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M E M O R A N D U M

TO: Trial Court Administrators
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FROM: Sharon Buckingham, Senior Court Operations Consultant, OSCA
Laura Rush, General Counsel, OSCA
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DATE: June 14, 2010

SUBJECT: Frequently Asked Questions Regarding Court Reporting Services
Memo #02-2010

This memorandum is being issued as part of the OSCA's ongoing effort to provide technical assistance to the trial courts in addressing the operational impact of recent rule revisions, standards of operation and best practices adopted by the Supreme Court. Provided below, you will find responses to questions that have been recently submitted. As additional questions arise, please feel free to contact us.

1. ***The idea of having uniformity throughout the Florida court system in terms of stenographic reporting and digital reporting system or equipment is a great future goal. In that regard, I would ask you if there is a consensus as far as any one particular type of the court reporting software that should be used in each circuit. I am aware that some circuits use CaseCatalyst by Stenograph and some circuits use Total Eclipse by Advantage Software. Is there a plan of preference to use one particular software statewide?***

   Answer: Currently, there is not a plan to designate one particular stenography software statewide. Due to the concerns raised by the Court Reporting Technology Workgroup regarding the need to prevent vendor 'lock-in', it is not recommended to designate only one software for statewide use. Vendor 'lock-in' is created when a vendor gains a sizeable portion of the market. Often, the result

is lessened market competition which reduces a vendor's motivation to continue the development of their product, improve costs, or provide excellent customer service.

2. ***For those circuits that are in a shared cost agreement with the Public Defender's Office: When a private attorney who represented the defendant in a criminal case at the trial level withdraws after his client is declared indigent and the PD is appointed for appeal, who is being held responsible for the cost of the transcripts when that private attorney files the Designation to Court Reporter, as is required before he can withdraw? Are those transcript pages being "charged" to the Public Defender who is responsible for the appeal or is the private attorney being held responsible, as is required by Rule 9.200 (b), "Costs of the original and all copies of the transcript(s) so designated shall be borne initially by the designating party (emphasis added), subject to appropriate taxation of costs as prescribed by rule 9.400. At the time of the designation, unless other satisfactory arrangements have been made, the designating party must make a deposit of ½ of the estimated transcript costs, and must pay the full balance of the fee on delivery of the completed transcript(s)."***

   Answer: The cost of the original transcript and copies are borne initially by the designating party, subject to appropriate taxation of costs as prescribed by rule 9.400, Florida Rules of Appellate Procedure. The rules do not provide relief to the designating party for payment of the full cost of the transcript. A designating party could seek a determination from the presiding judge at the hearing on the motion to withdraw, or simultaneously with filing a motion to withdraw, as to who is responsible for payment of the full cost of the transcript.

3. ***When an official record is needed for appeal in those cases that are required to be reported or recorded at public expense, who is responsible for verifying that the transcripts that are filed are, in fact, being prepared by approved court reporters or transcriptionists? Clerks? Court Administration? DCA?***

   Answer: Verification that a transcript has been prepared by an approved court reporter/transcriptionist most likely does not require a formal verification process, unless a circuit and/or district chief judge decides that it is necessary to have one. Should the preparation of a transcript come into question, it would fall to the party filing the appeal to defend who produced the transcript. For this reason, court reporting programs in each circuit should at least develop criteria and establish a process for approving individuals to prepare transcripts and also maintain a list of the approved individuals and make it widely available to all applicable stakeholders.

4. ***How do the circuits handle recordation for civil cases? My understanding is some of the circuits have the recordation on all the time. Do they then provide CD's of civil hearings to court reporters for transcription? It is our understanding that the recordation is paid for by the state of Florida and is not for civil matters.***

   Answer: The simple answer to this question is that civil cases should not be recorded at state expense (using state funded personnel or equipment) as the funds appropriated by the legislature to the trial courts for court reporting services are not appropriated for civil cases. Section 29.004, Florida Statutes, indicates that state revenues are appropriated for the state courts system to provide, "reasonable

court reporting and transcription services necessary to meet constitutional requirements." Therefore, the trial courts would not want to be in a position of using state tax payer dollars to pay for recording civil cases. This is considered especially critical when resources are limited and it may be difficult to cover those proceedings that are supposed to be recorded at state expense.

