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Indiana Supreme Court
315 Indiana State House
200 W. Washington Street
Indianapolis, IN 46204

In Re: Proposed Amendment to Rule 74(B)

Dear Justices of the Indiana Supreme Court:

We are writing on behalf of the National Court Reporters Association Strong Committee to offer comments in opposition to the Proposed Amendment to Rule 74(B). The Committee serves as the Association's subject matter experts in all methods of preserving the record of legal proceedings. The National Court Reporters Association (NCRA) is recognized as the preeminent authority on capturing, storing, and preserving the spoken word, then producing a timely, skillful, accurate, and stenographically watermarked, verbatim transcript therefrom. Our organization's purpose is to apply over a hundred years of institutional knowledge and the experience of rigorously trained and tested stenographic reporters, working in cooperation with the bench and bar towards ensuring personal accountability for producing our nation's court records. Stenographic court reporters are impartial officers of the court present during the proceedings who must comply with state laws and federal and state court rules regulating their practice.

NCRA Strong Committee stands for the proposition that in all matters before the courts of the United States, the protection of equal access to justice through an accurate record for all Americans, regardless of race, religion, age, disability, gender, sexual orientation, national origin, ethnicity, or levels of income, as well as the safeguarding of litigants' personally identifying information and preservation of civil liberties is of paramount importance.

We believe the proposed amendment has not been well researched, does not have adequate safety measures in place to replace the existing language, and does not in any way address the release of biometric voice and facial data to unknown individuals who are not practicing under the auspices of the court or any other regulatory agency in Indiana. We would strongly recommend that you review the article entitled, "Jump in Facial and Voice Recognition Raises Privacy, Cybersecurity, Civil Liberty Concerns," authored by the JacksonLewis law firm in Berkley Heights, New Jersey, which states, "Organizations that collect, use, and store biometric data increasingly face compliance obligations as the law attempts to keep pace with technology, cybersecurity crimes, and public awareness of data privacy and security. It is critical that they maintain a robust privacy and data protection program to ensure compliance and minimize business and litigation risks."

The article also states, “While the ease and efficacy of voice recognition technology is clear, the privacy and security obligations associated with this technology, as with facial recognition, cannot be overlooked.”

We believe that your proposed amendment would hold courts to a lower standard of privacy and security that could well jeopardize citizens’ private information. We implore you to ask yourselves: Have we fully tested, vetted, and investigated the harm that could result by this implementation of electronic recordings utilizing AI/ASR? When you click the End User License Agreement of these technologies, you will likely find that the court and litigants’ rights are not protected, and responsibility for violations will fall back to the courts.

Although the members of the bench may not be aware, often gig workers, who are not obligated to follow Indiana Court Rules, are utilized to transcribe recorded court proceedings. Indeed, they are not under the auspices of any regulatory agency, including the court.

This amendment will eliminate professional, stable, well-paid jobs, held mainly by women, and instead replace them with low-wage, low-skilled gig workers.

Additionally, a growing number of transcription companies currently engaged in producing transcripts for courts utilize artificial intelligence (AI) and automatic speech recognition (ASR). There are currently no chain of custody requirements in place in Indiana courts for recordings being made in its courtrooms, and there is no way of verifying or certifying that the transcript reflects that what was originally recorded by the person operating the equipment in the courtroom, since the transcribers producing and certifying the transcripts were not present at the proceedings and the original recording operator does not review the final transcript to ensure its accuracy. It would be difficult, if not impossible, to later verify the forensic accuracy of the cloud-based ASR transcript since ASR is constantly changing and evolving. ASR is known to produce inaccurate results and can be subjected to targeted cyberattacks known as perturbations that can change the output of the translations to be incorrect. That conflicts with FRCP 80¹. In one instance in the past year, that lack of oversight resulted in 55 pages of testimony missing from a proceeding digitally recorded in California and a trial that was lost because the error was not discovered until important decisions were already rendered².

