



# Judicial Impact Statement

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## JUDICIAL IMPACT STATEMENT: Court Reporting Revisions

### TITLE INFORMATION

Makes clarifications to the changes made to the court reporting statutes contained in House Bill 487, 129<sup>th</sup> General Assembly.

### IMPACT SUMMARY

The Court Administration Committee of the Ohio Judicial Conference evaluated Enacted House Bill 487, 129<sup>th</sup> G.A. and determined that it fails to modernize the language regarding court reporting and transcripts, that it is inconsistent with several court rules, including Superintendence Rules 11, 44, and 45, and Appellate Rules 9 and 10, and that it was poorly worded leading to confusion over the meaning of the statute and how to implement the law uniformly across appellate districts and the state.

### BACKGROUND

The Ohio Judicial Conference and the Supreme Court of Ohio have been working over several years to achieve changes to Appellate Rule 9 as well as Superintendence Rules 11 and 13 with regard to court reporting and transcripts. The process of changing court rules has taken a significant amount of time, but was a necessary first step to changing the Ohio statutory provisions that correspond to those court rules.

House Bill 487, 129<sup>th</sup> G.A. was introduced containing a proposal to require court reporters to provide prosecutors and defense counsel with free copies of court transcripts. The Judicial Conference and the Court Reporter Association opposed this change, which had been previously proposed in House Bill 153, 129<sup>th</sup> G.A. *The* court's obligation to maintain and produce an accurate record of court proceedings is a critical court responsibility that cannot be jeopardized. The Judicial Conference opposition was two-fold. (1) We opposed the change in fee structure because the proposed language was unclear in its practical application and interferes with each court's discretion in designing a fee formula that meets the specific circumstances of that court. (2) We opposed other changes because they created confusion regarding the legislative intent, conflicted with established court procedural rules and made administering justice more difficult and less uniform across the state.

What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

While the Ohio Senate removed the court reporter provisions from House Bill 487, a conference committee restored the provisions. The hurried nature of the legislative process really did not allow for sufficient time for the Judicial Conference, Prosecutors, Public Defender, Court Reporters, and others to arrive at a consensus over the changes that were needed. Indeed, some of the confused practical impact was not fully evident until the time came to implement the new law. The Judicial Conference began getting calls from local courts asking what the statute meant and how they could implement it without running afoul of Supreme Court rules already in place. Indeed, the implementation has been rocky and there is no uniform interpretation.

One important reason that the Judicial Conference was established in 1963 was to encourage “uniformity in the application of the law, rules, and practice throughout the state and within each division of the courts as an integral part of the judicial system of the state.” The Judicial Conference has been unable to meet this statutory obligation with enactment of House Bill 487.<sup>1</sup>

When we realized the confusion caused to the judiciary by enactment of House Bill 487, the judges met on August 16, 2012 to develop a proposal to address the unintended, negative consequences of the 2012 changes, while still being faithful to the General Assembly’s intent to provide prosecutors and defense counsel with free or at actual cost copies of transcripts, once the appellant had paid for the original transcript.

The current Judicial Conference proposal is intended to remediate these negative consequences by restoring the text of the court reporters statutes as it existed prior to passage of House Bill 487, by updating that text consistent with the recommendations of the judicial branch of government, and clarify the legislative intent by including provisions to ensure that prosecutors and indigent defense counsel receive copies of court transcripts, free or at cost of reproduction as a court record, once the county treasury has paid for an original transcript. This statutory adjustment will enable the judiciary across the state to develop uniform interpretations and practices consistent with court rules.

## **JUDICIAL IMPACT**

The changes made to the court reporter statutes in House Bill 487 failed to include the modernization proposals developed over the last several years by the Ohio Judicial Conference and the Supreme Court of Ohio. Those recommendations resulted from an extensive process of reviewing court rules and statutory references to court reporting and court transcripts. That review resulted in a conclusion that the

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<sup>1</sup> During the summer and early fall, the Judicial Conference has received numerous calls from judges, court administrators, and court reporters asking a plethora of questions regarding the meaning and implications of House Bill 487. Those questions and concerns include whether the new rules apply to private civil cases, whether there is any legal significance of the fact that court “actions” (and not proceedings) are to be recorded, whether a court reporter includes the independent contractors or otherwise self-employed reporters, whether the same rules apply when the court does not have a court reporter on staff, whether the judge can increase the fee for an original transcript to offset the loss of income/revenue from copies sold, whether the court can charge each party the costs of the original and then give free copies ONLY to anyone who paid for an original, whether there are any restrictions on who can order a transcript or on who can receive a copy of a transcript, whether you have to be a party in the case to order a transcript or a copy of transcript, whether the appellant is the only one who pays for a transcript and all other requests are filled free of charge, whether there is a practical implication of removing “forthwith” that may result in delayed payments, whether free copies must be distributed before the original transcript has been ordered or paid for, whether a “copy” in the statute is different from the “duplicate” transcript that is described in Appellate Rule 9/10, whether the law applies retroactively to cases and transcripts made prior to the effective date of House Bill 487, how court reporters are to be compensated for overtime, and how to deal with the shrinking work force of court reporters.

court reporting and transcript language was outdated and that it fails to accommodate current or future technological changes that affect the court's capacity to maintain court records and provide for timely production of court transcripts.

