MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 10, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 10, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present.

HOUSE BILL NO. 554: Rep. Daily, District No. 69, requires creation of an escrow fund to pay crime victims from the perpetrator's proceeds of a crime. This bill tries to prevent people who have committed a serious crime in Montana, and have been convicted of a serious crime, from benefiting financially from the crime. Any profit received from the crime will be paid to the victims or the victims family. It will also pay for court appointed attorneys and the remainder will be deposited into the crime victims fund. Current statute allows the Workers' Compensation to do this and the statute uses the word "may" and this bill changes the language to "shall" which requires them to do this so that perpetrators will not benefit from their crime.

PROPONENTS: MIKE MCGRATH, Lewis and Clark County Attorney, supported this legislation. He stated that this bill was drafted by the County Attorney's Association. This bill insures victims will receive the fund.

HIRAM SHAW, Workers' Compensation, Department of Labor and Industry, stated that HB 554 allows a minimum of $5000.00 to automatically go to the victim and the remainder of the funds will be placed in the crime victims account.

There were no further proponents and no opponents. There were no questions from the committee.

Rep. Daily closed the hearing on HB 554.

HOUSE BILL NO. 371: Rep. Addy, District No. 94, sponsor, stated this bill allows the Department of Motor Vehicles to turn over to the selective service system the names of individuals who reach the age of which they are suppose to register for the selective service. That age is 18. He addressed two aspects of the bill: 1. Fairness; 2. Privacy. He stated that it has been determined that by registering everyone before a national emergency occurs, at least four months in start up time is saved. People who fail to comply with the law actually get a better shake than those

who comply with the law. He pointed out that it is only fair, if you are going to ask youth to put their lives on the line, that you assure them that the drawing will be as fair as you can make it. It is essential to get all names in the pool so everyone gets a fair shake. The information that is being authorized for release in this bill is not being taken from a young man's clothing, car, house or any other area of privacy.

PROPONENTS: CHRIS CHRISTENSEN, Selective Service, stated that historically, Montana has ranked number one in the nation, but recently it has slipped. He further explained the penalties for noncompliance with the selective service stating that any Federal aid for college loans will not be given to the young man, there will not be any participation in the job training partnership program and they will not be able to get employment with the executive branch of the Federal government.

There were no further proponents.

OPPONENTS: CHIP CLAWSON, from Helena, stated that he opposed HB 371 basically because of the privacy issue. He pointed out that stiff penalties exist for not registering for the draft after they go through the warning procedure, which are 5 years in prison and $250,000.00. He quoted the constitution, article 2, section 10, stating that it provides for the privacy of an individual. He requested that this legislature continue to protect privacy.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 371: Rep. Darko asked Rep. Addy how many other states turn over driver license information to the selective service and stated that between 5 and 10 states do not provide the information.

There were no further questions.

Rep. Addy closed the hearing by stating that existing law provides one exception, which says that this section does not apply to the right of access either by Montana law enforcement agencies, or by purchase or otherwise of public records dealing with motor vehicle registration. He pointed out that it is a clear authorization for release of information. The attorney general has ruled that there must be a more explicit authorization and he said that covers all purchases of motor vehicle registration records except for selective service. He urged support.

HOUSE BILL NO. 354: Rep. Miles, District No. 45, sponsor, stated this bill deals with the bad faith statute and all it does is if there is going to be a bad faith claim filed that all proceedings in the case must be suspended until the

liability issues of the underlined claim has been determined. This is basically a codification of a case brought before the Supreme Court in April.

PROPONENTS: KARL ENGLAND, Montana Trial Lawyers Association, stated that this is a good move for the legislature to codify this into the statutes on bad faith.

ROGER MCGLENN, Independent Insurance Agents Association of Montana, stands in support of this bill because bad faith is the number one problem as far as insurance availability in the state of Montana.

RALPH YAAGER, Governor's Council on Economic Development, supported this legislation.

There were no further proponents, no opponents and no questions.

Rep. Miles closed the hearing on HB 354 by stating that this bill should be passed because it is the only bill all session that the Trial Lawyers and insurance companies have agreed on.

HOUSE BILL NO. 514: Rep. Pistoria, District No. 36, sponsor, stated that this is something new for the State of Montana. It provides for videotape recording of district court proceedings, which is not compulsory but they may use the equipment. He stated that a recent evaluation of Kentucky's approach to video recording of trial court proceedings, conducted by the National Center for State Courts, has determined that video recording is the most advantageous means of court reporting both in terms of benefits and cost efficiency. Among the benefits of video court reporting, cited by the National Center are: Recording Accuracy, Reliability, Timeliness, Unobtrusiveness, and Suitability for Education. Rep. Pistoria further stated that his bill will reduce the price of transcript copying. He proposed that the court reporters allow those who are required to make up several copies of the transcripts to use the original, whereby they can make their own copies at a much less cost. He stated that he does not recall when these costs were ever questioned by corporations or financially able people because of the money available but it is time to have this situation corrected because it is a financial burden on the average income people. He submitted written testimony. (Exhibit A). He admits that his interest in court reporters stems from his own experience in a libel case which he won on appeal to the Supreme Court. There were delays, the transcript was done on "taxpayers' time," and he had to pay $1,345.00 "in full, in advance," he said. He submitted an article from the Montana Law Week.

(Exhibit B). A claim form from Cascade County was submitted as (Exhibit C) to show an example of how much an appeal transcript from one case, cost.

There were no proponents to HB 514.

OPPONENTS: JEROME ANDERSON, Lobbyist for the Montana Shorthand Reporters Association, opposed the bill and introduced Bob Nieboer, from Kalispell; Sam T. Marshall, from Polson; Julie M. Lake, Missoula; Richard Mattson, Billings; Lois Williams, Missoula; and Lisa Lewis and Betty Robinson, Great Falls who also oppose this legislation.

RICHARD MATTSON, submitted handouts (Exhibits D-K) containing information in opposition to using video equipment in the courtroom. He stated this is not new. It has been employed in at least three jurisdictions in 1976 as a two year experiment in the courts of Ohio and the criminal courts of Tennessee and New Mexico. An Ohio case, where a woman was sentenced to die in the electric chair, had to have a new trial because her rights were violated when videotaping of the trial failed to keep an accurate record. Nine minutes of testimony was missing, apparently caused when the technician fell asleep. There were 428 inaudible statements; 52 instances of no audible responses; 94 unidentified speakers. Mr. Mattson stated that in one two-week trial, the judge will receive 30 video cassettes to review. That is very time consuming. He strongly opposed the bill.

JEROME ANDERSON, submitted a letter, written February 5, 1987, by FRANK M. DAVIS, District Judge, Fifth Judicial District, (Exhibit L). The letter stated that there is a great many drawbacks regarding the use of video recording of court proceedings in place of the live court reporter. He further wrote that he has had to deal with television cameras in the courtroom on a number of occasions and has seen the reaction of the witnesses to this intimidating device. A video camera would be no different. Cameras are intrusive and intimidating in a court of law. He has had witnesses refuse to testify on camera, and he has held that is their right. He felt the bill should be soundly defeated.

Mr. Anderson also submitted a letter from the State of Montana, Department of Labor and Industry, dated January 12, 1987, (Exhibit M), as an example of a tape recorder malfunction in a Workers' Compensation case, which states that because of the malfunction, there may be a significant problem in the Administrator's review of the matter.

PATRICK DRISCOLL, representing the Attorney General's Officer, stated the use of video equipment is unworkable and the bill is opposed.

PATRICK L. PAUL, Office of the County Attorney, Cascade County Courthouse, submitted written testimony. (Exhibit N). He stated he has dealt with videotaping, in some instances, and has found that many things can go wrong. In some instances, sound may not be turned high enough for each different witness, or several people may speak at once and garble conversation on the tapes. Either of these problems can effectively eliminate any record you need for appeal. In criminal cases, if a record cannot be made of the proceedings prior to trial and the trial itself, then the case can be dismissed upon appeal. He believes that people are easier to deal with in many instances than machines, and this is one of those instances in which the court reporter would be more accurate, easier to work with, and less expensive.

JANET L. STEVENS, Chairwoman, BARBARA EVANS, Commissioner, ANN MARY DUSSAULT, Commissioner, Missoula County, Board of County Commissioners, submitted written testimony. (Exhibit O). They stated they applaud efforts to provide for a better, upgraded, standard of justice for citizens, but this proposal did not give them an improved process for court reporting over what they now have.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 514: Rep. Meyers asked Mr. Mattson if court reporters are paid a salary. He stated they are paid a salary by the district divided by the counties. Rep. Meyers stated the way he reads the bill, court reporters will still have a place under this bill but questioned if they will be required. Mr. Mattson stated they will not be required to be at hearings and they will not be required in criminal cases. He stated the bill provides that whoever requests the service will also pay for securing that service.

Rep. Hannah asked Rep. Pistoria why it is important, in some cases, to have written word and some cases to have video. He answered that reporters will not be eliminated under this bill, and pointed out that the written transcript must be used in criminal and death cases. He further stated there is a rule making authority in the bill and the judges can decide when a written transcript should be used and when video can be used.

Rep. Pistoria closed the hearing on HB 514.

HOUSE BILL NO. 367: Rep. Miller, District No. 34, sponsor, stated he was asked to carry this bill by the Red Cross in

Great Falls. The bill pertains to tissues, organs or bones that should have the same liability coverage as blood currently has.

PROPONENTS: KAY CRULL, American Red Cross, stated the progress in transplantation has been slowed by several obstacles. Tissue rejection remains the most serious problem. The body's response to foreign tissue is to reject it. Lack of long term preservation is another obstacle in that an organ will deteriorate rapidly without oxygen. The shortage of organs and tissues for transplant surgery needs to be greatly increased if transplantation is to reach its full potential. She urged support for this bill and submitted written testimony. (Exhibit A).

J.D. SALISBURY, Montana Eye Bank Foundation, stated this bill is an important step in decreasing the liability by declaring organ and tissues, like blood product, to be a service exempt from the general law of sales and by warranty and strict liability. He strongly supported this legislation.

NADINE LANGAN, cornia transplant patient, stated it is beautiful to have this procedure possible and it is time that Montana moves ahead on this important matter.

DEBORAH HANSON-GILBERT, Director of Technical Transplantation Services, pointed out the availability of blood and blood products has revolutionized modern medicine. Because of the current shortage of donated bone; autologous, or bone collected from another site in the patient himself, must be used. In many patients, this approach is neither desirable nor feasible, such as in geriatric or pediatric patients. The American Red Cross would like to see the same protection extended to all human tissue. Skin, bone and eye collection programs have been, and are being established to meet a need. She asked that we help in that need by encouraging the collection of tissue by the passage of HB 367. She submitted written testimony. (Exhibit B).

JERRY T. LOENDORF, Montana Medical Association, supported this bill.

There were no further proponents and opponents.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 367: Rep. Bulger asked about the language on page 1, lines 14-15 in regard to declared service and not sale. Ms. Gilbert stated if a product is sold there is an implied warranty. If something is declared a service rather than a sale then one does not go by the lines of strict liability. Rep. Bulger asked what is the relationship to the hospital over the

tissue products and do the hospitals bill for them. Ms. Gilbert said that the tissues and blood are not sold to the hospital. Blood is furnished to the hospitals for their use and the patient pays for the services and tests. The hospitals bill the patients.

Rep. Hannah asked Ms. Gilbert if (by his understanding) organs, tissues, and blood are free, then, the costs of testing and services are then charged to the patient. Ms. Gilbert stated that essentially, he is correct. The United States has gone to a volunteer system of blood donation. The medical community is opposed to selling organs.

Rep. Miller closed the hearing on HB 367.

