ASSOCIATION OF BUSINESS TRIAL LAWYERS

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A CONSTITUTIONAL CRISIS —THAT HAS A READY SOLUTION

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Allan Browne, the Founding President of the ABTL, famously said, "All of us share similar concerns in the courthouse as well as the legislature." We, the Presiding Judge of the Los Angeles Superior Court ("LASC") and the former Supervising Judge of the Family Law Division, write with hope—and *expectation*—that members of the ABTL indeed share a deep concern about a genuine constitutional crisis in our courtrooms right now. So far in 2023, tens of thousands of litigants in the LASC—which number will run into the hundreds of thousands this calendar year—are being denied elemental justice, namely, review on appeal. Why? Because of the unavailability of verbatim transcripts of proceedings in family law, probate, and unlimited civil cases. Again, why? Because (a) there is a profound shortage of Certified Shorthand Reporters ("CSRs")—they do not exist to be hired by our court (we have nearly 100 CSR vacancies now), and (b) Government Code section 69957 prohibits the court from using electronic recording devices to generate a verbatim transcript in family law, probate, and unlimited civil cases, even though the identical technology may be used for the identical purpose for infraction, misdemeanor, and limited civil cases. Yet the Appellate Division of the LASC successfully handles over 500 appellate matters every year using transcripts generated by electronic recordation. Electronic recording technology works.

ABTL lawyers and their clients now know that they must dig ever deeper into their pockets to pay a shrinking number of *private* CSRs to appear for their hearings and trials. No doubt this generates grumbling and dissatisfaction among your clients. But what if there were no pocket to dig into? What if you and your client simply had to forgo a verbatim transcript and, with it, any practical reality of review on appeal? Unthinkable, right? Please think again. This is today's reality for a huge number of modest-means litigants (not just those who are impoverished) in our civil, probate, and family law courts.

Bluntly, here's the question: Should our civil justice system supply a practical possibility of appellate review for potential legal error or abuse of discretion? Take family law as an example: Should the four-year-old child have been permitted to move with a parent to New York, causing heartbreak to the stay-in-LA parent? Or when parents cannot agree, which parent should make medical decisions (e.g., about vaccinations or gender-affirming care) for the 15-year-old child? Or should the restraining order have been imposed upon the father, thereby meaningfully restraining his liberty (e.g., requiring him to stay 100 yards away or refrain from electronic communications), possibly eliminating his custody rights and meaning that his name will appear on state and federal law enforcement websites for years to come? These are very significant issues that each of our family law judicial officers is called upon to decide dozens of times each week. They are very good at it but, like all of us, not perfect. There is a role for the Court of Appeal—but not if there is no record.

No record means no appeal—it's that simple. "If it is not in the record, it did not happen." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) Per the California Supreme Court, the lack of a verbatim record will "frequently be fatal" to a litigant's ability to have an appeal decided on the merits. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608.) And, in *Griffin v. Illinois* (1956) 351 U.S. 12, the United States Supreme Court addressed the problem of litigants' being denied

a transcript, precluding appellate review. Finding that both due process and equal protection rights were violated, Justice Hugo Black, writing for the Court, observed that there is "no meaningful distinction" between denying indigent defendants the right to appeal and denying them a trial. (*Id.* at p. 18.) What's more, in *M.L.B v. S.L.J.* (1996) 519 U.S.102, the U.S. Supreme Court held that decrees forever terminating parenting rights are in the category of cases in which the State may not, consistent with the Equal Protection and Due Process Clauses, "'bolt the door to equal justice,'" meaning that Mississippi could not withhold from M.L.B. a "'record of sufficient completeness'" to permit proper appellate consideration of her claims. (*Id.* at pp. 105-106.)

Before going further, let us be clear: In our view, the gold standard for the creation of a verbatim transcript is a licensed (living, breathing) CSR. It is by far our court's preference over any other option. But despite offering unprecedented signing and retention benefits, and very generous salary and employment benefits, our court has been unable to make a dent in our CSR employee shortfall. It is a fact of life—the number of CSRs retiring from court service outpaces the number of new hires. There is no reason to believe in the short or even the long run that the court will be able to staff all of its courtrooms (in which electronic recording is prohibited) with CSRs, and it will not be long before court-employed CSRs will be unavailable for statutorily mandated proceedings such as felony and juvenile justice cases. The licensed CSR population is aging and retiring, and people are not going into the profession. Sufficient CSRs cannot be hired because sufficient CSRs do not exist. We would love to be shown that we—and the 54 Chief Executive Officers of California's Superior Courts who issued a comprehensive report in November 2022 entitled, "There is a court reporter shortage crisis in California"—are wrong. But "wait and see" is not an option.

For these reasons, we say again: We are in the midst of an undeniable constitutional crisis, and none of us should sleep well at night under the assumption that all is well. Or that this will work itself out just fine one of these days. We often hear from lawyers, "What can we do to help the court?" We appreciate the question, but it is not stated correctly. The question, we suggest, as you look in the mirror, is "what did *I* do when thousands of the most vulnerable members of *my* community were frankly being denied basic justice?"

We have a responsibility as leaders in the legal community to ensure that the administration of the law is not unequal or unfair.

There is a legislative solution—permitting electronic recording in family, probate, and unlimited civil cases to create a verbatim transcript *when a CSR is not otherwise available*. Senator Susan Rubio's bill SB-662 - Courts: court reporters would permit electronic recording under specified conditions. Unfortunately, the legislature will not address it further until 2024 at the earliest. There are no doubt other legislative solutions to be offered and considered.

The point, however, is that this cannot be treated as business as usual. Thus, we ask you to add your voice to ours as we strive to preserve equal and meaningful access to justice.

Judge Samantha P. Jessner *is the Presiding Judge of the Los Angeles County Superior Court.*

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