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Presentation to the DART Committee Meeting on July 31, 2009

Members of the DART Committee:

My name is Steve Japuntich. I am the President of the Public Defender's Association of Iowa. The Public Defender's Association of Iowa is an organization which provides support to those who work in the fields of criminal defense and juvenile law. In addition to sponsoring an annual seminar which features a full years worth of CLE credits including the required ethics credit and 6 hours of Federal CLE credit, the Association, through its members, is involved in policy matters germane to the practice of law.

I would like to thank Beth Baldwin, the members of the DART Committee and all others involved for allowing the Public Defender's Association of Iowa to contribute to the debate which is the subject matter of today's meeting. This debate focuses on the best way to provide accurate legal transcriptions.

Let me begin by stating verbatim the official position of the Public Defender's Association of Iowa:

And I quote:

"The PDAI desires employment of the most accurate type of record transcription possible in order to protect the rights of criminal defendants. It is our position that the current system, wherein certified court reporters are utilized to record, conserve and transmit testimonial portions of legal proceedings, should be retained."

Unquote

My friends, if we at the Association have an agenda in this matter it is an agenda of simply acting on behalf of criminal defendants and other parties availing themselves of the legal system in order to ensure that legal proceedings are preserved accurately AND in their entirety.

As a young trial lawyer I came to the conclusion that my clients protections consisted of only two things. Number 1, the rules (specifically the rules of criminal procedure and evidence) and Number 2 the record. In defending a client charged with a criminal offense, it is incumbent upon the trial lawyer to enforce the rules while making a record of that enforcement so as to protect the clients appellate rights. An advocate can not change the law, and, as much as we

would like to, an advocate cannot change the facts of a case.

Those of you deal in civil matters have the same obligations of representation. Even though you rarely deal with the liberty deprivations inherent in criminal practice, your clients cases present very important, potentially life-changing situations. Civil litigants are forced ,in some situations, to rely upon constitutional guarantees in protecting their interests, for example in situations dealing with condemnation of property.

The issue that this committee is confronted with is a grave one. I am here today on behalf of the Association not only for the purpose of stating our position on the potential future reliance upon electronic recording, but also to offer our support to you for the duration of your study.

The advice I can offer you is somewhat limited and perhaps redundant of that which you have received or will receive from other participants. Much of the advice we have to offer is based upon our own experience in the profession. My own experience with electronic recording has not been at all satisfactory. Years ago as a public defender, in Fort Dodge Iowa, I would use preliminary hearings as a means for conducting some free pretrial discovery. We employed secretaries and court reporters to transcribe the hearings and despite the level of competence of the transcriber, inaudible portions were quite common. More recently, in 2004, I gave a presentation to the Iowa Supreme Court. I had the presentation transcribed by a veteran court reporter who has been in the business since 1976 and is, in my opinion, quite good at what she does. The transcribed portions in which I was speaking were all recordable. Some of the Supreme Court's questions and comments were inaudible, despite the fact that this presentation was given in an almost brand new facility which presumably was equipped with state-of-the art recording devices

I think that the nub of the dispute between digital recording and human transcription lies in the fact that recording devices preserve sounds; Court reporters preserve words. When the attorney and the witness are talking at the same time, the reporter will interrupt so as to be able to take down the witness' answer. That retrieval cannot be done retroactively by someone transcribing that which has been recorded. Extraneous sounds, like someone coughing, or a construction worker using a jackhammer outside may make it impossible to hear a witness' answer, an attorney's objection, or the court's ruling. A court reporter will retrieve that information as soon as the problematic, extraneous sound becomes apparent.

How do you as a committee approach the issue before you? Let me give you an analogy if I may. Those of us who have been in private practice, myself included, have learned that it is possible to be a competent lawyer without being a really good business manager. There is nothing inherent in our legal training that qualifies us to manage a business despite the fact that whether you are a solo practitioner, or a member of a law firm, management expertise is required. Some law firms hire accountants to handle their financial affairs because of their business expertise.