EXECUTIVE SESSION:

ACTION ON HB 367: Rep. Gould moved DO PASS. Question was called. A voice vote was taken and the motion CARRIED unanimously.

ACTION ON HB 554: Rep. Daily moved DO PASS. Question was called. A voice vote was taken and the motion CARRIED unanimously.

ACTION ON HB 514: Rep. Brown moved DO PASS. Rep. Meyers stated he is not sure if this bill saves money or not. Rep. Daily moved to amend on page 6, line 10, which makes sure that for all cases there is a written transcript made. Rep. Miles commented that she does not see that any money will be saved. Question was called. Rep. Hannah made a substitive motion of DO NOT PASS. Rep. Brown moved DO PASS. He stated he is not sure if the amendment is clear enough. Rep. Hannah moved to TABLE the bill. A voice vote was taken and the motion CARRIED 10-3, with Reps. Darko, Brown, and Strizich dissenting. HB 514, TABLED.

ACTION ON HB 163: Rep. Mercer moved to take HB 163 OFF THE TABLE. A voice vote was taken and the motion CARRIED unanimously. Rep. Mercer moved to amend on page 2, line 7 by inserting the word "diminished". Rep. Mercer moved that HB 163 DO PASS AS AMENDED. (See Amendment attached). Question was called and a voice vote was taken. The motion CARRIED 10-3, with Reps. Brown, Gould, and Grady dissenting. HB 163, DO PASS AS AMENDED.

ACTION ON HB 262: Rep. Daily moved DO PASS. Rep. Miles stated this bill is a big improvement from the one last session. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 262, DO PASS.

ACTION ON HB 301: Rep. Bulger moved DO PASS. Question was called and a voice vote was taken. The motion CARRIED 11-2, with Reps. Brown and Daily dissenting. HB 301, DO PASS.

ACTION ON HOUSE JOINT RESOLUTION NO. 13: Rep. Darko moved DO PASS. Rep. Lory moved to amend on page 2, line 9, inserting: "(2) that if passed, the Secretary of State shall send a copy of this joint resolution to each Supreme Court Justice and District Court Judge." (See Amendments attached). Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Darko moved that HJR 13, DO PASS AS AMENDED. Question was called and a voice vote was taken. The motion CARRIED unanimously. HJR 13, DO PASS AS AMENDED.

ACTION ON HB 472: Rep. Darko moved DO PASS. Rep. Mercer stated that he feels it is a good idea to use mediators in divorce cases. Rep. Meyers wondered if the mental health agencies could somehow start mediation programs. Rep. Darko stated that this would cause an overload of work in the agencies. Rep. Bulger pointed out that there were problems in the bill that needed to be worked out. Rep. Daily stated that financially the budget could not handle setting up this system in the courts. Rep. Meyers moved to TABLE the bill. He stated it was not his intent to kill the bill but problems existed in it and they needed to be worked out. A voice vote was taken and the motion CARRIED 12-1. HB 472 TABLED.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 10:55 a.m.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 10, 1987

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| JOHN MERCER (R) | ✓ | | |
| LEO GIACOMETTO (R) | ✓ | | |
| BUDD GOULD (R) | ✓ | | |
| AL MEYERS (R) | ✓ | | |
| JOHN COBB (R) | ✓ | | |
| ED GRADY (R) | ✓ | | |
| PAUL RAPP-SVRCEK (D) | ✓ | | |
| VERNON KELLER (R) | ✓ | | |
| RALPH EUDAILY (R) | ✓ | | |
| TOM BULGER (D) | ✓ | | |
| JOAN MILES (D) | ✓ | | |
| FRITZ DAILY (D) | ✓ | | |
| TOM HANNAH (R) | ✓ | | |
| BILL STRIZICH (D) | ✓ | | |
| PAULA DARKO (D) | ✓ | | |
| KELLY ADDY (D) | ✓ | | |
| DAVE BROWN (D) | ✓ | | |
| EARL LORY (R) | ✓ | | |
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# STANDING COMMITTEE REPORT

February 10, 1987

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE JOINT RESOLUTION 13

[x] do pass
[ ] do not pass

[ ] be concurred in
[ ] be not concurred in

[x] as amended
[ ] statement of intent attached

Chairman

1. Page 2.
Following: line 3
Insert: "(1)"

2. Page 2.
Following: line 9
Insert: "(2) That if passed, the Secretary of State shall send a copy of this joint resolution to each Supreme Court Justice and District Court Judge."

FIRST reading copy ( WHITE color )

# STANDING COMMITTEE REPORT

February 10, 19 87

Mr. Speaker: We, the committee on Judiciary

report House Bill No. 262

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

FIRST reading copy ( WHITE color )

# STANDING COMMITTEE REPORT

February 10, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 367

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

FIRST reading copy ( WHITE color )

# STANDING COMMITTEE REPORT

February 10, 19 87

Mr. Speaker: We, the committee on Judiciary

report [redacted] NO. 554

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

FIRST reading copy ( WHITE color )

# STANDING COMMITTEE REPORT

February 10, 19 87

Mr. Speaker: We, the committee on Judiciary

report HOUSE BILL NO. 301

☒ do pass
☐ do not pass

☐ be concurred in
☐ be not concurred in

☐ as amended
☐ statement of intent attached

Chairman

FIRST reading copy ( WHITE color )

# STANDING COMMITTEE REPORT

February 10, 19 87

Mr. Speaker: We, the committee on Judiciary

report HOUSE BILL NO. 163

[xx] do pass
[ ] do not pass

[ ] be concurred in
[ ] be not concurred in

[xx] as amended
[ ] statement of intent attached

Chairman

Page 2, line 7.
Strike: "lessened to the slightest degree"
Insert: "diminished"

FIRST reading copy ( WHITE color )

Exhibit A
Date 2-10-87
HB #514

# VIDEO RECORDING OF COURT PROCEEDINGS

Prepared for Representative Pistoria

By Tom Gomez, Staff Researcher
Montana Legislative Council

January 1987

A recent evaluation of Kentucky's approach to video recording of trial court proceedings, conducted by the National Center for State Courts, has determined that video recording is the most advantageous means of court reporting both in terms of benefits and cost efficiency. Among the benefits of video court reporting, cited by the National Center, are:

**Recording Accuracy.**

Video recording allows for complete verbatim recording of all court proceedings. Because the tapes can be used as transcripts in themselves, the possibility of omitting words or sentences through human incomprehension or other error is eliminated.

**Reliability.**

Video recording systems are generally reliable and less vulnerable to breakdown than a human being making a manual shorthand record or a human being with a shorthand machine. Over the past three years of video recording trials in Madison Circuit Court, there has been only one minor breakdown of video equipment. Likewise, the Jefferson County system has remained trouble free since its installation in FY 1984.

**Timeliness.**

Because video tapes can act as transcripts in themselves, they are available for immediate playback, avoiding the wait for a written transcript, which can take months to produce. Copies of the tapes can easily be provided to parties involved in the case.

**Unobtrusiveness.**

Because the video cameras can be wall-mounted like those in a bank, and because the support equipment can be located outside of the courtroom, video recording is much less distracting or obtrusive than a court reporter.

#514 Exhibit

**Suitability for Education.**

Video tapes of court proceedings can be used to educate both public and law-related individuals through public forums, high school and college classes, and judicial and bar-sponsored seminars and programs.

The National Center for State Courts report also concluded that video recording of trials provided the greatest possible benefits for the lowest possible costs. Although, the initial cost of an automated video recording system is approximately $34,000, it eliminates the need for an in-court reporter, which would save the court salary and benefit expenses.

In Kentucky, court reporters earn as much as $20,000-22,000 per year, including fringe benefits. Video recording systems that replace court reporters will pay for themselves in less than two years. The average maintenance cost for video recording equipment is $1,200, which means substantial savings in comparison to the annual salary expense for retaining a court reporter.

tpg/7006.TXT

A

*The Big Sky Country* 2-10-87

HB # 514

# MONTANA STATE HOUSE OF REPRESENTATIVES

REP. PAUL G. PISTORIA
DISTRICT NO. 36
2421 CENTRAL AVE.
GREAT FALLS, MONTANA 59401

Sunday, October 20, 1985

COMMITTEES:
LOCAL GOVERNMENT
STATE ADMINISTRATION

What I wanted added, which wasn't mentioned in the article, is that the Court Reporters are now using the 8½" x 11" paper and double spacing for transcripts and depositions instead of the 8½" x 14" size paper that had been used for years and are charging the same (as in 3-5-604), $2.00 per page for the original copy, 50¢ per page for the first copy and, 25¢ per page for each additional copy. Thus, those who are involved, are being overcharged and are being short changed unbeknown to them and the public. This is a terrible rip-off.

At the taxpayers expense, the District Court Reporters are provided with office space, telephones, filing cabinets, desks, typewriters and all other office equipment. In some cases, they use taxpayers paper. They also receive a maximum of $23,000 salary per year, vacation, sick leave and all benefits as all other public employees and, may belong to the Public Employees Pension Plan (PERS).

Also, in some cases (as was done in my case), they type up the transcripts during working hours at taxpayers expense. I know this because it was done in my case. I observed it.

Some of these same Court Reporters have another office together for themselves. As in Great Falls, some of these Court Reporters rent office space in the Strain Building, Room 603.

Yes, they have a racket and a monopoly. If it could be known, some of them probably make more than the District Court Judges, the Supreme Court Judges and the Governor. If their income tax report could be seen, it probably would surprise us.

Therefore, I will try to have this corrected in the law on what they can or cannot do. I will have the $2.00 charge per page for the original copy (as in 3-5-604) reduced to $1.50 or less because the Court Reporters use the 8½" x 11" paper instead of 8½" x 14" paper. Also, the price for the other copies may be re-adjusted if necessary.

Paul G. Pistoria

Paul G. Pistoria
State Representative

mon - oct. 28, 1985

P.S. - additional that I forgot to add.

At times District Court Reporters are called on to take Depositions for attorneys during their working hours at Taxpayers expense. This must be stopped because they make extra money for this. Therefore, will make them sign time cards & the time be subtracted from their regular salary.

Also, allow those who are required to make up several copies of the Transcripts that they shall receive the original copy from the Court Reporters, whereby they can make their own copies at much less cost. Probably at 5¢ to 10¢ per page, instead of 50¢ per page for 2nd Copy & 25¢ per page for additional copies as charged by the Court Reporters.

Note: I don't recall when these costs were ever questioned by Corporations or financially able people because of the money available. It is time to have this situation corrected because it is a financial burden on the average people.

Paul E. Pistoria
State Representative

Basin counties, STAB held that no adjustments should be made in the values of farm machinery assessed according to the 1985 spring edition of the official guide. While recognizing concern with the abrupt change in values due to the farm economy, the law must be followed as it now exists. Legislative changes in the market value of farm machinery don't become effective until Jan. 1.

However, STAB concluded that machinery not listed in the official guide should be revalued using 1984 procedures with depreciation considered for 1985 because procedures developed by DOR have not been verified by field testing and resulting values are substantially higher than actual wholesale values.

10/8.

**Day care licensure.** Hearing Examiner Jim McLean upheld SRS's denial of a day care license for Juanita Hirschi, Grandma's Day Care, Missoula, after listening to 41 witnesses in a 3-day hearing. Half the witnesses testified for Hirschi as character witnesses, while SRS's witnesses testified of specific violations of regulations. McLean found Hirschi's testimony in general to be not credible, and concluded that she conducted her facility "in arrogant and outspoken disregard for all SRS regulations," including enrollment, supervision, transportation, discipline, and medication. The case was the longest and most complex appeal of a day care license denial in SRS history. No appeal is planned, according to Hirschi's lawyer, Mars Scott. Leslie Taylor and Michael Baker for SRS. SRS Fair Hearing 86-9, 10/11.

