2) when the court determines that the funds available for reporting services are insufficient to employ a qualified person for the position at the prevailing wage . . . ; or

(3) when the court determines that a reporter will be unavailable based on the court’s existing staff of official court reporters, reasonable projections concerning official reporters’ vacations, sick leaves, and other approved absences, and reasonable projections as to the workload in each of the court’s departments.

Put simply, this broad definition would not have been valid under LACRAA’s holding that requires the superior court to provide an official reporter to a party who requests one.

Therefore, under this more narrow interpretation of CCRA I and under the expenditure of public funds for the maintenance of or creation of a nonstenographic method and system for preparing the official verbatim record of superior court proceedings.

Id. (emphasis omitted) (emphasis added).

228. See Memorandum from William C. Vickrey to All Presiding and Sole Judges of the Superior Courts et al., supra note 9, at 2. This memorandum states, “The Judicial Council directs each superior court not to expend any of the upcoming [fiscal year] 96-97 third quarter state funding distribution on the maintenance or creation of nonstenographic methods for preparing the official verbatim record of superior court proceedings.” Id. (emphasis added).

229. See Los Angeles County Court Reporters Ass’n v. Superior Court, 37 Cal. Rptr. 2d 341, 342-43 (Ct. App. 1995) (“The petition challenged the court’s practice of using electronic recording devices rather than certified court reporters to make a record of general civil proceedings where neither the assigned judge nor the parties requested that an official shorthand reporter record the proceedings.”) (emphasis added).

230. Id. at 349-50 (“[T]he court is not prohibited . . . from choosing to maintain a record of general civil proceedings by means of electronic recording devices where neither the court nor any party requests that a verbatim record be taken by official shorthand reporter . . . .”) (emphasis added).


232. Id. 980.3(a).

233. Id. 980.3(b) (emphasis added).

234. Id.; see supra note 122.

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the clear holding of LACRAA, a superior court judge could make an electronic record of proceedings as long as the electronic recording is not called an “official record,” and as long the court also provided an official reporter to any party who requested one. Under LACRAA’s holding, state funds could legally be spent to maintain, and even expand, electronic recording facilities in superior courts without violating CCRA II, Judge Garcia’s injunction,235 or the Judicial Council’s January 1997 directive236—each of which prohibits the expenditure of public funds to electronically prepare the “official” record.237 Until recently, Orange County Superior Court relied on limited county funds and user fees238 to

235. See supra notes 45 & 47 and accompanying text.
236. See supra note 48.
237. Local courts can reallocate their “baseline” state funding. Therefore, with some exceptions, local superior courts have the flexibility to reallocate monies allocated by the Trial Court Budget Commission (“TCBC”) for Court Operations Baseline Budget to operate and maintain electronic recording technology. See Letter from Marlene Nelson to author, supra note 195 (“[T]he Court has the ability to allocate and reallocate state provided funds as a general rule with a few exceptions.”). However, the TCBC sets aside certain funds from a county-wide trial court system’s baseline allocation that are earmarked for specific programs, like the Court Interpreter Program or the ER/Verbatim Reporting Conversion Program. If these earmarked funds are not spent for the specific purpose provided, they revert back to the State Trial Court Trust Fund. See id. Apparently, in shutting down its electronic recording equipment, the Los Angeles Superior Court mistakenly concluded that sound recording of superior court proceedings constituted an “official” record and, therefore, state funds could not be spent to support electronic recording of superior court proceedings. Under this Article’s analysis of the applicable statutes and case law, the Judicial Council could allocate funds statewide for the maintenance and operation of electronic recording equipment to provide a record of proceedings, so long as the record is not the official record. For political reasons, however, the Council has moved away from electronic recording by increasing the allocation of funds earmarked for the ER/Verbatim Reporting Conversion Program.

238. The issue whether a county or superior court has the authority to charge a user fee for court services turns on whether the Legislature has “so fully covered by general law matters relating to fees . . . that it must be considered a matter of state concern.” Hogoboom v. Superior Court, 59 Cal. Rptr. 2d 254, 257 (Ct. App. 1996). In Hogoboom, the Second District Court of Appeal held that “the Legislature has preempted the right of a superior court to charge fees for family law and domestic violence mediation other than those specifically enumerated by statewide statute.” Id. Hogoboom was distinguished by the Fourth District Court of Appeal in Lu v. Superior Court, 64 Cal. Rptr. 2d 561 (Ct. App. 1997). In Lu, the court rejected petitioner’s contention that Hogoboom prohibits the Orange County Superior Court from requiring petitioner to pay a fee to a discovery referee appointed by the court. Lu confined Hogoboom’s holding to the imposition of “a fee for the use of court operated mediation facilities in family law and domestic violence cases.” Id. at 566. The court stated:
The [Hogoboom] court based its holding upon the conclusion state law preempted the field of fees which may be charged by courts in the areas of family law and domestic violence. . . . Hogoboom is also based on Government Code section 68070, subdivision (a)(1) which prohibits a court from enacting
operate and maintain its video recording equipment.\textsuperscript{239} Los Angeles County Superior Court could not finance its sound recording system with county funds.\textsuperscript{240}