With this thought in mind, may I suggest to you members of the DART committee, that the retention of an entity whose area of expertise is the gathering and interpretation of data may aid you in coming to the best conclusion in your quest for the truth. Availing yourselves of the services of an unbiased, professional research company would allow you to compare apples to apples and oranges to oranges. You are in need of objective information addressing cost, reliability, quality and feasibility.

Additionally, I would suggest that you need to anticipate the law of unintended

consequences prior to making a recommendation. Some of the unintended consequences are of a nature which would allow you to forecast certain problems. One example of the law of unintended consequences lies in some statutes currently in effect which are in conflict with regard to the issue you have been called upon to address.

Iowa Code Sections 232.41, 94, and 115 state that stenographic notes or electronic recordings shall be taken of all court hearings unless waived. The sections in question reference Section 624.9 which is somewhat ambiguous, but from which could be argued the necessity of having the proceedings transcribed by a court reporter.

The law of unintended consequences rears its ugly head when we read these statutes with reference to the code of federal regulations regarding the Foster care maintenance payments program. This statute, 42 CFR 1356.21 mandates the conditions that the State must meet in order to remain eligible for federal funding of foster care maintenance. These requirements include a showing by the State that reasonable efforts have been made to maintain family unity, that removals are necessary for the welfare of the children in question and that there be a judicial determination that reasonable efforts have been made. This judicial determination must be made within 60 days from the date that the child is removed from the home. Certain circumstances relieve the findings of reasonable efforts including consideration of the welfare of the child. All support for the court's decision must be included in the court order. If the criteria is not met, the only way to remedy the situation, in order to secure federal funding, is by use of a transcript.

We all know that judges are human. They may fail to include the magic abracadabra language in a particular order. If they fail to do so in the case of Foster care maintenance payments, it could be costly to another governmental agency, the Department of Human Services. We have to ask ourselves, in this day and age of massive federal subsidies, how many of these time bombs are out there? Are we going to trust the preservation of this information to a mechanical device?

One unintended consequence of changing the way we do business will be reflected in the quality of justice for parties involved in the legal system. There will be have's and have nots. Those who can afford to hire court reporters for hearings and trials will do so and will be assured of receiving accurate transcripts which recall the words spoken during the proceedings. Those who cannot afford to hire court reporters will have the fate of their precious transcripts decided by an inanimate device that merely records sounds. Can we truly say that such a two-tiered system comports with due process? Equal Protection under the law?

Folks, I became involved in this matter last February when I learned of the proposal to study the feasibility of digital recording. I think that most of us learned of this issue at about the same time. My phone was ringing off the hook and I was receiving mass amounts of emails from members of the Public Defender's Association of Iowa. People were saying to me "Steve, you've got to do something." Everyone that contacted me, including government lawyers and private attorneys, articulated the same fears regarding the loss of our exemplary court reporter system.

I would like to read to portions of the letter that I sent to the Supreme Court in Feb.

quote:

“The Public Defender’s Association of Iowa respectfully requests that the Court reflect long and solemnly before making a decision which could severely impact the dispensation of justice in our state. The employment of court reporters is vital to providing a process for litigants that is both fair and accurate.

Someone who has to transcribe a hearing after the fact, regardless of the individual’s skill and competency, will simply not be able to recapture the inaudible portions. This failure to transmit the testimonial record in an accurate form will result in injustices to litigants civil and criminal alike.

To many citizens, court reporters are the first individuals they interact with when visiting the courthouse. Attorneys and citizens alike may stop in the judge’s chambers needing information, and those awaiting hearings will usually approach the court reporter who awaits the entry of the tribunal, requesting information about the proceedings or courthouse information in general. Based upon my own experience, Iowa court reporters are usually friendly, helpful and courteous to those citizens to whom the court reporters represent the legal system. “

Unquote

The budgetary problems faced by the Iowa Judicial Branch are very real. The Public Defender’s Association of Iowa has officially articulated our position that the judicial branch should be fully funded. The judicial branch is a co-equal branch of government and one that is absolutely necessary to the maintenance of a civilized society.

If quality access is a goal of the legal system, that facet will be greatly diminished if we turn our backs on the guardians of the record-our court reporters.

Thank you.