## LEGISLATION

**Transcripts.** Rep. Paul Pistoria, D-Great Falls, is preparing legislation that would permit a party to obtain official transcripts by paying the court reporter only for the original and then making his own copies. $3-5-604 presently provides for a fee of $2 per page for the original, 50¢ per page for the first copy, and 25¢ per page for each additional copy. "You should be able to make your own copies for 5 or 10 cents a page," he says.

He is also looking at authorizing audio and video recordings in addition to or as alternatives to stenographic notes and written transcripts.

Pistoria sponsored an amendment in 1983 to the court reporters' pay increase bill which cut $3,000 off the proposed maximum of $26,000. He admits that his interest in court reporters stems from his own experience in a libel case which he won on appeal to the Supreme Court. There were delays, the transcript was done on "taxpayers' time," and he had to pay $1,345 "in full, in advance," he says.

# CLAIM FORM

**Cascade County**
Great Falls, MT

This claim must be itemized and invoice attached before payment can be made.

Claim No. _____
Warrant No. _____
Vendor No. 43292

Exhibit C
Date 2-10-87
HB # 504

HB 5
Video-Court Reporter Bill

Claimant: LISA S. LEWIS
Remit to:
Address: 805 47th ST SO
City: GREAT FALLS, MT 59405

Official Use Only
ACCOUNT NUMBER

| INVOICE NO. | DESCRIPTION | AMOUNT | Fund | Dept. | Funct. | Act. | Sub Activity | Object | Amount |
|---|---|---|---|---|---|---|---|---|---|
| | STATE V. MORSE & | | 2180 | 3544 | 41 | 03 | ~~00~~ 70 | 350 | 8914. |
| | BROWN | | | | | | | | |
| | CDC-85-247 | | | | | | | | |
| | APPEAL TRANSCRIPT | | | | | | | | |
| | 2, 547p @ 3.50/p | $8,914 50 | | | | | | | |
| | | | | | | | | | |
| | | $8,914 50 | | | | | | | 8914 50 |

JUDICIAL SYSTEMS

Terrie

I certify that this claim is correct and just in all respects, and that payment or credit has not been received.

Claimant sign here X Lisa S Lewis

DEPARTMENT O.K. Sally Roth

**OFFICIAL USE ONLY**

I have carefully examined the above account and refer the same to the Board of County Commissioners.

Filed: JAN 21 1987

County Auditor

**Approved by Board of County Commissioners**

Member

Date

Rec'd Thur-Jan. 29, 1987

Paul
brought this
would interest you

Patricia
Cascade County
Commissioner

2-10-87
#514

# TRANSCRIPT CLAIM FORM

**CAUSE NO.** CDC-85-247

**TITLE OF CAUSE** THE STATE OF MONTANA V. ROBERT EUGENE MORSE

**JUDGE ORDERING TRANSCRIPT** JOEL G. ROTH

**PERSON REQUESTING TRANSCRIPT** JOHN KEITH, PUBLIC DEFENDER

**DATE ORDERED** 7/8/86 **DATE COMPLETED** 1/19/87

**TOTAL NUMBER OF PAGES (ORIGINAL)** 2,547

**NUMBER OF COPIES AUTHORIZED** FIVE (5)

**ALLOWABLE COSTS: (3-5-604 (1), MCA)**

| | | |
|---|---|---|
| **ORIGINAL** | 2,547 | @ $2.00 PER PAGE |
| **FIRST COPY** | 2,547 | @ .50 PER PAGE |
| **ADDITIONAL COPIES** | 2,547 | @ .25 PER PAGE |

**TOTAL AMOUNT DUE** $8,914.50

**COURT REPORTER:** LISA S. LEWIS

Exhibit C
Date 2-10-87
HB # 514

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

FILED

THE STATE OF MONTANA, )
Plaintiff, )
vs ) No. CDC-85-247
ROBERT EUGENE MORSE, )
Defendant. )

ORDER

UPON MOTION of Counsel for the Defendant, and it appearing from the files in this matter that Defendant is unable to afford the costs associated with an appeal of this matter;

IT IS HEREBY ORDERED that the Defendant shall be permitted to proceed in forma pauperis in this matter;

IT IS FURTHER ORDERED that the costs of providing a transcript of the proceedings shall be born by Cascade County.

DATED: July 10th, 1986

DISTRICT JUDGE

cc: C.A.-
J. Keith
Defendant c/o Counsel
Court Reporter

47-263

148

D
2-10-87
514

# Death ruling appealed due to videotaping error

By TED VIROSTKO
Ohio Scripps-Howard Bureau

A Columbus woman sentenced to die in the electric chair should have a new trial because her rights were violated when videotaping of the trial failed to keep an accurate record, the Ohio Supreme Court was told Wednesday.

The request was made on behalf of Alberta Osborne, 53, of Columbus. She is one of two women and 59 men who are awaiting execution since Ohio's capital punishment law was rewritten and became effective Jan. 1, 1974.

MRS. OSBORNE was convicted in Franklin County Common Pleas Court on Mar. 18, 1975, in the Dec. 15, 1974, kidnap-slaying of Hermalee Ross, the wife of Mrs. Osborne's lover. She was convicted of hiring her son and his friend to kill the woman.

The breakdown of videotaping was spotlighted during oral arguments by Mrs. Osborne's attorneys, who also challenged the constitutionality of Ohio's capital punishment law on the ground "the ultimate decision as to who lives and who dies is still made in an arbitrary manner."

ATTORNEY James K. Hunter III led the attack on the shortcomings of videotaping the trial. He said the failures were uncovered when transcripts of the trial were being made as the appeal was being prepared.

Hunter said, "Videotaping is a good idea but the execution (in this case) was poor." He said nine minutes of testimony was missing, apparently caused when the technician fell asleep; there were 428 inaudible statements; 52 instances of no audible responses and 94 unidentified speakers.

HUNTER SAID the technician was fired by the company contracted to videotape the trial once the discrepencies were uncovered. Under questioning by the court, Hunter said many of the inaudible statements occurred during "bar conferences" between the judge and counsel.

He said microphones were in the vicinity and he assumed everything was being taped. Hunter blamed the bad video on a "grossly incompetent technician."

In his brief to the Supreme Court, Hunter said when a trial court undertakes an experiment and such an experiment (videotaping) fails "to accurately and adequately record such proceedings, the rights of the accused to due process of law and equal protection under the law have been violated and a new trial must be ordered."

CO-DEFENSE counsel Dennis B. Ehrie Jr. claimed the trial court erred when it failed to grant a request for a change of venue (switch the trial to a new location) because of excessive pre-trial publicity.

Ronald J. O'Brien, who handled the state's case during the trial, told the Supreme Court the prosecution had not been asked to "fix the record" once the failure of the videotaping was discovered.

O'Brien admitted the technician could not be seen by the judge during the trial when the technician was seated. He said he did not actually see the technician take a nap while the trial was in progress because "I was busy presenting the case."

O'BRIEN SAID "the State of Ohio proved without doubt that the defendent was guilty," and that Mrs. Osborne received a "fair and impartial trial in the county."

He said each juror swore he or she could decide the case on evidence presented during the trial and was not influenced by pre-trial publicity.

O'Brien said the state's key witness Kay Osborne, the defendant's daughter, testified her mother told her that she had hired Carl (her son) and his friend, Jimmy Weind to kill Mrs. Ross for $325 because her romance with Mr. Ross had soured.

# Judge Impounds Tape Of Preliminary Hearing

STEUBENVILLE (AP) — The videotape recording of a preliminary hearing of a defendant charged with a felony offense was ordered impounded Friday by Jefferson County Common Pleas Court Judge Brenner Levinson.

The judge ordered the tape impounded after a videotape technician said it had been "tampered with."

Levinson said his action was "in the best interests of the case," because "the court feels (the tape) is very important. I don't want to hear it is unavoidably lost."

The tape had been used as the grounds for three defense motions for mistrial in the case of Stanley Mark Gilliam and his brother Anthony, chairman of the Steubenville Human Relations Commission.

They are charged with inciting to violence in a Nov. 2, 1977, confrontation with police in downtown Steubenville.

Defense attorneys James McNamara of Columbus and George B. Hairston, an NAACP staff attorney from New York, said they were notified before the trial that the audio portion of the recording equipment malfunctioned. As a result, McNamara asked twice for a dismissal because the transcript of the preliminary proceeding in municipal court against Stanley Gilliam was unavailable.

McNamara, after reviewing the tape recently, further charged that "gaps" appeared in the video portion.

Susan Urbas, a freelance producer and director from Columbus and a former Ohio State University faculty member, said Friday "it appears to me somebody tampered with the tape."

Both defense attorneys have charged that police officers testifying for the state changed their testimony after the preliminary hearing because Anthony Gilliam had been indicted by a grand jury.

They introduced sworn statements by two attorneys representing Stanley Gilliam at that time that the testimony was different.

The defense maintains the original testimony cleared Anthony Gilliam of any crime.

The defendants have filed a $200,000 lawsuit in Columbus alleging that several Steubenville police officers beat Stanley Gilliam during the incident near the downtown intersection.

The state has charged the Gilliams, both black, with inciting a crowd to violence against the arresting police officers at the time.

Levinson took a motion for dismissal under advisement following Friday's testimony.

Pending testimony from another expert witness scheduled to testify Monday for the state, Levinson also took under advisement a renewed defense request for dismissal for alleged police harrassment of defense witnesses and the staff of the defense attorneys during the trial.

The all-white jury of seven men and seven women has been told it can expect to begin deliberation Tuesday, the 17th day of the trial.

# Video Tape Records

Charles B. Lester

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Over the past several years, the entucky judiciary has been nundated with articles and informational material extolling the virtues of video taped records f trials as opposed to the transcribed printed word. The prime exponents of the latest chnology are a few trial judges nose primary argument, and justifiably so, is the savings in osts to the litigants. To date, o member of the appellate judiciary of the Commonwealth had addressed the subject.

Before examining some of the lems of the video concept from standpoint of appeal, the basic differences between the trial and ppellate tribunals should be called. In the trial forum, the litigants, their lawyers, the witnesses and the jury are all ually physically in attendance ith the primary function of all present to resolve issues of fact der proper instructions on the w and render a verdict. One of the most important factors in aching a result is the judging of e credibility of witnesses, a nction particularly reserved to the trial court by virtue of the vil rules and numerous opinions our court of last result. Jury members and judges alike can be ayed by such elements as meanor, courtesy or lack thereof, facial expressions, mode of dress, r articulation of counsel.

The appellate level is concerned whether there has been any error of law committed at the trial. In many cases, it is necessary that the transcript of evidence be reviewed at least at those points therein where a factual understanding is necessary to a resolution of a legal point. It should be remembered that the appellate court never hears evidence from the litigants or witnesses. Until recently, only the printed or typed evidence was before the court reflecting neither emotions, facial expressions, physical motions or even, on occasion, hysterics. Enter the video record.

Until this time, appellate courts reviewed a cold record looking for what was testified to by witnesses and said by counsel and the court, not how it was said. This means that an individual with a flair for theatrics might more readily impress the reviewer in the manner in which he addressed the issue as opposed to what the evidentiary value might be on the legal issue. Contrary to what some may think appellate judges are not beyond the human influences to which the laymen are subject. The actors on the video tape in some instances may have a bearing upon the impartiality expected of the appeals personnel.