House Bill 487 also introduced inconsistencies between the Ohio Revised Code and several court rules, including Superintendence Rules 11, 44, and 45, as well as Appellate Rules 9 and 10.

Even the changes relative to free copies to prosecutors and defense counsel were written so poorly that some counties initially thought the newly written statutes required the prosecutor and defense counsel, as well as each private party in a civil case, to pay the original fee before receiving copies for free or at cost. Although the Judicial Conference has attempted to guide the local courts regarding the legislative intentions of the statute the language that was adopted is producing disparate interpretations that are inconsistent with court rules and inconsistent with the intention of the General Assembly to provide free copies to prosecutors and defense counsel once an original transcript fee had been paid by the county.

In order to fix the problems created by House Bill 487, the Judicial Conference proposes restoration of the pre-HB 487 language, with the modernization language, along with a simple, clear, and easy to understand provision ensuring prosecutors and defense counsel be entitled to copies free or at cost once the county has paid a fee for the original. We believe this approach will encourage uniformity across the state with regard to the procedures for keeping accurate records of court proceedings. This will improve the administration of justice in Ohio.

#### **RECOMMENDATION**

Sec. 2301.18. The court of common pleas shall appoint a reporter as the official reporter of the court for a term not exceeding three years, unless removed by the court after good cause shown for neglect of duty, misconduct in office, or incompetency. The court may appoint assistant reporters as the business of the court requires for terms not exceeding three years under one appointment. The official reporter and assistant reporters shall take an oath faithfully and impartially to discharge the duties of their positions.

Sec. 2301.19. A transcript is an official verbatim record of a proceeding which is prepared by a reporter and which is certified to be correct by the reporter. A transcript, and not a duplicate copy of a transcript, shall be taken and received as prima-facie evidence of its correctness.

Sec. 2301.20. ~~All civil and criminal actions in the court of common pleas shall be recorded. If any party to a civil or criminal action requests the services of a reporter at a hearing in the action, the judge shall grant the request. The reporter shall carefully preserve the proceeding on an appropriate medium take accurate notes of or electronically record the oral testimony. The notes and electronic records medium shall be filed in the office of the official reporter and carefully preserved for either of the following periods of time:~~

(A) If the action is not a capital case, the ~~notes and electronic records medium~~ shall be preserved for the period of time specified by the court of common pleas, which period of time shall not be longer than the period of time than the other records of the particular action are required to be kept.

(B) If the action is a capital case, the ~~notes and electronic records medium~~ shall be preserved for the longer of ten years or until the final disposition of the action and exhaustion of all appeals.

Sec. 2301.21. In every case recorded as provided in section 2301.20 of the Revised Code, there shall be taxed for each day's service of the official and/or assistant reporter(s) a fee of twenty-five dollars, to be

collected as other costs in the case. The fees so collected shall be paid quarterly by the clerk of the court of common pleas in which the cases were tried into the treasury of the county and shall be credited by the county treasurer to the general fund.

Sec. 2301.22. Each reporter shall receive the compensation that the court of common pleas making the appointment fixes. That compensation shall be in place of all per diem compensation in those courts. In case the appointment is for a term of less than one year, the court may allow a per diem compensation to be fixed by the court, plus actual and necessary expenses incurred, for each day the reporter is actually engaged in taking testimony or performing other duties under the orders of the court, which allowance shall be in full payment for all services so rendered.

The county auditor shall issue warrants on the county treasurer for the payment of the compensation under this section in equal monthly installments if the compensation is allowed annually, and in case of services per diem, for the amount of the bill approved by the court, from the general fund upon the presentation of a certified copy of the journal entry of appointment and compensation of the reporters.