\textit{LACRAA} left undecided the legal status of an electronic record for appeal purposes.\textsuperscript{241} However, as correctly noted by the fourth appellate district’s unpublished opinion in \textit{Gandall v. Grimes},\textsuperscript{242} no appellate rule

local rules which impose “any . . . charge . . . upon any legal proceeding . . . .”

The court noted acts by the conciliation court are statutorily classified as “proceedings,” and mediation is statutorily required in cases involving issues of custody or visitation. Neither condition exists here.

\textit{Id.} (citations omitted). A user fee charged to litigants for electronic recording services provided by a superior court is not a “charge . . . upon [a] legal proceeding.” \textit{Cal. Gov’t Code} \textsection{68070(a)(1)} (West Supp. 1999). Furthermore, the Legislature has not preempted the superior courts from choosing to employ electronic recording devices to prepare a verbatim record, see \textit{supra} notes 209-20 and accompanying text, and, therefore, has not preempted the superior courts from charging a user fee to cover the cost of providing that service to litigants.

239. The Orange County Superior Court’s former practice of spending locally-generated revenue to fund electronic recording does not violate Judge Garcia’s injunction, which bars the expenditure of state funds to electronically record court proceedings. Judge Garcia’s judgment binds only the Judicial Council and the Alameda County Superior Court. Although paragraph four of the injunction restrains the Judicial Council “from authorizing and from causing the expenditure of public funds” to use electronic recording to prepare the “official verbatim record,” California Court Reporters Ass’n \textit{v.} Judicial Council, No. 728173-6 at 2 (Alameda County Super. Ct. Nov. 1, 1996) (emphasis added), the only funds the council allocates by law are state funds appropriated by the Legislature. See \textit{supra} notes 180-86 (concerning state trial court funding). The 1997 Judicial Council directive barred superior court spending of state funds to maintain electronic recording. See Memorandum from William C. Vickrey to All Presiding and Sole Judges of the Superior Courts et al., \textit{supra} note 9, at 1-2. In his September 15, 1999 letter, William Vickrey, the Administrative Director of the Courts, advised the Orange County superior court, for the first time, of the council’s view that the court’s use of locally-generated revenue to support electronic recording violates paragraph four of the injunction that restrains the council from “authorizing or causing the expenditure of public funds” to support electronic recording. Letter from William C. Vickrey to Kathleen E. O’Leary, \textit{supra} note 16, at 2. Although the Administrative Director requested, but did not formally direct, the Orange County Superior Court to stop spending locally-generated revenues to videotape the official record, this “request” amounts to an expansion of the council’s authority to allocate state-appropriated funds to include control over local court spending of locally-generated revenue. The implications of this expansion for decentralized court administration in California are ominous. One of the goals of the 1997 Isenberg-Lockyer Trial Court Funding Act was to preserve “[l]ocal authority and responsibility of trial courts to manage day-to-day operations.” \textit{Cal. Gov’t Code} \textsection{77001(a)} (West Supp. 1999).

240. See \textit{supra} note 190 and accompanying text.

241. See Los Angeles County Court Reporters Ass’n \textit{v.} Superior Court, 37 Cal. Rptr. 2d 341, 350 (Ct. App. 1995) (“[W]e do not decide the purposes, if any, for which the generated electronic recording may be used, because this question is outside the scope of the discrete issue presented by the association’s petition and evidence.”). Despite this reservation, the court made clear that electronic recording is not inconsistent with statute where neither party, nor the court, requests the services of an official reporter. See \textit{id.} at 349-50.

prohibits the use of electronic recordings to prove the proceedings.243 The Gandall decision observed that California Rule of Court 4(d) of the Appellate Rules, “which governs the preparation of a transcript for appeal, simply requires that the reporter prepare and deliver to the court clerk a transcript of the trial proceedings and ‘certify it as correct.’”244 Although Rule 4(d) refers to a “reporter” (though not an “official” reporter), Gandall treated the “duly designated court transcriber” who prepared the transcript in that case as a “reporter” for purposes of satisfying the requirements of Rule 4(d).