The criminal case presents additional problems. The average person accused of a criminal offense is normally not the type of individual who can express himself well in a live setting and very often gives the impression that he is either not telling the truth or is at least being evasive, when actually he is being very candid in his testimony. It is much fairer to look at his appeal through the "cold" printed word as compared to his often times faulty live presentation. On the other side of the coin, prosecutors are frequently charged with remarks considered by criminal appellants as being highly inflammatory. What interests the reviewing court is what was said from the standpoint of its bearing upon the rights of the defendant and not particularly in the way it was said. If the latter should be the case, there would be many more reversals based upon the manner in which a remark is made rather than its content.

Another consideration in criminal appeals is worth mentioning. In various parts of the nation surveys are being made which demonstrate that black defendants in criminal actions receive more severe sentences than their white counterparts. In the bulk of the records presented to the Kentucky Court of Appeals, there is nothing contained therein indicating the color of a man's skin. The video tape would eliminate this concept.

As to the time involved in reviewing a record, it can be said without reservation that the video tape utilizes more of the judges' hours than the conventional transcript. In part, this is attributable to lack of synchronization between the machine making the tape and the one upon which the

playback is attempted. In a nutshell, this means the counters are not compatible so the reviewer expends a great deal of time searching for specific testimony. Also to be taken into account is whether the briefs contain specific references to given places on the tapes and whether those are accurate. It has been suggested that the courts acquire yet another piece of equipment which will render the capability of going directly to that point on the tape that a party wishes to be particularly examined but whether this will be able to solve the problem remains to be seen in light of the technology and the potential of human error in making the citation if the briefs contain any citations whatsoever.

Many appellate judges circulate portions of a record, which are easily photocopied and mailed to other panel members. This can be accomplished usually by a secretary. With the video system, this could only be done by the acquisition of fourteen or fifteen more video records, making the tapes or portions thereof, packaging them and mailing them to the other judges. There can be little doubt that this is more time consuming than the photocopy method.

As to the quality of tapes, it can be reported that some are forwarded with blank video while others are of such poor quality that the reviewer is unable to discern the characters. Typical of this problem was a motion to file a transcript to supplement a video tape record which was presented to a motion panel in August, 1986. On part, the appellate pointed out that the Commonwealth stated in its brief: "much of what Ms. Smith said to the judge and trial counsel is unintelligible due to the poor quality of the recording." He further argues that because the record does not reveal what Ms. Smith said to the trial judge, the record is in effect incomplete and since it is appellate's duty to produce an adequate record on appeal, this Court should assume in this case that the record supported the actions of the trial judge.

The appellee-respondent opposed the motion. Motions are being submitted frequently to the Court of Appeals to correct video inaccuracies. It should be noted that over a year ago the video concept of appeals was presented to the Court and it was soundly rejected. At the present time, the members of the Court maintain that position.

One of the abuses of the video taped trial can be found in a case presented for review. A good portion of the tape was consumed with the picture of the trial judge, and when not so utilized the screen always had in one of the four corners the court while on the balance of the screen appeared one or more lawyers but at all points, there were always two or more individuals (i.e., judge and one lawyer, judge and two lawyers, judge, lawyer(s) and witness) talking at the same time. That record could best be described as a disaster.

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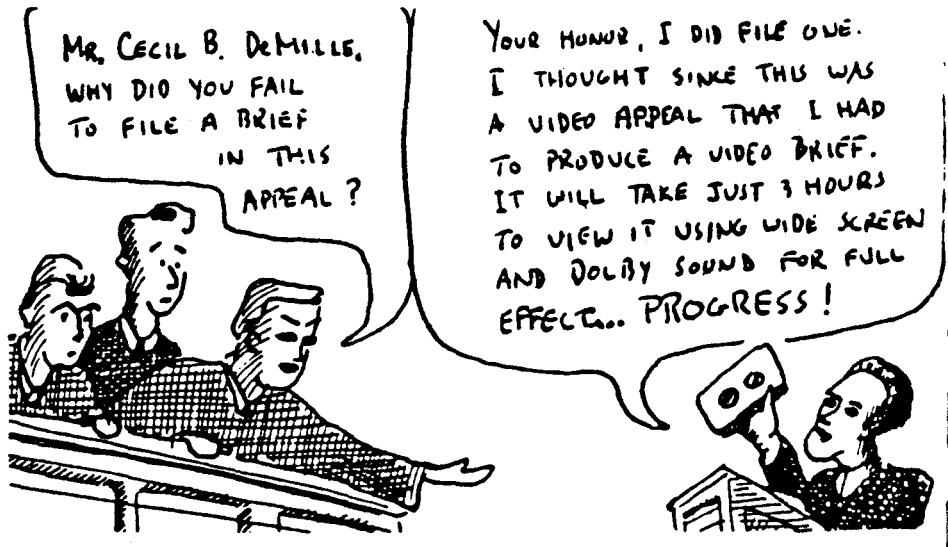
There is some conjecture about the political implications of the videc trial. With one court alread broadcasting the day's crimina trials over a public access outlet at the beginning of prime time, there is cause to wonder if this could be construed as a continuinc campaign for political advantage at some future time.

When the court of justice moves tc replace the human element in the courtroom, it should do sc cautiously. We are not in t business of movie production but, if we were, then at future judicial seminars and bar associatior meetings we could have awards for best video trial judge, best leac male lawyer-actor, best lead female lawyer-actress, best supportinc male lawyer actor, best supportinc female lawyer actress, best judge video technician, best dressec litigants, most intelligent jury and on ad infinitum.

Charles B. Lester, Judge
Kentucky Court of Appeals
6th Appellate District, Division I

Judge Lester was appointed August 16, 1976 to date. He maintains his chamber in Fort. Thomas, Kentucky



MARTIN
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January 6, 1983

Senator Mike Halligan
Montana State Senate
Capitol Station
Helena, Montana 59620

Dear Mike:

I am writing you with regard to proposed legislation coming up regarding Montana court reporters. In a brief synopsis we are asking for a much needed change in the appeal transcript rate from a folio rate -- which is the status quo -- to a much more understandable per page rate. Secondly, we are asking for a salary increase, coupled with a cost of living increase. Thirdly, we are seeking state certification of Montana reporters.

Court Reporters received the first increase in the transcript folio rate since the 1890's during the last legislature. The increase was from 7 1/2 cents to 10 cents a folio. A folio is defined as consisting of 80 to 100 words, thus achieving an average of 2 1/2 folios per page. The net result is a 30 cent charge per page per copy. With the requirement of an original and four copies for civil appeals, under the statute as it now stands, we are able to charge $1.50 a page. Unfortunately, bare minimum costs consisting of just the typing fee and photocopying amount to $1.05 per page, leaving 45 cents a page to compensate the reporter for his labor and other overhead; which, I might add, is on the official reporter's nights, weekends and any free days they might wrangle. The folio rate is vague and interpretations often vary.

The per page rate suggested would be equitable to all concerned. It is a rate presently authorized by the United States Judicial Conference; i.e., $2.00 per page for the original, 50 cents per page for the first copy, and 25 cents per page for each additional copy. There would no longer be the various interpretations of what the folio rate actually is. It would set out a clear and concise guideline enabling all concerned to easily and accurately predict the appeal costs.

As business people, I feel we are entitled to a fair return on our dollar and it's obvious that has not been the case. For too long we have subsidized both appeals at our own expense. Please help us change that. As a point of interest, our present folio rate is the lowest in the U.S., and to top it off, we are below Puerto Rico's rate.

Our salary is presently set at a minimum of $14,000 and a maximum of $20,000. The proposed bill would recommend an increase from a minimum of $18,000 to a maximum of $26,000. We are also asking for a

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cost of living increase similar to the one the Juvenile Probation Officers are now receiving. For your added information our surrounding states have the following rates for salaries and transcripts:

| STATE | SALARY | TRANSCRIPT RATE |
|---|---|---|
| Idaho | $24,000 w/cost of living index | $2.00 p.p. original<br>No copy rate dictated |
| North Dakota | $28,000 w/cost of living index | $1.90 p.p. original<br>.35 first copy<br>.15 each add. copy |
| South Dakota | $17,180 w/cost of living index | $1.50 per folio for origina<br>.50 per folio all copies |
| Wyoming | $27,795 | $2.25 p.p. original/one cop<br>.90 p.p. each add. copy |
| Washington | $30,000 King County<br>25,000 Spokane County<br>15,000 small counties<br>w/cost of living index | $2.00 p.p. for indigents<br>No rates set for non-indig<br>appellants |
| Utah | $21,000 with 3 percent increment built in | $ .50 per folio |

Too long our profession has been equated to an overglorified secretary. We are not. We have a special skill upon which the rights and liberties of all citizens who chance into the courtroom rely upon, which brings me into the matter of certification.

Nearly every state in the U.S. has certification requirements reporters must meet. To everyone's detriment Montana does not. Consequently, our state is becoming the proving ground for new reporters, some of whom have graduates, others who have not. How unfortunate if you should ever be in court with your freedom or property dependent upon that record if that reporter is not competent. And who's to know? A layperson certainly cannot read the stenotype notes and know if it's accurate.

Our national association requires all members to attain the registered professional designation. This RPR designation, I feel, is a minimum requirement that any competent reporter should be able to attain. This test is given twice a year, and once attained continuing education is required to maintain that designation. Our state association has been administering the test for the last three years here in Montana. What we are seeking is that the authority be placed in the Supreme Court to require that reporters coming into Montana pass that minimum requirement. There would be no need for a new agency to be created, and no funding required as our state association would conduct the testing at our own expense with assistance from our national association.

I sincerely seek your support for our bill. It is hard to appreciat the importance of it until it is your life or property that is dependent on the accuracy of that trial record.

If you have further questions, please contact me or Mr. Jerome Anderson, who is representing us at the legislature.

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# The New Mexico Trial Lawyer

The Journal of the New Mexico Trial Lawyers' Association

April 1983 Vol XI No. 4


## C.A.T.: AN ALTERNATIVE TO TAPE TRANSCRIPTS

*Jennifer Bean and Roger Proctor*

*Jennifer Bean has been a Certified Court Reporter for six years. She is currently the President of the New Mexico Court Reporters Association. A freelance court reporter, she specializes in depositions and was the first court reporter in the state to use the CAT system.*

*Roger Proctor is an official court reporter in the Second Judicial District. He is a member of the Board of Certified Shorthand Reporters, a regulatory body. He serves as the liaison officer between the CSR Board and court reporters at large in the state.*

The Supreme Court, the Court of Appeals, judges, lawyers and court reporters alike, have a common interest in an accurate, reliable record for the protection of litigants and the general public, thus improving the quality of justice in the New Mexico Court System.

*Jennifer Bean*

One of the goals we will work towards in this article is to help everyone better understand how CAT could substantially expedite the appellate process in New Mexico.

"Computer Aided Transcript" — whose acronym is CAT — is presented here as an alternative to a taped transcript system. This article proposes a pilot program for Bernalillo County utilizing CAT on a side-by-side basis with the existing tape system, offering a choice to the litigant.

*(Continued on Page 44)*

## DISMANTLING EMPLOYER IMMUNITIES: A New Era in Employee Rights

*Eric Isbell-Sirotkin, J.D.*

*Eric Isbell-Sirotkin practices with Reiselt & Rosenfiled, P.A. in Albuquerque. He also teaches employment and labor law at the University of New Mexico School of Law and is the author of the recent article "Defending the Abusively Discharged Employee: In Search of a Judicial Solution." 12 N M L Rev 711 (Spring 1982).*

> In purchasing labor does the employer buy the right to regulate the employee's day as he sees fit? Does he purchase the right to ignore the proprieties of conduct, or must he treat the employee with decency and respect for his physical and psychological needs? Philip Selznick, "Law, Society and Industrial Justice" 135 (1969)

Until recently an employer's "propriety of conduct" included the century old unfettered right to terminate an employee "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of (a) legal wrong." **Payne v. Western and Atl. R.R.** 81 Tenn 507, 519-20 (1884). An employer's immunity from suit was primarily reinforced through this judicially created "employment at will" presumption. However, a contributing factor had been the inability of the trial bar to recognize the applicability of traditional causes of action to abuses arising within an employment relationship.