Sec. 2301.23. ~~When notes have been taken or an electronic recording has been made in a case as provided in section 2301.20 of the Revised Code, If the court or either any party to the suit requests a written transcript of all or any portion of the a proceeding which has been preserved on an appropriate medium by the reporter or other court personnel, the reporter reporting the case shall make a full and accurate transcripts of the notes or electronic recording. The court may direct the official reporter to furnish to the court and the parties copies of decisions rendered and charges delivered by the court in pending cases. When the compensation for transcripts, copies of decisions, or charges is taxed as a part of the costs, the transcripts, copies of decisions, and charges shall remain on file with the papers of the case.~~

Sec. 2301.24. The compensation of reporters for making written transcripts as provided in section 2301.23 of the Revised Code shall be fixed by the court of common pleas of the county in which the ~~trial proceeding~~ is held. ~~If more than one transcript of the same testimony or proceeding is ordered, the reporter shall make copies of the transcript at cost pursuant to division (B)(1) of section 149.43 of the Revised Code or shall provide an electronic copy of the transcript free of charge. When a transcript of any portion(s) of a proceeding is ordered by the prosecuting attorney, the attorney general, a municipal director of law, or a similar chief legal officer of a public office in an appeal of any civil, or criminal, or juvenile case, or by the indigent defendant in an appeal of any criminal or juvenile case, any additional transcript of the same portion(s) of the proceeding which is ordered by any of these parties for filing shall be provided by the reporter at actual cost as that term is defined in Rule 44 of the Rules of Superintendence for the Courts of Ohio. In all other circumstances, the compensation to the reporter for making an additional transcript shall be as fixed by the court but shall not exceed one-half the compensation allowed for the first transcript made of the portion(s) of the proceeding.~~

The compensation shall be paid by the party for whose benefit a transcript is made, ~~except that The the~~ compensation for transcripts requested by the prosecuting attorney or an indigent defendant in criminal cases or by the trial judge in either civil or criminal cases, and for copies of decisions and charges furnished by direction of the court, shall be paid from the county treasury and taxed and collected as costs. If the testimony of witnesses is taken before the grand jury by reporters, they shall receive for the transcripts the same compensation and be paid in the same manner as provided herein. A duplicate copy of a transcript shall be provided by the clerk of court, if the transcript has been filed, or by the reporter, if the transcript has not been filed, at actual cost as that term is defined in Rule 44 of the Rules of

Superintendence for the Courts of Ohio. Personnel cost may be added to the actual cost where the duplicate copy or additional transcript is made by a reporter whose time in making the copy is not being compensated by a public entity. An electronic copy of a transcript to a proceeding shall be provided by the reporter at actual cost as that term is defined in Rule 44 of the Rules of Superintendence for the Courts of Ohio.

Sec. 2301.25. When ordered by the prosecuting attorney or the defendant in a criminal case or when ordered by a judge of the court of common pleas in either civil or criminal cases, the costs of transcripts shall be taxed as costs in the case, collected as other costs, whether the transcripts have been prepaid or not, as provided by section 2301.24 of the Revised Code, paid by the clerk of the court of common pleas quarterly into the county treasury, and credited to the general fund. If, upon final judgment, the costs or any part of the costs are adjudged against a defendant in a criminal case, and the defendant has prepaid for the cost of a transcript or has paid a deposit toward the cost of the transcript, the defendant shall be allowed credit on the cost bill of the amount paid for the transcript the defendant ordered and, if the costs are finally adjudged against the state, the defendant shall have the defendant's deposit refunded. for the amount prepaid or deposited toward the cost of the transcript and shall not be charged again for this amount as part of the court costs. If, upon final judgment, the costs are adjudged against the state, the defendant shall receive a refund for the amount prepaid by the defendant or paid as a deposit toward the transcript. ~~All transcripts shall be taken and received as prima facie evidence of their correctness. If the testimony of witnesses is taken before the grand jury by reporters, they shall receive for the transcripts the same compensation and be paid in the same manner as provided in this section and section 2301.24 of the Revised Code.~~

~~Sec. 2301.26. Reporters appointed under section 2301.18 of the Revised Code may be appointed referees to take and report evidence in causes pending in any of the courts of this state. In the taking of evidence as referees, the reporters may administer oaths to witnesses. They shall be furnished by the board of county commissioners with a suitable room in the courthouse, and with supplies and equipment necessary for the proper discharge of their duties and for the preservation of their notes and electronic records. The notes and electronic records shall be the property of the county and carefully preserved in the office of the reporters.~~

### **1901.33 Court employees.**

(A) The judge or judges of a municipal court may appoint one or more interpreters, one or more mental health professionals, one or more probation officers, an assignment commissioner, deputy assignment commissioners, and other court aides on a full-time, part-time, hourly, or other basis. Each appointee shall receive the compensation out of the city treasury that the legislative authority prescribes in either biweekly installments or semimonthly installments, as determined by the payroll administrator, except that in a county-operated municipal court they shall receive the compensation out of the treasury of the county in which the court is located that the board of county commissioners prescribes. Probation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court. Assignment commissioners shall assign cases for trial and perform any other duties that the court directs.

The judge or judges may appoint one or more typists, ~~stenographers~~, statistical clerks, and official court reporters, each of whom shall be paid the compensation out of the city treasury that the legislative authority prescribes, except that in a county-operated municipal court they shall be paid the

compensation out of the treasury of the county in which the court is located that the board of county commissioners prescribes. The cost of transcripts shall be determined as provided under section 2301.25.