In addition to Rule 4(d) of the Appellate Rules, Rule 980.5 of the California Rules of Court (“General Rules—All Courts”), which is applicable “when a court has ordered proceedings to be electronically recorded,”246 provides:

A transcript prepared and certified as provided in the preceding subdivision [(f)], and accompanied by a certified copy of the monitor’s certificate pertaining to each reel transcribed, is prima facie a true and complete record of the oral proceedings it purports to cover, and shall satisfy any requirement in these rules or in any statute for a reporter’s transcript of oral proceedings.247

No statute or appellate rule restricts proof of testimony and

243. An electronic recording or electronically-derived transcript satisfies the due process right of a criminal defendant to “a record of sufficient completeness to permit proper consideration of his appeal.” People v. Turner, 79 Cal. Rptr. 2d 740, 743 (Ct. App. 1998) (quoting In re Armstrong, 178 Cal. Rptr. 902, 905 (Ct. App. 1981)).


245. Id. Note that the Judicial Council has the power to amend the appellate rules to clarify, if necessary, that a certified transcriber qualifies as a “reporter” under Rule 4(d). In 1941, the Legislature delegated to the Judicial Council the authority to promulgate rules governing appellate procedure that supersede pre-existing statute. See CAL. CIV. PROC. CODE § 901 (West 1980) (“The Judicial Council shall prescribe rules for the practice and procedure on appeal not inconsistent with the provisions of this title.”).

246. CAL. R. CT. 980.5(a).

247. Id. 980.5(g). Rule 980.3, which authorized audio and video recording as a means of making a verbatim record in superior court, was repealed effective January 31, 1997 pursuant to Judge Garcia’s injunction. See id. 980.3 (1996) (repealed 1997). Rule 980.5(g), however, is still in effect. See id. 980.5. Also see Rule 980.5(i), which provides that, upon stipulation of the parties, “the [original reels or electronic copies thereof] satisfy the requirements in these rules or in any statute for a reporter’s transcript.” Id. 980.5(i). Pursuant to Rule 980.5(i), the fourth appellate district, which includes Orange County, promulgated a “Memorandum of Policy,” dated May 8, 1991, which “approves any such stipulation if the oral proceedings recorded on video tape are one hour or less in duration.” Memorandum of Policy, Office of the Clerk, Court of Appeal, Fourth Appellate District, Division Three (May 8, 1991) (on file with author).
proceedings in a case to the official reporter's certified transcript. Section 273 of the California Code of Civil Procedure merely provides that "[t]he report of the official reporter . . . when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of that testimony and proceedings." However, by according a court reporter's certified transcript a presumption of accuracy, section 273 does not thereby preclude the admission of other forms of evidence to prove trial court testimony. No statute precludes the admissibility on appeal of an electronic recording, or a transcript derived from electronic recording, to prove trial court testimony or to challenge the accuracy of any transcript derived from shorthand.

IV. CONCLUSION

The CCRA decisions were wrongly decided and should either be disavowed or narrowly confined to their facts. The First District Court of Appeal—not the Legislature—fabricated without justification an implied statutory scheme that prevents the courts from utilizing increasingly advanced technologies to efficiently allocate scarce judicial resources and to provide litigants more affordable options to make a verbatim record. The First District Court of Appeal has for no justifiable reason thrown a monkey wrench into the wheels of progress. It is time to recognize and reverse or mitigate the error.


249. A prior iteration of section 273(a), which was not adopted, provided that the court reporter's "[r]eport . . . shall for the purposes of making a statement upon motion for new trial or appeal be conclusive of the facts therein stated." Act of May 17, 1861, ch. 434, § 4, 1861 Cal. Stat. 497 (handwritten draft) (emphasis added) (on file with author). For the text from another section of this document, see supra note 56.

250. See Los Angeles County Court Reporters Ass'n v. Superior Court, 37 Cal. Rptr. 2d 341, 346 (Ct. App. 1995). The court wrote:

Section 273 does nothing more than create an evidentiary presumption. . . . If a transcribed and certified report of the official reporter or official reporter pro tempore is not obtainable because a request for such a record was not made ([section] 269), then the presumption would not be available to prove what occurred in the proceeding. However, the absence of an official shorthand record would not prohibit litigants from establishing the relevant event by other legitimate means, such as by an admission or independent testimony. Conversely, the existence of an official shorthand record would not bar the presentation of evidence tending to demonstrate its inaccuracy. Moreover, an official reporter's transcript is not required in every instance to perfect an appeal; a settled statement or an agreed statement is, under specified terms and conditions, an authorized substitute.

Id. (citations omitted).