*(Continued on Page 53)*

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# From the Editor

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We have come to believe that the ultimate guarantee in a criminal or civil trial in a free society is the trial by the impartial jury. This idea has been around since the Ninth and Tenth Centuries in Europe, delivered to us by way of the Magna Carta and subsequent English colonization of America. Yet, it is almost astounding how long it is taking to actually provide a litigant with a fair and impartial jury of his peers. Jurors in Europe were limited to only certain portions of the wealthy landed classes. This requirement persisted in the United States through approximately 1840, when jurors were always selected from property owners, frequently with the further prerequisite that only owners of a certain *value* of property could be jurors. After 1840, the pool of prospective jurors was opened a little wider, by drawing them from "white male electors". Slowly, haltingly, the former requirements have been dropped — first, the requirement that the juror be "white", thence that he be "male".

So now, in this age of greater enlightenment, we have only one vestige of the previous limitations placed upon jurors. They must be *electors*, in nearly every state of the Union. Several challenges have been made to this means of selecting jurors, but have been noteably unsuccessful, unless the challenging party could point to some restriction that was coupled to the elector-requirement, such as a systematic way of reducing or eliminating certain members of a race.[1]

The problem with challenging the requirement that the juror be an elector is that there is no good way of showing what types of people are being systematically excluded by that requirement. Yet, there is always the suspicion that somehow the litigant is not really being tried by his peers, since the litigant may or may not be an elector, at that particular time in his life..

New Mexico has taken a giant step forward in promoting a more fair selection of jurors with the recent passage of Senate Bill 136, which provides for a pilot program in Valencia, Sandoval and Cibola Counties. The program provides that the jurors will be selected from driver licenses as well as from poll books. This will help a lot.

However, it is not going to solve the problem that every trial lawyer is aware of, at least in Bernalillo County. We all recognize that the juries in this County seem to be seriously dominated by retirees, housewives or employees of the utility companies and Sandia Base. In other words, large segments of the high, middle, and low income groups are virtually eliminated from the jury pool. One seldom sees welders, shoe salesmen, professionals, or construction workers sitting on the jury.

This situation is largely one that has come in through the back door: a juror who is otherwise selected randomly can obtain exemption from service by showing that (1) he is making more than $3.35 per hour, and (2) that his employer will not pay him ordinary wages while he is on jury service, and (3) asserting that it would be an economic hardship for him to serve as a juror for a month. Only certain persons, such as retirees, housewives, and employees of certain large companies fail this test.

Recently, the Second Judicial District on its own took another giant step forward to eliminate the implicit screening process in the present selection system. It has decided to henceforth limit jury service to only *two weeks*. The purpose of this decision is to make it easier on both the jurors and their employees for the jurors to serve. Previously, the juror served for a full month, and whether he was actually selected or not, his employment schedule was disrupted by various necessary appearances and voir dire selection.

This step that the Second Judicial District has taken should be generally applauded. It is a step in the right direction to obtain as fair and impartial a jury as possible.

1. Strauder v. West Virginia, 100 U.S. 303

*C.A.T: An Alternative — cont.*

CAT use has virtually swept the country in the preparatio of typewritten transcripts both in and out of the courtroom resulting is a savings of time and money without sacrificin accuracy.

The end result of CAT technology is a rapidly prepared typed transcript produced from an interface process betwee the court reporter and the computer. The typed transcript of a long and complex trial can now be produced in days instead o months.

New Mexico's adoption of the tape transcript system unfortunately came right at the time when CAT had just begun to prove its tremendous capabilities and its economic feasibility. As things now stand, New Mexico's court system has missed out on this revolutionary development.

While the tape transcript system has some advantages, its adoption in New Mexico as a mandatory process has created considerable controversy in the legal community.

On the other hand, CAT has not been controversial anywhere it is in use. CAT transcripts are produced extremely rapidly, often on a daily-copy basis.

What exactly is CAT? How does it work?

As its name implies, CAT turns the reporter's notes into a typed transcript.

This process, however, is far from automatic.

Each court reporter using the computer must prepare two "dictionaries", which permit that reporter to communicate

with the computer. The first is the "permanent" dictionary, an extensive listing of all individual denotations the particular reporter uses in his or her note-taking; and the second is the "job" dictionary, which contains all the words common to a particular job or case. These dictionaries must be prepared in advance, and they are utilized by the computer in preparing the transcript.

Here is the sequence in CAT preparation: 1) the court reporter takes notes as usual on a stenographic machine. The difference is that the machine has been fitted with a magnetic tape cassette assembly which records the reporter's notes electronically at the same time they are being recorded on paper. 2) After the trial, or deposition, the court reporter's notes are fed into the computer via the magnetic tape that was produced. 3) The computer, utilizing the dictionaries prepared by the reporter, translates the notes into English and projects the words onto a cathode ray tube (similar to a TV screen). 4) The court reporter (or a trained assistant called a "scoper") then looks at the screen and refines the text into a readable form. This is done by selecting word options according to contextual meanings; such as, words that sound alike but are spelled differently and mean different things; by adding proper names; by punctuating; by paragraphing, and so forth. 5) Thus refined, the text is then printed at a rate of 125 pages per hour. 6) Thus printed, the final version is proofread and corrected.

It is reasonable to say that appellate transcripts, prepared with the use of a CAT system, could be routinely completed and delivered within 15 days from the end of the trial, even in lengthy and complex cases.

We believe that it may be too soon to say that the tape transcript system is the final answer for our courts. We believe that a pilot program could be established in Bernalillo County at a low cost, which would permit the courts to discover and consider the capabilities and advantages of the CAT system.

For approximately $35,000.00, a pilot program could be established using two reporters and either the Cimarron or Baron system, which are the two most popular systems available. The main systems consist of a tape reader, dual disc drive, CRT and printer, plus the special stenotype machine. Either the Cimarron or Baron can comfortably accommodate two to four reporters on a full-time basis.

Two reporters would need only one disc drive, one scope (CRT), one printer, one tape reader, and their own individual datawriter. For approximately $35,000 the system itself is complete. That cost includes on-site training of each reporter for two and a half days, and continuous update and system support, via hotline. The reporters are already employed, of course, and would not represent an additional cost.

The pages per month that a reporter can produce under the CAT system will vary, depending on work load and proficiency. But with the reporter working at a reasonable rate of speed and proficiency, it is not unreasonable to expect each reporter to produce somewhere between 700 and 1500 pages of transcript per month. In most cases, this will be 100% of the transcript load of a reporter; the addition of a scoper to back up the reporters would add even more to the reporters' production capacity.

The authors believe that a pilot program such as the one proposed here and initiated in other states, is a viable way to substantially expedite the appellate process, thereby improving the overall quality of justice in the New Mexico State Courts.

EXHIBIT #

## *Uniform Jury Instructions*

# COMPARATIVE NEGLIGENCE INSTRUCTIONS — PROXIMATE CAUSE AND LAST CLEAR CHANCE

*Rebecca Sitterly, J.D.*

The concept of proximate causation has traditionally been sidestepped in the Courtroom whenever possible because of anticipated jury confusion or the lawyers' unfamiliarity with the doctrine. As long as traditional contributory negligence worked as a complete bar to a plaintiff's recovery, a defendant needed only to prove slight causative fault by plaintiff and recovery would be entirely defeated. Now, a showing of only slight fault does nothing significant to help the defense.

It has been frequently stated that the introduction of comparative negligence should have no effect on proximate causation;[1] however, the reality is that defense strategies must now be directed toward the other end of the scale — proving that plaintiff was *entirely*, rather than just slightly at fault.

One of the most obvious ways to accomplish this goal is to manipulate the concept of proximate cause so that the jury is convinced that plaintiff's conduct was the *sole* proximate cause of his injuries — thus barring recovery. And "proximate cause" lends itself to a variety of definitions. The Restatement defines it in terms of whether conduct was a "substantial factor" in causing the injury;[2] our uniform instruction (UJI Civ. 3.8) leans toward a "but-for" definition; still another view places the proximate cause as the last or nearest factor to the injury.

As defense familiarity grows, we will see an intensified effort by defense lawyers to manipulate the definitions and convince the jury that plaintiff's conduct is the sole proximate cause of his injuries. The litany could go as follows: although it is admitted that defendant may have contributed to this incident, not all contributory conduct means liability — only that which proximately caused the injury. The complete bar to recovery placed by the use of sole proximate cause in this manner can be tantamount to the contributory negligence bar.[3] Unfortunately, Armstrong v. Industrial Electric & Equipment Service, 97 NM 272, 639 P.2d 81 (1981) illustrates that our uniform instruction on proximate cause can be used to aid the defense "sole proximate cause" stratagem. UJI Civ. 3.8 defines proximate causation and includes an *optional* paragraph which explains clearly that there may be more than one proximate cause of an injury. Armstrong was a comparative negligence case, but the trial judge refused the optional language. The defense convinced the jury that plaintiff's conduct was the sole proximate cause of his injuries and plaintiff recovered zero. On appeal, the Court stated that *normally* the optional language should be included in a comparative case, but that in this instance the jury could

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# A Management Experiment: The New Mexico Pilot Project

By Jill Berman Wilson

As any user of computer-aided transcription knows, making a move to CAT takes dedication, hard work, and a major financial commitment. It also takes careful planning and time. During the past two years, all these things were made especially clear to the reporters and administrators at the Bernalillo County, New Mexico, District Court in Albuquerque; the people at the New Mexico State Court Administrator's office; Justice Mary Walters of the New Mexico Supreme Court; as well as members of the New Mexico Shorthand Reporters Association and NSRA. During that time, all these people have been involved in the planning and implementation of a pilot project in which CAT has been installed in the busiest trial court of that state.

Beginning in 1977, court administrators of the State of New Mexico began using tape recording in lieu of live reporters in their trial courts. Initially, the tape machines were used in domestic relations and worker's compensation cases; but by early 1984 all cases except civil trials were being recorded instead of reported. In most courtrooms, the court reporters remained employed but did little actual reporting; they were used as tape monitors.

This state was by no means alone in its use of tape recording. It was, however, unique in that no written transcripts were prepared of the recordings. The tapes themselves became the record, and when a case was appealed they were forwarded to the Court of Appeals (and, if further appealed, to the Supreme Court) for review.

**New Mexico was by no means alone in its use of tape recording. It was, however, unique in that no written transcripts were prepared of the recordings. The tapes themselves became the record, and when a case was appealed they were forwarded to the Court of Appeals for review.**

The justices at the Court of Appeals and Supreme Court were faced with the ponderous task of reviewing the record from these audio tapes. So the Court of Appeals hired a staff of attorneys whose primary function was to listen to the appeal tapes and create summaries. In addition to reviewing these documents, the justices spent long hours locating and listening to sections of the recordings that dealt with the issues on appeal.

While the New Mexico Court of Appeals and Supreme Court do not consider large numbers of cases when compared to some jurisdictions, this tape procedure was causing appellate backlog and delay. In addition, expenditures for the necessary staff were eliminating any potential savings that might have been realized by use of the tapes.

