

Court reporters ramping up campaign to save profession

By Kris Olson

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Is it too late to stop the train?

That's the question that one criminal defense attorney finds herself asking about the likely obsolescence of the state's court reporters, whose jobs are expected to be phased out by early next year.

It's also a question that is being asked with greater frequency and urgency as awareness spreads about the true cost, financial and otherwise, of the new For The Record digital system. Local business owners, most of them women, say FTR has added to the growing challenge of securing transcription work.

For their part, the official court reporters are resigned to their fate, at least to a point.

"Our jobs are gone; we understand that," said Nancy McCann, an official state court reporter, who has been representing herself and her 39 colleagues — the least senior of which has been employed for 10 years — in collective bargaining over the impact of the Trial Court's new digital recording system.

While McCann said she cannot discuss the specifics of those negotiations, she hoped to make one thing clear: She and her fellow court reporters have dedicated decades of their lives to the court system and would dearly like to have a role in moving it into the future.

In the meantime, a larger battle has been brewing. In recent weeks, the Massachusetts Court Reporters Association has secured meetings with top state officials, in which MCRA members have gone to bat for their official counterparts and also shined a light on the pitfalls of a shift away from local transcript production.

There is some self-interest, to be sure. Members of MCRA would like a fair shot at business from which they currently feel frozen out. But there is a consumer-protection aspect to their plea as well. Ultimately, it is lawyers and their clients who will suffer if the current course isn't reversed, they say.

Popular petition

The level of concern within the bar is seen on a petition begun by MCRA on Change.org,

which quickly gathered hundreds of signatures (677 as of Aug. 3) and dozens of impassioned comments.

"You cannot replace court reporters with machines," begins one representative comment, from Boston criminal defense attorney Rosemary C. Scapicchio. "Court reporters are vital to the entire trial and appellate system. The skill and effort they expend to produce an accurate record cannot be reproduced by pressing a button. Save our court reporters!!!"

In an interview with Lawyers Weekly, Scapicchio amplified those remarks, suggesting that a move to digital recording would severely bog down the appeals process, as missing or otherwise flawed parts of the record are reconstructed, now without the benefit of the court reporter's notes.

While court reporters are required to minimize the number of times the notation "inaudible" appears in a transcript, those creating transcripts from digital recordings will be under no such restriction, she noted.

Scapicchio said there also are logistical challenges to be worked through: how the record of a jury's viewing of a crime scene will be recorded or how to eliminate violations of a defendant's Sixth Amendment right to counsel when an attorney forgets to press the mute button and a privileged conversation is captured on the recording.

But over and above that, there are lingering questions about how a change of this magnitude could be implemented without including in the process people who are in courtrooms trying cases day in and day out, she said.

The petition, which was delivered to Trial Court Administrator Harry Spence and other court officials at the July 20 meeting requested by MCRA, makes three requests:

"1. Certified per diem court reporters should be available upon motion to the Court for first-degree murder and life-felony criminal trials.

2. Attorneys should have the ability to hire a certified court reporter to cover civil proceedings and the court reporter's transcript deemed the official record.

3. Digital audio recordings of both criminal and civil Trial Court proceedings should be transcribed by local, approved transcribers and/or certified court reporters and not outsourced."

The first request is modeled after the practice of a number of other states, MCRA members note, in light of the vital role an accurate record plays after the almost inevitable appeal of a conviction in such cases.

The second relates to the fact that, as things stand now, official records have to be created by one of the 55 people on the Trial Court Approved Transcriber List, which has seen only one update since 2008: the removal of a no-longer-active transcriber.

Trial Court spokeswoman Erika Gully-Santiago said the court is not required to reopen the list by putting out a request for proposals on any particular timetable, though that would be done if there were a need.

"There haven't been requests from courts, clerks or registers seeking additional transcribers to meet their transcription production needs," she noted in response to an inquiry from Lawyers Weekly in February.

But court reporters say they are mystified as to why the list needs to be so static and so exclusive.

"[The Office of Transcription Services] is excluding the more skilled professional court reporter from transcription," said Lisa M. Phipps, a MCRA director and freelance court reporter with more than 30 years of experience. "I do not understand their reasoning, and there is no statute that gives them that right."

The stance makes even less sense in the context of Committee for Public Counsel Services cases, she added, noting that the rate for transcription services is set by statute.

"Why not have CPCS have the right to use the transcriber that they have been happy using for the past however many years and have trust in?" she asked rhetorically.

She suggested that Massachusetts might want to follow the process in place in Utah.

"If the Trial Court does not want to engage in the management of transcription, they can

simply sell a CD to the attorney for \$30 like Utah does,” she suggested. “That way, the Massachusetts attorney would be free to hire the certified court reporter, official or transcriber of their choice.”

Indeed, the state’s online “open checkbook” shows payments into the six figures — \$112,748 in 2015, \$137,206 in 2016 — to a company not on the approved transcribers list, New-York-based eScribers LLC.

Those who attended the July 20 meeting with Spence said he was surprised to learn of the payments and pledged to investigate.

Raising MCRA’s concerns about eScribers is what the association’s members perceive as a cozy relationship with For The Record, due to company officers who crossed paths earlier in their careers.

