LAWYERS' FORUM

PRESIDENT & PUBLISHER: Peter Mierzwa
pmierzwa@lawbulletinmedia.com | **EDITOR:** Andrea Hanis
ahanis@lawbulletinmedia.com

Find us on:

Homage to court reporters: Indiana proposal to ban them is dangerous

FOR THE DEFENSE

DONALD P. ECKLER

As the name of this column reflects, For the Defense, the perspective of this author is of a civil defense attorney.

But the integrity and completeness of the record, particularly the trial record, is an issue that plaintiffs' and defendants' attorneys can surely agree on, and any threat to it is a threat to justice for our respective clients.

It is for this reason that the hackles went up recently when a proposed change to Indiana Trial Rule 74, which addresses recordings of trials, provided that "[r]ecording through shorthand or stenography is prohibited."

Let the word "prohibited" sink in for a moment and reflect how a trial would be conducted without a court reporter and relying solely on recording equipment to create and preserve the record.

As discussed in this space on Oct. 19, 2022, with the impending sunset of the Illinois Shorthand Court Reporters Act of 1984, 225 ILCS 415/1 et seq., issues related to what is being considered in Indiana are coming to Illinois this legislative session.

Returning to the Indiana proposal, a trial without a shorthand court reporter would be a very different trial. Relying solely on recording equipment would pose real challenges to conducting a trial:

1. Read-backs of testimony during trial and during jury deliberations are either not possible (as has been the experience of many using digital reporters at deposition) or at least very difficult and time consuming.

2. Daily copy is not possible without shorthand reporters working in teams, and digital reporting cannot perform that function, as real time reporting is necessary to be able to get a transcript of the morning trial session by the end of the trial day and of the afternoon session by mid-evening.

ECKLER • Page 8

DONALD "PAT" ECKLER *is a partner at Freeman, Mathis, & Gary LLP focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of Illinois Defense Counsel. Eckler also is the co-host of the Podium and Panel podcast with Daniel Cotter. His views are his own and not those of his firm or its clients.*

Supreme Court might have easy outs on major election, immigration cases

MARK SHERMAN AND JESSICA GRESKO
Associated Press

WASHINGTON — The Supreme Court soon could find itself with easy ways out of two high-profile cases involving immigration and elections, if indeed the justices are looking to avoid potentially messy, divisive decisions.

Off-ramps could prove attractive in a term with no shortage of big cases that could divide the court's six conservatives and three liberals.

Affirmative action, voting rights, gay rights and student loan forgiveness also are on the agenda for a court that is less than a year removed from overturning nearly 50 years of constitutional protections for abortion and seeing a significant dip in public confidence.

The Biden administration provided one possible way out for the court this week. A legal fight over turning away immigrants at the border because of the coronavirus pandemic, under a provision of federal law known as Title 42, is about to become irrelevant, the administration said in a court filing Tuesday.

That's because the administration recently announced that the public health emergency that justified the quick expulsion of immigrants will expire on May 11.

The use of Title 42 began during Donald Trump's presidency and continued after Joe Biden took office. It has been used millions of times to quickly turn away migrants at the border.

Title 42 is at the root of a Supreme Court case that the justices in December put on a fast track, with arguments set for March 1. At issue isn't the use of Title 42 itself but the question of whether a group of Republican states can insert themselves into a lawsuit over the policy.

The court could rule before May 11, though that would be faster than usual. It's also possible the policy's end date will be pushed back beyond that date. But if the public health emergency ends as planned and the justices do nothing until then, the case could end without a decision.

The other case the court could dodge involves a closely watched elections issue and comes out of North Carolina. Last week the state's top court ordered a new look at the case.

Republicans in North Carolina have asked the justices for a ruling that could leave state legislatures virtually unchecked in making rules for congressional and presidential elections. Such an outcome would for the first time validate what is known as the "independent state legislature" theory, which would dramatically enhance the power of state lawmakers over elections for president and Congress at the expense of state courts.

The justices have been at work on a decision in the North Carolina case for more than two months, but the final word in this and other consequential cases often doesn't come until late June.

So the court could wait to see what the North Carolina court does before reaching its own conclusions.

Vikram D. Amar, a professor at the University of Illinois College of Law, said the court can always find a way out "if it wants to dodge the case," including if the justices are finding trouble reaching consensus.