So in October of 1984, then Chief Justice Federici appointed a committee to investigate the possibility of returning court reporters into the system. This committee, chaired by Justice Mary Walters, was not in favor of returning to the old court-reporter arrangement, where dictation was used as the chief means of transcript production. The committee wanted to increase productivity, reduce delay, and maintain costs at current levels. The means for achieving these goals, at least on an experimental basis, seemed clear—computer-aided transcription.

The committee members, some of whom were reporters, felt they needed additional help with such matters as determining the cost of a CAT pilot project and selection of equipment. NSRA President Raymond F. DeSimone offered the assistance of the Association's Research and Technology Department, and I began working with this committee that same month, October 1984.

Even starting the pilot project was difficult. The state legislature was reluctant to

*Jill Berman Wilson is now president of Wilson Levy & Associates of Plainview, New York. She is NSRA's consultant on the CAT Pilot Project in New Mexico —work she began as NSRA's Director of Research and Technology two years ago.*

allocate funds. An initial six-month delay resulted. Then it was hard to decide on appropriate equipment. Because there had been so little transcript prepared during the past five years, there were few reliable clues to use in predicting the number of pages that would be produced in the future.

The reporters themselves were concerned about some of the ground rules. They had been told that, since state funds were being used to purchase and house the CAT equipment, they themselves would now be required to supply at no charge "free process" transcripts (those ordered by the prosecutor's and public defender's offices) and transcripts for indigent criminal defendants. They'd been paid for all of these in the past. In addition, officials of the New Mexico Shorthand Reporters Association were worried because many of the reporters involved had for a number of years done little stenographic reporting and might have lost some of their skills and speed.

Nonetheless, the committee managed to overcome the legislature's reluctance on funding, to approximate as nearly as possible the potential volume of transcript, and to convince the reporters to try producing the free transcripts involved. On this last point, the reporters were not to be charged for CAT time and supplies needed to produce the free transcripts, and computer fees were arrived at for their paid transcripts that were significantly lower than the costs for using typists.

Then NSRA provided necessary materials, and NMSRA sponsored speedbuilding sessions for reporters who felt they needed to regain shorthand skills before the project began. Around the same time, the committee worked with me and with the State Court Administrator's office as we all developed a detailed request for proposal to send to potential CAT vendors.

After demonstrations by four potential vendors, at which the reporters were invited to ask questions and express opinions, the Administrator's office chose Stenograph Corporation for the pilot project. The equipment they selected included one Cimarron VI, four Cimarron III configurations, a laser printer, and several DataWriters.

The equipment was installed at the beginning of February 1986, and training began. Groups of three reporters each were given 2½ days of instruction, and by the end of that month 12 reporters had been trained in Albuquerque. In addition, Vicki Akenhead, RPR, traveled to Stenograph's headquarters outside of Chicago to be trained on the Cimarron system and in CAT management. That's because Vicki, in addition to being the full-time reporter for Judge Joseph F. Baca, serves as managing reporter.

A few reporters, during earlier work with CAT, had already developed Cimarron dictionaries, but most had to start fresh with this task. To speed up the process, many translated and edited matters for which transcripts had not been ordered. Most of the reporters began using the new system immediately for civil work, which they'd been reporting stenographically all along. They all had to cover their reporting and monitoring assignments as they learned to use the new equipment. Full use of this CAT system is being phased in over a period of close to a year to ensure that reporters are not overwhelmed by these requirements at the beginning of the project.

On June 1, reporters began using the new CAT system for criminal pleas and sentencings, as well as for worker's compensation matters. Then on July 1 they began reporting short one- and two-day criminal trials on CAT. As this article is written, in September, it's expected that by late fall all tape recorders will be out of the courtrooms and every matter heard will be reported stenographically.

Ms. Akenhead, who had very little previous CAT experience herself before the project, says those reporters who did have experience have been a tremendous help to the newcomers. Included in this group of experienced CAT users are Janice Aylesbury, Carmen Mendoza, Edna Ford-White, Roger Proctor, and Brook Lane. She says they provided tips and helped solve problems, but their greatest service has been the sense of determination and confidence they have passed on to the others.

The reporters I talked with commented that for the most part the judges have been very supportive of their efforts. In order to even the workload, a modified pooling system was put into effect. Ms. Akenhead says that, contrary to what she expected, this managerial change caused more concern among the reporters than the judges. She explains, "Being assigned to different judges' courtrooms means the reporters must become familiar with the different ways the judges manage their courtrooms. It's not an easy change to make, but they've done a terrific job."

She also says the reporters have gotten a good deal of support from both the personnel at the State Court Administrator's office and the Supreme Court. Several new policies have been instituted there to aid in the changes, including a requirement that all new reporters have previous CAT experience.

The reporters themselves have had to adapt to a new system of management. Back when reporters were assigned to individual judges, they geared their own schedules to those of "their" judges. Now reporters are required to be in the courthouse by 8 A.M., whether or not individual judges are present, in case they're needed to cover other courts. In addition, there's a great deal of newly instituted record-keeping and scheduling designed to guarantee that the CAT system is fully used and that all reporters have equitable time allotted on the system. The reporters say they've found these procedures to be very time-consuming.

The long-term success of the pilot project can only be evaluated after still more time

## REPORTERS MANAGE BETTER THAN MACHINES

In early June, I visited the Bernalillo County Courthouse to talk with reporters and administrators about this project to obtain the information for this article. I sat in the courtroom of Judge Ross C. Sanchez, waiting for his reporter, Roger Proctor, to finish reporting a very hotly contested motion. Emotions were high so that more than once Mr. Proctor was forced to interrupt and remind counsel "One at a time, gentlemen." In addition, outside the courtroom's open windows workmen were using a noisy jackhammer to repair the building's front steps.

Had a tape recorder been used to make the record, most, if not all, of this session would certainly have been unintelligible.

Incidentally, Mr. Proctor tells me a transcript will be required, as plaintiff's counsel intends to appeal Judge Sanchez's ruling.

—J.B.W.

has passed. For example, it remains to be seen whether the requirement to produce "free-process" transcripts without payment will be an overwhelming burden on the reporters. Also, it will take months to determine whether the CAT system is cost-efficient for the reporters as well as the State, and whether the project should be expanded throughout New Mexico.

These, however, are the types of reasons why pilot projects are useful. Success or failure here will provide invaluable information to other courts considering governmentally funded moves to CAT, not only in New Mexico but throughout the country.

One thing is certain, though, even this early in the project: everyone involved deserves a great deal of credit and thanks from the court-reporting community. That includes the people at the New Mexico Supreme Court, the State Court Administrator's office, the Bernalillo County District Court, and certainly the reporters involved—Vicki Akenhead, RPR; Janice Aylesbury; Edna Ford-White, RPR; Jan Gallegos, RPR; Kim Henson; Dawn Kemper; Brook Lane, RPR; Carmen Mendoza, RPR; Roger Proctor, RPR; B. J. Serna; Mary Simms, RPR; Evangeline Trujillo; and Suzan Wilborn. They've all made a commitment to this technology and to the future of the court-reporting profession. They are today making the sacrifices and undertaking the hard work that will, I feel certain, make this project in New Mexico a model for courts throughout the country. ■

EXHIBIT I
DATE 2-10-87
514

**The reporters themselves have had to adapt to a new system of management. . . . Now reporters are required to be in the courthouse by 8 A. M., whether or not individual judges are present.**

# A View From the Inside

**By Jan Gallegos**

The CAT room, as it's been named by the reporters who use it, is an impressive place. Often all five computers are being used at once; sign-up sheets are being filled out for computer time; dictionaries and word lists are put on shelves so reporters can share their knowledge with others. The project, so far, is a success, but for the reporters involved the hardest part is yet to come.

Within the next few months tapes will be pulled out of our courtrooms completely. Criminal appeals are to be transcribed at no charge, and with a 10-day deadline.

In Bernalillo County District Court, cases are rotated on a monthly basis. Judges hear a month of criminal cases, a month of civil nonjury, followed by another month of criminal, and then a month of civil jury trials. Backup cases are set, so that each day's time is used to the fullest.

Often a reporter will spend five straight weeks taking stenographic notes in court, or taping in court, with no time to transcribe. Usually only when scheduled cases go off the calendar at the last minute do reporters have time free to work on transcripts. And these free periods can never be predicted.

Each of the reporters in the courthouse is unique, and for each the pilot project has created unique challenges. In the past, a reporter has worked basically only with the staff of that office—the judge, secretary, and bailiff. As a result, until this project, few reporters were friends with one another; few even spoke to other reporters regularly. But now each of us confronts the entire group with problems and gains strength from the others.

Our motto has become that the skill of the group is only as good as that of the least-skilled reporter. So each of us takes an active, caring interest in the progress of others on the computer. We face as a group each problem that arises, usually with as much humor as the group can muster.

There have been many times when the obstacles to this project have seemed impossible to overcome. Some reporters grasp the concepts behind CAT more quickly than others. For a reporter who has been typing his or her own work for 15 or 20 years, the computer can seem like an alien from outer space. Then, too, some reporters have children at home and have problems getting to the computer before and after work; some have conflicts within their own offices that have made progress difficult.

All scheduling duties related to computer time, including the pooling that has been necessary to ensure that each reporter has time on the computer and the scheduling changes that arise due to emergencies, have been handled by one of the reporters in the group, Vicki Akenhead, along with all her regular reporting duties. There are no backup reporters for the group. Each reporter is assigned to a judge. So when two reporters call in sick, it is no easy task to schedule 11 reporters to cover 13 courtrooms.

Each reporter in the group realizes the impact that success or failure in this project could have on our profession. And each has so far given the project complete dedication and cooperation. As an example, each has put in substantial overtime to keep the project on course.

Of all the reporters in the country watching the New Mexico pilot project, none is more anxious to know its outcome than the 13 reporters involved. Without a managing reporter who is designated for management duties alone, without even one backup reporter to help cover vacations, sick days, and maternity leaves, without the pooling coverage needed to produce transcripts, and with so much computer transcription having to be done after hours at the courthouse rather than at their homes, the reporters themselves have wondered how the project will succeed.

But for today, at least, the atmosphere in the CAT room is optimistic. Only time will tell how far dedication and perseverance will need to be stretched to make the project work. ■

*Jan Gallegos, RPR, is an official reporter at the Bernalillo County District Court in Albuquerque, where the New Mexico Pilot Project is taking place.*

Will CAT stand the

EXHIBIT K
DATE 2-10-87
HB 514

# Test of the "Do-Gooders"?

By Frank O. Nelson

## New State Law Mandates Computer Transcription in Some Cases

The following management scenario occurred in a large state this past year: At the behest of the state's Judicial Council, and with the support of the Attorney General, a bill was introduced into the legislature by an Assemblyman. It moved smoothly through the legislative process with minimal discussion and little opposition, and was signed into law by the Governor. Effective date: January 1, 1987.*

The language of the bill was unequivocal:

> In any case in which a death sentence may be imposed, all proceedings conducted after the date of this section in the Justice, Municipal and Superior Courts, including proceedings in chambers, shall be conducted on the record with a court reporter present. *The court shall assign a court reporter who uses computer-aided transcription equipment to report all proceedings under this section.* [Italics added.]

From seconds-long criminal calendar items to full-blown state court criminal trials, a CAT reporter must be assigned to potential death penalty cases. So why should reporters care? It's an administrative problem, right?

Perhaps not. Consider the following views of some court reporters who put their thoughts in writing:

> ....This could be a precedent to setting up a "class system of reporters." ....The final product, i.e., the verbatim transcript, is what we are all about, and as long as it is completed in an efficient and accurate manner, either method should be allowed. It is inconceivable that [the association] would have sat on its hands years ago if lawmakers had attempted to legislate forced use of the Stenograph machine, leaving pen writers ineligible to report or transcribe a certain type of court proceeding. The concept is identical.