Spence said that’s not the reason. Instead, what he has since learned is that it was eScriber’s capacity to accept electronic transmittal of recordings that had earned it the business.

But if they disagree about the past, both sides agree about what should happen in the future.

“In our minds, it’s an easy fix: Open up the list,” said Norwood attorney Tracey A. Brown, who has been working with MCRA. She acknowledged that transcribers would have to prove that they are certified and that they can produce transcripts that meet the court’s formatting requirements.

That indeed may happen, Spence said. He indicated that the entire transcription process is under review and that the “existing system will go the way of the past ... pretty quickly,” provided the quality of the end product can be assured through “some type of certification process.”

Why are we doing this again?

While McCann refers to the court reporters’ jobs as “gone,” it may be more accurate to say the 40 official court reporters’ jobs are on “borrowed time.”

The court reporters were given a reprieve of at least six months as the reliability of the new For the Record system is tested, after initial indications were that their services would no longer be needed after the fiscal year closed on June 30.

Spence insisted that no decision has been made other than to install For The Record — something that would have had to happen anyway, given how antiquated and prone to breakdowns its predecessor, JAVS, has become.

He added that the court reporters’ fate has not been sealed. The current six-month testing period may well reveal that it would be smart to retain at least some of the court reporters in some capacity.

But in the meantime, the humane thing to do, he suggested, was to begin discussions about what might happen if the automated process proves itself to be superior to the human one.

Part of that picture includes a bill that would have provided an early retirement incentive for the official court reporters. But that measure failed to rise to the top of the agenda on Beacon Hill before lawmakers adjourned their session.

The hope is that the bill will be taken up when the new session begins early next year. But until a final version is passed, it is hard to know whether the measure will accomplish its goal: whittling the roster of 40 court reporters down closer to the 20 to 25 courtroom-monitor positions that will be available to oversee the operation of the new digital recording system.

McCann said her members will face a difficult choice, noting that for at least some members, even those with decades of service, it will mean swallowing a 50-percent cut in their pensions.

Not that those who stay on the payroll as courtroom monitors will have it easy. Those employees will almost assuredly have to take a pay cut, McCann said, though she was quick to add members of her union feel fortunate to have been extended the opportunity to serve as monitors.

However, the courts will be losing out as well, she added. While courtroom monitors may have lower salaries, “at least we produced pages,” McCann said.

That becomes all the more relevant if the idea of making certified per diem court reporters available in first-degree murder and life-felony criminal trials takes hold, an avenue that Spence said the testing could reveal is a prudent one.

If you multiply the projected number of trial days in life-felony cases by the per diem rate, you quickly approach — if not exceed — the cost of just keeping the court reporters on the payroll, some suggest.

But there also is a growing sentiment that if saving money was to be one of the benefits of moving away from live court reporters and to digital recording, it is not necessarily working out that way.

While it has been previously reported in Lawyers Weekly and elsewhere that For The Record had been awarded a \$5 million contract to install a digital recording system across the state, the state’s open checkbook website shows that nearly \$16.7 million was paid to the company in Fiscal Year 2016. Add in the more than \$1.4 million paid to FTR in FY15, and the total exceeds \$18.1 million.

Spence insists the \$5 million figure was never correct.

“I don’t know where that number came from,” he said, suggesting that it may have been an estimate of the cost in the first year of the contract.

The contract is and has always been for \$15 million, exclusive of the cost of installing cable, which has proven to be a challenge in some of

Transcriber list proves frustrating for some reporters

The experience of Lisa W. Starr exemplifies the flaws in the Court Approved Transcriber List, according to the Massachusetts Court Reporters Association.

Starr, a Massachusetts court reporter for 35 years who established her agency, Copley Court Reporting, in 1984, said she had left voice-mails and sent emails to the Trial Court offices for approximately five months, requesting to be added to the approved transcriber list. She explained that she wasn’t seeking to compete with the approved transcribers, just fulfill requests to provide transcriptions of CDs and other audio recordings from long-standing client attorneys that could be used in appeals.

Finally, on Feb. 1, she was directed to Sybil A. Martin, support services manager in the Office of Court Management. In a short reply to Starr’s email, Martin said the courts were not currently recruiting for approved court transcribers and suggested to Starr: “Please advise your clients that if they are utilizing their transcripts for the Massachusetts Courts, they must utilize an approved court transcriber from the Trial Court’s List, and that you are unable to prepare their transcripts.”

On April 14, Starr responded, “I would like to be clear, I am not ‘unable to prepare’ my clients’ transcripts, having thirty-six years of court reporting and transcription expertise, but that I am being prevented from doing so by your office.”

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the state’s older courthouses with 2-foot-thick concrete walls, Spence said.

Moreover, he asserted that the figure available online from the state is incorrect. His figures show that For The Record has been paid \$10.3 million in FY16, including the cable installation.

The installation costs are one thing. But McCann notes that an audit in For The Record’s home base of Australia found that cost savings turned out to be only half of what had been estimated and had come at the cost of users of the courts.

And then there are considerations such as employees’ loyalty and the value of their relationships with judges and other court personnel that are hard to quantify. Spence said the Trial Court administration is aware and respectful of such considerations. To that end, the MCRA said it has been promised another meeting before any big changes are implemented. **MLW**