INDIANA’S COURT PROCEEDINGS AND COURT REPORTER REGULATIONS

In Indiana’s current Administrative Rules, trials are recorded by a court clerk or other individual running digital recording equipment, which is thereafter uploaded into the cloud to be downloaded by another individual who is not an officer of the court. This does not satisfy the requirements outlined in Rule 10 or Rule 15. Additionally, the proposed new amendment will conflict with Indiana Rules of Trial Practice, specifically Rule 30(B)(4), Rule (F)(1), Rule (D)(1) through (4), as it will be difficult, if not impossible, for the officer before whom the testimony was taken to certify the accuracy of a transcript prepared by someone else without the requirement of an authenticated chain of custody of the audio recording and all transcribers who participated in transcribing the audio files.

¹ FRCP 80 – Stenographic Transcript as Evidence. If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

² Melissa B. Buchman, Esq., Mary Pierce, Daily Journal – California Lawyer, April 13, 2022, <https://www.dailyjournal.com/articles/366920-make-sure-your-court-reporter-is-really-a-court-reporter>

Specifically focusing on Administrative Rule 10, each judge is administratively responsible for the integrity of the judicial records of the court and must ensure that (a) the judicial records of the court are recorded and maintained pursuant to Supreme Court directives, and (b) measures and procedures are employed to protect such records from mutilation, false entry, theft, alienation, and any unauthorized alteration, addition, deletion, or replacement of items or data elements.

Stenographic court reporters have multiple forms of backup and authenticity capabilities which preserve the original record of proceedings and maintain custody of them at all times. Conversely, it is relatively easy to change the content of a recording by deleting audio or obscuring meaning with over-recorded sounds or by adding additional words through synthesis. With the advances in biometric duplication of voices digitally recorded, it is relatively easy to change testimony with simple apps, and that potential will only increase.

Focusing on Administrative Rule 15B(1), it states: **A Court reporter** is a person who is specifically designated by a court to perform the official court reporting services, **including preparing a transcript of the record**. The proposed rule amendment conflicts with the requirement that the person who is designated by a court to perform the official court reporting services for the court will also be the person with direct responsibility for preparing a transcript of the record.

In a recent article produced by Government Technology, it states that Marion County installed digital recording equipment that Works with Amazon Web Services (AWS) to provide cloud-based archiving, playback, and the creation of automated text from digital recordings. “While these AI-based transcripts are not accurate enough to generate certified court documents, they are essential to finding words and phrases within testimony³.” The article states that Marion County, in partnership with a private company, and Amazon Web Services, has implemented a “robust records and transcript management solution.” Amitav Thamba, chief technology officer for Marion Superior Court, says the private company being utilized to produce transcripts “has significant experience in transcript production and overall court record management.” Who ensures that the transcripts accurately match the digital audio files stored in the cloud? Will the transcriptionists be under the auspices and direction of the court or the private company providing the transcriptionists? Has the Indiana Supreme Court reviewed the circumstances of the California Bar Association’s recent data breach that necessitated 1,300 clients, complainants and witnesses being notified of a breach? It has been widely reported that the breach was linked to a Tyler Technologies Odyssey system portal security flaw, and that portal is also used in audio court vendors’ court management recording solutions.

It is also important to point out that the proposed amendment conflicts with the Indiana Court Reporter Handbook, Sixth Edition (2022 Revision), which throughout its 186 pages of text refers to and allows for stenographic court reporters.

Additionally, the proposed amendment conflicts with Ind. R.Crim. P. 24 (D), which requires stenographic reporting in capital cases.

LITIGANTS AND THE PUBLIC WILL BE HARMED BY THE PROPOSED AMENDMENT

A. DISCRIMINATION

Transcripts created from electronic recordings via automatic speech recognition (ASR) and/or artificial intelligence (AI), which is a new and unproven method often utilized by transcription companies providing transcription for courts, are creating an entirely new avenue for

³ Government Content Studio, 2022, <https://papers.govtech.com/Modernizing-Transcription-and-Media-Management-in-a-Metropolitan-Court-System-141669.html>

discrimination against people of color⁴, women⁵, individuals with disabilities, or individuals who have unique speech patterns, accents, or dialects, in addition to the many other factors that result in disparity in the quality and accuracy of transcription that jeopardizes litigants' access to justice. The utilization of ASR and AI methods of transcription of court proceedings should be banned by all courts allowing for transcription by someone other than the person who recorded and personally witnessed it until it can be proven to be 100% accurate and safe.