Another wrote:

> I feel very prejudiced against for your new proposal on only using computers on death penalty cases. My transcripts are just as complete, accurate, and timely as anyone else's, if not better, because I usually type them myself and [they] are very error free.

And a third said:

> I'm a non-CAT reporter and I feel my right to report any death penalty matter has been violated.

Lastly:

> I do not believe our method of transcription should be dictated to us by the government. I think the real issue is whether or not transcripts are filed on time....I do not wish to switch to CAT. I am very satisfied with my present system of dictation/typing....If I was required to go on CAT my monthly payments on a computer would be far greater than I presently pay my transcriber....I believe this new bill is very discriminatory.

On the other hand, some felt this way:

> The legislature is sending a message to reporters. Government officials and attorneys are aware of the many benefits of computer reporting. They understand how much time and money they will save. We know through personal experience of one-reporter daily transcripts that attorneys are eager to work with computer reporters in exploring computer technology, which offers so much now and offers still more in the future. [The legislation] makes logical economic sense. [Our association] should embrace the new law and make it effective by offering more services and thus preventing further inroads from electronic recording.

Inevitably, although belatedly, harsh criticism was leveled at the state

* *The state involved is California. See also Short Takes item at page 60.*

*Frank O. Nelson, RPR, of Santa Barbara, California, is a member of our editorial staff.*

reporters' association for not vigorously opposing the bill. However, discussions had taken place at the association's board meetings during the pendency of the bill and the essence of those discussions was published in the board minutes. In addition, the information was published in the state association's house organ.

At one point the association's technology committee chairman counseled as follows:

> Requiring CAT in these cases may be impossible to implement as there may be no CAT reporters available in some jurisdictions.
>
> In those jurisdictions where CAT reporters are scarce, the courts may be required to pay additional fees to employ a CAT reporter.
>
> In those jurisdictions where the official court reporters do not use CAT, the court may be required to contract out some or all of their reporting services.
>
> In some jurisdictions the courts may perceive it is easier to attempt to require all reporters to utilize CAT (regardless of whether it's economically feasible for the court reporters to utilize CAT).
>
> Many jurisdictions operate just as efficiently without CAT reporters as those with CAT reporters. This legislation would be of no benefit to those courts.
>
> Most importantly, this legislation may actually be counterproductive in that death penalty cases may be delayed while courts search for CAT reporters.
>
> Although there are problems with this legislation...I don't believe [the association] should formally oppose this bill, because it is pro-CAT and the negative aspects of the bill more directly affect those who administer the courts. If [the association] wishes to oppose this bill, we should communicate our concerns to those who administer and fund the delivery of court reporter services and let them lead the opposition.

Ultimately, the association instructed its legislative representative to take a neutral position with respect to the bill, but to tactfully urge affected court administrative personnel to carefully analyze its ramifications vis-a-vis their responsibilities. Little was heard from other court personnel. The bill became law soon thereafter.

The tragedy of this event is that CAT became the whipping boy for the failures of human beings. CAT has always been and always will be only a significant tool for the use of the court reporter. It was never designed to be, nor utilized as, a divisive technology.

Were CAT vendors involved in the introduction or support of this legislation? Unlikely.

Was reporter discontent and disharmony the goal of the Judicial Council when introducing the legislation? Probably not. But the Judicial Council's failure to understand the full significance of the bill and upon whom the impact would be greatest is revealing of the Council's lack of knowledge of court reporting and the Council's unwillingness to seek the reporters' counsel in legislative matters affecting them.

Why did not other court personnel perceive the potential for difficulty in the bill's language? So far as can be determined, only one seemed to, and then only after the bill had been signed into law. One county's public defender wrote to the Judicial Council, in part, as follows:

> It is my experience that the most competent court reporters are now assigned to death penalty cases. These reporters are assigned important criminal trials because of their experience, trustworthiness, accuracy of reporting, speed in dictation, punctuality in attending scheduled proceedings, availability to the courts, congeniality, and overall competence. This bill is stated in mandatory language such that a court reporter with the above skills would be statutorily unavailable to the courts for use in the most serious criminal cases. The courts would be required to disregard some of the most able and trusted reporters in our court system in favor of others who have computer-aided equipment without regard to competence, availability of otherwise-qualified reporters, or inconvenience to the courts.
>
> In nearly all counties there exist many criminal calendars throughout the day in many departments. These calendars handle such matters as pretrial discovery motions, setting of future court dates, and other motions which may be brief in nature. Since the provisions of [this bill] apply to all proceedings in any death penalty case, court disruption can be predicted. The normal flow of a calendar would be interrupted anytime a death penalty case may be heard for any matter when the assigned courtroom reporter uses non-computer-aided equipment. The overcrowded courtrooms do not need procedural roadblocks to their efficient administration by taking recesses to locate a [CAT] reporter while an otherwise-qualified reporter stands idly in wait....
>
> I have practiced criminal law here for 13 years and have complete faith in the abilities of those chosen to handle complicated, extended trials. This bill will eliminate many of them from the cases in which they are most qualified to practice their skills. I urge you to recommend rejection of this bill.

Articulate, succinct, and correct. Why did the legislature, the Legislative Council, and the Governor seemingly ignore this good advice from a responsible public official and citizen who will be affected by the bill? It's common knowledge that even the very best proposed legislation is extremely difficult to pass and get the Governor's signature on if there is responsible opposition—sometimes even when there is irresponsible opposition. Why the virtual free ride for this particular bill? Speculation about that would be easy, but not productive.

**Why did the legislature, the Legislative Council, and the Governor seemingly ignore this good advice from a responsible public official and citizen who will be affected by the bill? It's common knowledge that even the very best proposed legislation is extremely difficult to pass and get the Governor's signature on if there is responsible opposition. . . . Why the virtual free ride for this particular bill? Speculation about that would be easy, but not productive.**

The language of the bill is now state law. Reporters, clerks of court, court administrators, prosecutors, public defenders, members of the bar, judges, and private citizens must now live with it. Recriminations by reporters against reporters will serve no good purpose except for those outside their ranks who, for nefarious reasons, may wish to see this happen. The reporters of the state affected must close ranks, work hard, work together, and either change the language of the law or make it work as is.

At the very least, let this experience be a warning beacon to reporters in other states to foresee and forestall similar legislation. Reporters simply cannot afford to allow CAT to be discredited, nor allow its use and control to fall into uncaring bureaucratic hands. The future of court reporting and the future of CAT are inextricably entwined; they are as one. ■

L
2-10-87
HB 514

FRANK M. DAVIS
District Judge
Fifth Judicial District

"Conformed copy"

February 5, 1987

Honorable Earl Lory
Chairman
House Judiciary Committee
State Capitol
Helena, Montana 59601

Dear Judge Lory:

As I am sure you are aware, there is a bill being presented, House Bill 514, regarding the use of video recording of court proceedings in place of the live court reporter. As I am also sure you are aware, there are a great many drawbacks in this proposal.

I have had to deal with television cameras in the courtroom on a number of occasions and have seen the reaction of the witnesses to this intimidating device. A video camera would be no different. Cameras are intrusive and intimidating in a court of law. I've had witnesses refuse to testify on camera, and I've held that is their right.

I question the proposed bill wherein it says that counsel will be responsible to secure a written transcript of the proceedings when necessary from the videotape. I know my own court reporter has had to try to create a written transcript from a tape recorded proceeding, and she was unwilling to certify it as to accuracy or authenticity. I doubt an accurate transcript can be created by a person who was not even in attendance at the proceeding. A court reporter will stop proceedings if she misunderstands or can't hear something. With the acoustics in most of these older courtrooms, the difficulty in understanding statements made and the transcription of the same would be very difficult and time-consuming, not to mention the duplicity involved in having to have both a written transcript and a videotape of a proceeding. Where is the cost savings?

EXHIBIT E

One of the most questionable aspects of this bill is the fact that should there be some sort of mechanical malfunction, it would not be noted until it was too late and potential for rehearings is greatly increased. In addition, as an attorney, I can't imagine having to try to draw up a brief by locating testimony, listening, possibly relocating it and relistening rather than being able to simply turn to a page in a written transcirpt and studying the contents of the evidence presented.

The bill also fails to take into consideration the cost of purchasing all the necessary items to get a courtroom set up for videotaping of proceedings. Who will pay for this equipment? I travel to three counties, and therefore in the Fifth Judicial District alone we would have to purchase three setups.

A few district judges have experimented with replacing the reporter with sophisticated recording equipment, and each time found it less efficient and in the end considerably more expensive. Therefore, it is my feeling that this bill should be soundly defeated.

Sincerely yours,

/s/ Frank M. Davis

Frank M. Davis

DEPARTMENT OF LABOR & INDUSTRY
DIVISION OF WORKERS' COMPENSATION
TED SCHWINDEN, GOVERNOR
MARGARET "PEG" CONDON BLDG.
5 SO. LAST CHANCE GULCH
STATE OF MONTANA
HELENA, MONTANA 59601

2-10-87
574

January 12, 1987

SEC. ☑
PARA. ☑
ATTY. ☐

Mr. David Kinnard
Attorney at Law
P. O. Box 21177
Billings, MT 59104

Mr. Steven J. Harman
ANDERSON, BROWN, GERBASE, CEBULL & JONES
Attorneys at Law
315 North 24th St.
P. O. Drawer 849
Billings, MT 59103-0849

Re: Vialpando v. Keil -- Claim No. 5-86-00011

Gentlemen:

I have received Claimant's Exceptions in this matter including a request for a transcript of the hearing. First, be advised that the cost of transcription of the record of oral proceedings is charged to the party requesting it. The way we customarily handle this is to charge one-half of the cost to each side. Anticipating the request for a transcript, we have had it transcribed at a total cost of $382.50

# 191.25 one-half

In reviewing the transcript already prepared, a problem has become apparent. It appears that the tape recorder malfunctioned and did not pick up a portion of the cross-examination of Mr. Keil, the direct examination of Lynn Keil by Mr. Harman, Michael Krank, Walter Clevand, David Keil, and the first part of Randy Popescu's testimony. The transcript resumes at the end of Mr. Harman's direct examination of Mr. Popescu. This may present a significant problem in the Administrator's review of this matter. My first suggestion to resolve this problem would be for me to present for your review a stipulation regarding the facts presented in testimony prepared from my detailed notes. Otherwise, we will have to reconvene in order to make a record of the missing testimony.

Submitted by Jerome Anderson lobbyist for the Montana Shorthand Court Reporters Ass

Division Telephones:
Administration 406-444-6518
Insurance Compliance 406-444-6530
Safety 406-444-6401



publications & graphics

I am sorry for the inconvenience presented by the incomplete transcript. Please advise me of your opinions on how to resolve this problem.

Sincerely,

STEVEN J. SHAPIRO,
Chief Legal Counsel

SJS/gp

DWC-1351t

EXHIBIT N
DATE 2-10-87
HB = 514

OFFICE OF THE COUNTY ATTORNEY
PATRICK L. PAUL
CASCADE COUNTY COURTHOUSE
GREAT FALLS, MONTANA 59401
TELEPHONE (406) 761-6700

February 9, 1987

The Honorable Earl Lory
Chairman
House Judiciary Committee
State Capitol Building
Helena, MT 59601

Dear Mr. Chairman:

I am writing this letter to express my concern over House Bill No. 514 entitled "An act to provide for videotape recording of district court proceedings; etc."

Since 1982 I have worked as a Deputy County Attorney in Cascade County and as such have spent many hours in the courtroom both in trial and hearings. After reading House Bill No. 514, I felt that there was a need to point out the problems which would arise if only videotaping were used during court proceedings.