Many circuits have posed similar questions over the years due to the operational reality that recording systems may have to be set to record various proceedings throughout the day in specific multi-use courtrooms because of the lack of staff to monitor proceedings or for other logistical reasons. In the event that civil proceedings are recorded using state funded resources because of these operational realities, circuits should not produce media copies (CD's, DVD's, etc.) or transcripts of these recordings and should not collect cost recovery funds for these activities.

Circuits have also mentioned that they are sometimes asked to record a civil proceeding as a one-time "favor." This practice should be avoided for the same reasons stated above and because of the significant likelihood that a circuit may then need to use even more state funded resources to produce media copies, prepare transcripts, and be responsible for redacting confidential information.

5. ***Can you provide further clarification on the terms 'official record' and 'public record' as they relate to primary and back-up electronic recordings? What is the definition of a back-up recording? Does a back-up recording include any secondary type recordings or a stenographer's electronic recordings? What about back-up recordings to back-up recordings? In reference to public retentions policy, what is the timeframe in which back-up recordings must be kept?***

Answer: In short, the transcript is the "official record," but the electronic recording from which the transcript is produced is a "public record." A backup recording is an electronic recording made simultaneously with the primary electronic recording to ensure that, in the event of a recording system failure affecting the primary recording, an official record of the proceeding may be prepared using the backup recording in lieu of the primary recording. The retention period for a backup recording is coextensive with the retention period for the primary recording. Electronic recordings of judicial proceedings fall within the definition of court records, under rule 2.420(b)(1)(A), Florida Rules of Judicial Administration, even though they are not maintained in the court file. Therefore, the retention period for electronic recordings is governed by rule 2.430, Retention of Court Records, Florida Rules of Judicial Administration.

Depending upon the court's recording policies and procedures, it is possible that a backup recording could capture non-court events that may not meet the definition of "public record" under rule 2.420(b)(1), Florida Rules of Judicial Administration, because the events and recording of the events were not made or received in connection with the transaction of official business of the court. Information that is not part of a judicial proceeding would not qualify as public record and would need to be redacted from the recording prior to disclosure to the

public. Therefore, in the context of a public records request, a primary recording and a backup recording in almost all instances would be identical because non-court events captured on a backup recording would not qualify as public record and could be redacted. The Supreme Court approved a best practice that circuits shall not disclose backup recordings of proceedings to persons not employed or contracted by the court. In accordance with the Florida Courts Technology Commission's (FCTC) functional and technical standards for court recording systems, this practice should be applied in order to help prevent judges and other participants in a proceeding from turning off or muting the backup recording system. The intent of the FCTC standards and the best practice is to protect the redundant backup recording should the primary recording of a proceeding fail. However, un-redacted backup recordings may be requested through discovery in a specific case, and would need to be provided.

A question has arisen as to whether backup recordings may not qualify as public records at all either because they are merely "precursors" to the final record, which is the official transcript, or because, like the backup audio tape involved in Holt v. Allen, 677 So.2d 81 (Fla. 2d DCA 1996), they are not produced in "connection with the transaction of official business" of the court. The Supreme Court in In Re: Amendments to the Florida Rules of Judicial Administration and the Florida Rules of Appellate Procedure – Implementation of Commission on Trial Court Performance and Accountability Recommendations, 13 So.3d 1044 (Fla. 2009), emphatically rejected blanket restrictions on access to electronic recordings of judicial proceedings. While the district court in Holt concluded that a stenographic reporter's backup audio tape, used solely to assist the reporter in preparing the official transcript, was not a public record because it was not prepared in accordance with any court rule or law, or in connection with the transaction of official court business, backup electronic recordings are prepared at the direction of the court as part of the policies and procedures stated in the circuit court reporting plan required by rule 2.535(h)(3), Florida Rules of Judicial Administration. Because backup and primary recordings are made pursuant to the circuit court reporting plan, it would be difficult to conclude that backup recordings are not made in connection with the transaction of official court business. In summary, backup recordings are not the equivalent of the audio recording at issue in Holt because they are made not for the convenience or assistance of an individual court reporter in the reporter's discretion, but in connection with the transaction of official court business, thereby meeting the definition of public record.

CC: Lisa Goodner
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