B. PRIVACY

As digital recordings are used for the preservation of proceedings, it has brought to the fore an incredibly concerning risk regarding the improper and illegal disclosure of private information. Allowing access to Personal Identifying Information (PII) from legal proceedings (such as Social Security numbers, banking information, minors,' and other protected individuals' names, as well as addresses), HIPAA information, trade secrets, patents coming to market, and even our military and sensitive national security documents pose substantial risk of harm. Additionally, individuals' personal biometrics could be used to access bank accounts, personal electronic devices, residences, and/or airport security clearance. This sensitive content is not being redacted nor protected as digital recordings are uploaded to the cloud for public access or sent out for transcription (often outside of the United States) with no oversight nor chain of custody. The mosaic of a person's recorded face, voice, and PII in the wrong hands could wreak havoc on the lives of those participating in court proceedings⁶.

C. SECURITY

At one point in time, we believed what we saw with our own eyes and heard with our own ears, but digital recordings are subject to hacking, cloning, photoshopping, and deepfakes⁷. Security and privacy risks are accentuated by allowing litigants' private and sensitive information to be handled by gig workers, many residing offshore. Few courts maintain meaningful oversight of those requesting to be "approved" transcribers, which may result in work being outsourced anywhere in the world to individuals who have no legal presence in the United States or demonstrable skill in the proper preparation of the record or accountability for the authenticity or chain of custody of the record. What we call "deepfake certificates" are attached to transcripts to create the illusion of accountability when none exists. Fully digital recordings of proceedings are not always kept in the custody of trained, sworn professionals whose sole purpose is to witness, report, and certify that the transcript they provide is a true and accurate statement of every word that was spoken in the given proceeding.

When there is no formal chain of custody, there are endless possibilities for fraud against unwitting litigants or citizens. As the acceptance of digital transcription grows and the accompanying social engineering becomes more prevalent, it will likely become cheaper and easier to implement cyberattacks without necessary oversight and personal responsibility for

⁴ Joshua L. Martin, Kelly Elizabeth Wright, Bias in Automatic Speech Recognition: The Case of African American Language, *Applied Linguistics*, 2022; amac066, <https://doi.org/10.1093/applin/amac066>;

⁵ Joan Palmiter Bajorek, Harvard Business Review, May 10, 2019, <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>

⁶ Frank Hersey, December 15, 2022, Prepare for post-biometric security amid AI cyber-attacks: Traficom, <https://www.biometricupdate.com/202212/prepare-for-post-biometric-security-amid-ai-cyber-attacks-trafficom>

⁷ Anthony T.S. Ho and Shujun Li, Department of Computing and Surrey Centre for Cyber Security, University of Surrey, Guildford, UK, Handbook of Digital Forensics of Multimedia Data and Devices, 2015, https://www.researchgate.net/publication/280086464_Handbook_of_Digital_Forensics_of_Multimedia_Data_and_Devices

authenticity and verification in place (even in password-protected, encrypted clouds). ASR provides predictive answers, not always definitive answers, and not always accurate answers, either⁸. Predictive translation technology will likely erode the public's trust in our justice system. The Lawyers' Committee on Civil Rights Under Law described the AI Bill of Rights as "a landmark set of principles for the fair and ethical use of artificial intelligence, machine learning and other data-driven technologies⁹" and discourages use in "high-risk environments." The use of ASR in judicial settings is a high-risk environment affecting litigants' families, livelihoods, property, resources, civil rights, lives, and freedoms, oftentimes with no existing rules for accountability, accuracy, security, and ethical standards in place.