The first issue that should be addressed is whether or not there will be an adequate record for appeal purposes. I have dealt with videotaping in some instances and have found that many things can go wrong. In some instances sound may not be turned high enough for each different witness, or several people may speak at once and garble conversation on the tapes. Either of these problems can effectively eliminate any record you need for appeal. A court reporter, on the other hand, can ask witnesses to speak up if they are not speaking loud enough, or tell the attorneys and witnesses to speak one at a time so that they can record the arguments and testimony. A machine is incapable of doing these things, and without reminders people can very easily make these mistakes.

In criminal cases if a record cannot be made of the proceedings prior to trial and the trial itself, then the case can be dismissed upon appeal. This has happened when court reporters have died or become very ill and transcripts could not be typed in time for an appeal. The penalty to the prosecution is very severe, particularly when the prosecution is not responsible for a record being made of the

proceeding but rather the court is. If courts are allowed to use only videotaping, it very well could force prosecutors to expend money from their budgets to hire court reporters for major hearings and for trials in order to ensure that there will be a record on appeal.

Many times equipment failure is not noticed until after it has failed to record for some period of time. Again, it is impossible to go back and redo parts of a trial if this happens and that means there is no transcript for appeal and a case may have to be retried or in the alternative, dismissed.

Another problem is that during trials people very often move around. A camera would have to be operated by a person during a trial or hearing since the attorneys are on opposite sides of the courtroom and witnesses at many times move around in order to explain graphs, photos, or other demonstrative evidence. This demonstrative evidence is on occasion placed around the courtroom in different places than any of the parties which you would want to record. Slide projectors are also used fairly frequently. Obviously a stationary camera without someone to run it would fail to record much of what goes on in the courtroom because of the movement of people and the placement of demonstrative evidence. A darkened room for the use of a slide projector or overhead projector could also present a problem to the technology of video camera taping. Bench conferences and chambers arguments also present separate problems as extra equipment would be needed for these locations or equipment would have to be moved from the courtroom to these locations so that these conferences and arguments could be recorded.

Finally, while this film may be sought for the purpose of lessening the monetary obligation of the court for transcripts, it is my belief that instead it will merely add a further monetary burden. Videotape cameras of some sophistication would need to be used and many microphones would be needed. Further, extra equipment would be needed for chambers and possibly for the bench itself. A cameraman would be needed so that if something did happen to the machinery it would be spotted immediately and a trial could be stopped, to be resumed when and if the videotape could be started again. That cameraman would also have to be responsible for making sure sound levels are adequate, that no more than the maximum number of people the machine can pick up are speaking at the same time, and that in fact the camera is taping the actual action in the courtroom. Added to this, when the videotape did not work, a court reporter would have to be called in to take the trial.

Lastly, if a written transcript were needed, a court reporter would have to have access to those tapes to be able to type them up. I know from my own experience of trying to listen to audio tapes used in some cases and video tapes used in some others, that it is a very time consuming and difficult task. If videotapes of hearings or

trials did not turn out well, and the tapes' sound or picture needed to be enhanced, these tapes would have to go to specialists at a substantial cost, and the attorneys would have to worry about making sure that in fact the tapes were not changed in any way after being enhanced.

In sum, I would ask the committee to seriously think about this bill before allowing it to go before the full house. It would be my impression that courts should not be allowed to use videotape alone, but that some other backup system such as a traditional court reporter or a traditional taping system with a court reporter be used in addition to the videotaping. I believe that people are easier to deal with in many instances than machines, and this is one of those instances in which the court reporter would be more accurate, easier to work with, and less expensive.

Sincerely,

Antonia P. Marra

Antonia P. Marra
Deputy County Attorney

APM/ld

MISSOULA COUNTY
BOARD OF COUNTY COMMISSIONERS
• Missoula County Courthouse • Missoula, Montana 59802
(406) 721-5700

EXHIBIT O
DATE 2-10-87
HB 514

BCC-87-083
February 9, 1987

Earl Lory, Chairman
House Judiciary Committee
Montana House of Representatives
Capitol Station
Helena, MT 59620

Dear Earl:

We would like to express our concerns about HB-514. While we feel that videotaping of court proceedings may be a logical move in the future, this bill doesn't adequately deal with significant drawbacks and potential fiscal impacts at the local and state levels. For instance:

1. There is no way to discover an equipment failure until the court proceeding has concluded. If the equipment has failed in any way, a retrial would have to be the remedy--at whose expense? (Especially if the case is an indigent criminal trial.)

2. Our courtrooms are not designed to be videotaping studios, which would cause accoustical problems. Who would determine whether the audio records were good enough?

3. Who would pay the cost of equipment for reviewing purposes or the cost of duplication equipment to provide duplicate copies to attorneys? Is this a cost that can be charged back to the State?

Please be assured that we applaud efforts to provide for a better, upgraded, standard of justice for our citizens. This proposal, however, does not give us an improved process for court reporting over what we now have.

Sincerely,

MISSOULA BOARD OF COUNTY COMMISSIONERS

Janet L. Stevens, Chairwoman

Barbara Evans, Commissioner

Ann Mary Dussault, Commissioner

BCC/JS/lm

cc: Missoula Legislators

A
2-10-87
HB 367

For the next few minutes, I would like to share with you a little of the history of transplantation. Although there was documentation of transplantation in 1000 BC, transplantation as we know it began in the late 1800's. There has been remarkable progress in the last 30 years - today there are 15 transplantable organs and tissues.

Progress in transplantation has been slowed by several obstacles. Tissue rejection remains the most serious problem. The body's response to foreign tissue is to reject it. It does not differentiate between a deadly bacteria and a life-giving heart. Drugs that suppress this response, especially the use of cyclosporin since 1978, have been responsible for boosting the success rates.

A second obstacle has been the lack of long term preservation. An organ will deteriorate rapidly without oxygen. And although advances now allow a cornea to be preserved up to 2 weeks, a heart-lung combination needs to be transplanted right away.

The shortage of organs and tissues for transplantation is yet another obstacle. The number of donors contributing to transplant surgery needs to be greatly increased if transplantation is to reach its full potential. Although the potential for donors is more than adequate to meet the need, the actual number of donors is well below the number needed. For the many candidates awaiting transplantation, the supply seems woefully inadequate.

The future of transplantation looks very bright. As communities accept the responsibility to meet the need, and researchers continue to unlock the secrets, transplantation in the future will be performed when necessary rather than when a donor is available. Increasing public awareness and support, and continuing professional education will increase the availibility of organs and tissues.

In reviewing the miraculous progress of the last 30 years, the future growth of transplantation is a bright hope for the thousands whose life depends on it, and for the tens of thousands whose quality of life will be improved through it. Thank you.

Exhibit A

B
2-10-87
HB #367

# American Red Cross

**Blood Services**
**Montana Region**
1300 - 28th Street South
P. O. Box 2406
Great Falls, Montana 59403
(406) 727-2212

DATE: February 10, 1987

TO: Chairman and Members
Judiciary Committee

FROM: Deborah Hanson-Gilbert, Director
Technical and Transplantation Services

RE: Testimony in favor of HB 367

The American Red Cross is a humanitarian organization known for identifying and addressing community needs. In time of disaster, the Red Cross is there first. And it helps prevent disaster with Health and Safety courses. We are probably best known for the provision of over half of the nation's blood supply, which is a human tissue.

The availability of blood and blood products has revolutionized modern medicine. Surgical techniques, such as cardiac bypass or heart surgery, are now routine procedures. Hemophiliacs can live long and productive lives and cancer is not the sentence of death it once was. All thanks in no small part to blood. The newest service, which will be available this year in Montana, is the surgical bone collection program. There are hundreds of hip replacement surgeries performed each year in Montana. This tissue, which would normally be discarded, can be retrieved and stored for use by another.

Because of the current shortage of donated bone; autologous, or bone collected from another site in the patient himself, must be used.

EXHIBIT B
DATE 3-10-87
HB # 367

In many patients, this approach is neither desirable nor feasible, such as in geriatric or pediatric patients. There is an additional cost to this method, both to the patient and to the hospital. Another incision is required, the skeletal frame is weakened, there is increased pain and risk of infection for the patient. More time and effort is required for the medical team, also.

The use of allogeneic, or donated bone, requires no second incision; it saves time and can reduce the risk of injury associated with the collection of autologous bone.

Saving people needless suffering and expense, saving valuable time for surgeons and hospital staff; these are the reasons the American Red Cross is dedicating its resources to the collection, processing and distribution of bone on a national scale.

In order to provide quality bone, each patient undergoing hip replacement will give their consent to have their blood tested for syphillis, HIV antibody (which indicates exposure to AIDS), and hepatitis. A complete medical history will be taken on each donor. Despite following rigorous standards, no procedure or process can guarantee the safety of any human tissue. In 1947 the Montana Legislature passed a law, with amendments in 1971 and 1975, declaring the furnishing of blood and blood products a service and not a sale. Based on this law, it is not enough for a transfusion recipient to show that he developed hepatitis after a transfusion in order to recover for injuries relating to the transfusion. Instead, the claimant must go further and show that the blood bank or hospital was somehow negligent in its collection or processing of that blood. This is an important legal protection of blood banks without which our ability to continue to contribute to the nation's blood supply would

be severely jeopardized.

The American Red Cross would like to see the same protection extended to all human tissue. Skin, bone and eye collection programs have been, and are being established to meet a need. Please help us meet that need by encouraging the collection of tissue by the passage of House Bill 367.

Thank you.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. #514 DATE Feb. 10, 1987

SPONSOR _____

| NAME (please print) | RESIDENCE | SUPPORT | OPPOSE |
|---|---|---|---|
| JEROME ANDERSON | BILLINGS | | ✓ |
| Bob WIEBOER | KALISPELL | | ✓ |
| Richard MATTSON | Billings | | ✓ |
| Julie M. LAKE | Missoula | | ✓ |
| Sam T. MARSHALL | Polson | | ✓ |
| Lisa Lewis | Great Falls | | ✓ |
| Betty Robinson | Great Falls | | ✓ |
| Lois Williams | Missoula | | ✓ |
| Patrick Driscoll | Helena-DOT | | ✓ |
| anne Leigh | Belgrade | | ✓ |
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IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. #554 DATE Feb 10, 1987

SPONSOR

| NAME (please print) | RESIDENCE | SUPPORT | OPPOSE |
|---|---|---|---|
| Hiram Shaw | Workers' Comp. | ✓ | |
| Mike McGrath | CMM Attys | ✓ | |
| Myron Waterman | Mt. Assoc. of Churches | | |
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VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. #371 DATE Feb. 10, 1987

SPONSOR

| NAME (please print) | RESIDENCE | SUPPORT | OPPOSE |
|---|---|---|---|
| Larry Majerus | Div. of Motor Vehicles | — | |
| Butch Turk - PLC | Missoula | | ✓ |
| Chip Lawson | Helena | | ✓ |
| Chris Christensen | Helena | ✓ | |
| Anne Wright | Belgrade | | ✓ |
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VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. #354 DATE Feb. 10, 1987

SPONSOR

| NAME (please print) | RESIDENCE | SUPPORT | OPPOSE |
|---|---|---|---|
| Kathy Irigoin | MT Insurance Dept. | X | |
| Roger McGlenn | IND. INS. AGENTS ASSN. OF MT | X | |
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VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. #367 DATE Feb. 10, 1987

SPONSOR

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|---|---|---|---|
| J.D. SALISBURY | Missoula | 367 | |
| Jodie Langan | Helena | 367 | |
| Kay Crull | Missoula | 367 | |
| Deb Hanson-Gilbert | Great Falls | 367 | |
| Jan T Doerty | Helena | 367 | |
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