But Amar, who filed a brief opposing the Republicans in the case, said it's important for the court to weigh in.

"The fact that they took the case in the first place tells us they think it needs resolution. Better to resolve this between election cycles," Amar said.

ECKLER

From page 5

3. There is no backup of the digital recording and no accounting for a situation where the recording device fails, the recording is lost or, through human error, the device does not record.

In contrast, shorthand reporters use recording as a backup, and so the options of shorthand reporting or digital recording are not mutually exclusive. It is the standard of care for shorthand reporters to have digital backup to their reporting, and in Illinois it is required. The presence of the reporter during an evidentiary proceeding can largely eliminate the problem of corrections as they will be able to ask counsel for clarification on the spelling of a word or name at a break. Digital reporting, often outsourced to different transcriptionists, has no such ability to get the immediate correction and could lead to multiple transcriptions of the same word or delay in completion of the transcript.

4. There is no ability to record portions of the trial — for example, sidebars, jury selection, jury instruction conferences, motions in limine, motions for directed verdict, etc. (the portions of trial that are very likely to yield issues for review and for which a complete verbatim record is essential) — that often occur outside the courtroom and necessarily outside the presence of the jury.

As an example of the cascade effect of not allowing shorthand reporters at a jury trial, consider a situation in which on the morning of closing, court and counsel are reviewing jury instructions. That conference needs to be on the record and so is done in the courtroom, instead of chambers. The jurors often have to enter the courtroom to access the jury room. As a result of the jury instruction conference, the deputy is forced to keep the jurors outside of the courtroom, increasing the likelihood of interaction between the parties and jurors. Instead, with the presence of a shorthand reporter, the court and counsel could go into chambers; the jurors could be secure in the jury room; and the parties would be in the courtroom.

5. Absent having the entire venire leaving the courtroom, there is no way to voir dire an individual prospective juror on sensitive issues and have a record of that voir dire. With a shorthand reporter, the court, counsel and the individual prospective juror can go into chambers, conduct the individualized voir dire and not encounter the hassle and time expended in retiring the entire venire and then making sure that they are seated in the correct places upon their return.

In sum, shorthand reporters, available to record the entirety of the trial, are essential for the proper conduct of a trial and the creation of a record of that trial. The proposed Indiana rule does not allow the parties to bring their own reporter and, even if it did, does not provide a mechanism for that reporter's transcript to become part of the record on appeal. It seems that the proposal to amend Trial Rule 74 in its current form is not going to be successful, and replacement language is being drafted. But that the proposal got so far as to the comment stage speaks to the need for attorneys to be alert to the issue.

Ill-intended motive should not be assigned to those who are making the proposal for increased or sole reliance on digital reporting, though it is clear there are those that have much to gain from greater, or entire, reliance on technology for the creation of the record.

The skills of court reporters are necessary for a complete and accurate record, and the solution to the alleged shortage of court reporters is not to prohibit them. The bench and bar should work together to foster a new generation of shorthand reporters, who are essential for justice.

> The skills of court reporters are necessary for a complete and accurate record, and the solution to the alleged shortage of court reporters is not to prohibit them.

NOTEBOOK

From page 1

The complaint alleges that the transmissions contain a design and/or manufacturing defect that makes them "shift harshly and erratically, causing the vehicle to jerk, lunge, and hesitate between gears," which is a "potentially life-threatening safety issue."

According to the complaint, defendant has refused to recall or replace its defective transmissions. The complaint asserts claims for breach of express and implied warranty, negligence, fraud and fraudulent concealment, unjust

U.S. District Court, Northern District of Illinois

O'Connor v. Ford Motor Co.

No. 19 CV 5045

U.S. District Judge Robert M. Dow Jr.

formed before they may order arbitration." The court reasoned that "even the most sweeping delegation cannot send the contract-formation issue to the arbitrator, because, until the court rules that a contract exists, there is simply no agreement to arbitrate."

It concluded that the plaintiff's argument — that it would be against public policy to enforce an arbitration agreement against her due to her youth — concerned the agreement's "validity, not its existence," because Illinois law treats contracts entered into by children as voidable rather than void.

In *CCC Intelligent Solutions v. Tractable Inc.*, 36 F.4th 721 (7th Cir. 2022) — which was decided shortly after the