The U.S. Federal Trade Commission (FTC) hosted a workshop in January of 2020 examining a subcategory of deepfakes known as voice cloning, or techniques that generate near-perfect reproductions of a person's voice. They held a series of panel discussions and lectures which included speakers FTC Commissioner Rohit Chopra, U.S. Department of Justice Attorney Mona Sedky, Microsoft Defending Democracy Tech and Operations Director Ashish Jaiman, and Defense Advanced Research Projects Agency (DARPA) Science and Engineering Tech Advisor Neil Johnson. "All agreed that regulation, methods of detection, and public awareness will be fundamental in a world where AI produces voices indistinguishable from that of real people¹⁰."

D. COST ANALYSIS/COST SHIFTING/ACCURACY/DELAYS:

In late 2018, the Pierce County Superior Court, State of Washington, was asked if cost savings could be achieved by use of electronic recording and creating a small pool of court reporters for specific trials. This question triggered a statewide staffing study by the Court Administrator to determine the staffing and cost breakdown for other courts in Washington. Based on the research, what the study showed is "actual cost savings would be minimal at best, with the court performance suffering greatly from the lack of realtime reporting. There is no court recording equipment which has the performance level of a court reporter." Please see Attachment A.

Courtroom implementation of electronic recording, as opposed to the presence of a staff stenographer, has resulted in cost-shifting to litigants as they must bear the added high costs for outsourced transcription services. This is resulting in justice becoming inaccessible to those without significant means, as well as poor quality transcripts. Conducting a text-based search of court websites to find the words "inaudible" or "indiscernible" will return thousands of hits. Appeals court records reveal that in many instances when a recording is determined to be incomplete, inadequate, or nonexistent, according to incarcerated defendants and their counsel in case filings, the appeals courts will simply send all counsel back to court to "recreate" the record with their notes and the judge's oversight. In addition, transcription services are documented to exponentially add to the wait time to receive appeal transcripts, creating unacceptable delays for incarcerated individuals awaiting judicial resolution. Lastly, there are many documented failures of digital systems in courtrooms throughout the country and globally. Please see Attachment B for a noteworthy list.

⁸ Pro-Sen Huang, Kshitiz Kumar, Chaojun Liu, Yifan Gong, Li Deng, Department of Electrical Computer Engineering, University of Illinois at Urbana-Champaign, USA, Microsoft Corporation, Redmond, WA, USA, 2016,

<https://www.microsoft.com/en-us/research/wp-content/uploads/2016/02/ConfidenceEstimator.pdf>

⁹ October 4, 2022, Lawyers' Committee for Civil Rights: <https://www.lawyerscommittee.org/lawyers-committee-for-civil-rights-under-law-applauds-white-house-ai-bill-of-rights/>

¹⁰ FCC CVVA (Section 13)(b)(1i)(2i)

The NCRA Strong Committee urges you, the highest court in Indiana, to rethink installations such as Marion County, where hardware obtained with taxpayer funds is being installed. When it works as it should, it is claimed it will save the county time and money. When it fails or is subject to cybersecurity breaches, the consequences can and will be catastrophic.

The potential for harm and negation of civil liberty rights that are guaranteed by the Constitution outweigh the cost savings in an exponentially immeasurable way. Civil liberties operate as restraints on how the government can treat its citizens. With no necessary safeguards in place, the Indiana Supreme Court would be reckless in adopting court rules prohibiting stenographic court reporters in its courtrooms. To the contrary, it should be adopting proposed rule amendments prohibiting ASR/AI, and other transcription modalities that abdicate the court's obligation to ensure accurate and authentic transcripts that are duly certified by officers of the court directly under their direction and control.

In closing, reporting proceedings by stenographic professionals who are highly trained guardians of the record, as well as officers of the court, remains the tried and proven gold standard for protection of the record. This method remains the most accurate and reliable form of capturing a verbatim record, and it should never be prohibited.

Thank you for your time and careful consideration of this crucially important matter. We hope this provides useful information for you to consider as you address the elimination of stenographic reporters through your proposed Trial Rule 74 change.

Respectfully,

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