(B) If a municipal court appoints one or more probation officers, those officers shall constitute the municipal court department of probation unless the court designates other employees as the department of probation for the court.

(C) The chief probation officer may grant permission to a probation officer to carry firearms when required in the discharge of the probation officer's official duties if the probation officer has successfully completed a basic firearm training program that is approved by the executive director of the Ohio peace officer training commission. A probation officer who has been granted permission to carry a firearm in the discharge of the probation officer's official duties annually shall successfully complete a firearms requalification program in accordance with section 109.801 of the Revised Code.

(D) The judge or judges of a municipal court in which the clerk of the court is elected as provided in division (A)(1)(a) or (d) or (A)(2)(b) of section 1901.31 of the Revised Code may appoint an administrative assistant. The administrative assistant shall have charge of personnel related matters of the court and shall perform any other administrative duties assigned by the court. The administrative assistant shall receive the compensation out of the city treasury that the court prescribes, except that, in a county-operated municipal court, the administrative assistant shall receive the compensation out of the treasury of the county in which the court is located that the court prescribes.

Effective Date: 03-31-2003; 06-30-2006

Uncodified section : In determining the appropriate transcript fee upon the effective date of this legislation, the provisions of section 2301.25 shall be applied to any transcript of proceedings recorded on or after the effective date of this legislation.

## **EXPLANATION OF CHANGES**

**2301.18-** NO CHANGE.

**2301.19-** The proposed revision to R.C. 2301.19 makes a distinction between an original "transcript" and a "duplicate copy of a transcript." Existing law does not adequately distinguish between these very different terms. A transcript of a proceeding which is certified by a reporter and to be a true and accurate record of the proceeding is presumed to be reliable for use in court proceedings. It is appropriate for filing with trial and appellate courts and for use in court proceedings. Meanwhile, a duplicate copy of a transcript may be sufficient for many purposes, such as for use by counsel in preparing arguments and appeals and in preparing for the examination of witnesses. However, a duplicate copy of a transcript, which is not certified to be a true and accurate record of a proceeding, is not presumed to be reliable because there is no way to determine its correctness other than through comparison with the original transcript.

**2301.20-** The proposed revision to R.C. 2301.20 addresses some flaws in the current statute. While a "proceeding" or a "hearing" may be recorded, an "action," the term generally used in referring to a lawsuit, is incapable of being recorded. The proposed language uses the term "proceeding" which is consistent with the use of the same term in Superintendence of Court Rule 11 and Appellate Rule 9. The requirement in existing R.C. 2301.20 for all "actions" to be recorded is in conflict with Superintendence of

Court Rule 11 and Criminal Rule 22, which do not require the recording of all proceedings. The subsequent language in existing R.C. 2301.20 that a court reporter shall record only “oral testimony” is inconsistent with the direction that an “action” be recorded. The proposed language restores the original language from R.C. 2301.20, prior to its amendment in 2012, that provided for the recording of a proceeding at the request of a party. The language is changed to allow the recording to occur on an appropriate medium, which in most courts will occur digitally at the present time. The use of the term “appropriate medium” also allows for other means of recording to be used in the future which are not now available as court technology advances.

**2301.21-** Existing R.C. 2301.21, when considered in combination with existing R.C. 2301.20, requires a fee of \$25.00 be assessed for each day’s service of a court reporter in recording an “action” in which there is oral testimony elicited. As interpreted by some prosecuting attorneys, this requires the assessment of a \$25.00 fee on a daily basis in numerous cases. It becomes the burden of court personnel to identify for the clerk of court those cases in which there was oral testimony elicited during the course of a day, and it becomes the burden of the clerk of court to account for and collect these fees. Since many courts record all proceedings using a digital format, the existing law results in an unnecessary charge to litigants and it places a tremendous burden on court personnel and the clerk of the court in attempting to comply with the mandate in the statute. Former R.C. 2301.21, prior to its amendment in 2012, required the assessment of the \$25.00 fee in cases in which the services of a court reporter were requested by a party. This is a logical distinction which is maintained in the proposed language for R.C. 2301.20 and R.C. 2301.21.

**2301.22-** NO CHANGE.

**2301.23-** Under existing R.C. 2301.20, the duty of the reporter to record by notes or electronically all or any portion of a proceeding is limited to oral testimony. Existing R.C. 2301.23 requires a transcript to be made upon request even though the portion of the proceeding for which the transcript is requested may not have been recorded on an appropriate medium. The proposed language addresses this problem. Consistent with the proposed changes made to R.C. 2301.20, the proposed language provides that a reporter, upon request of the court or either party to the suit, shall prepare a transcript of all or any portion of a proceeding provided it has been preserved on an appropriate medium by the reporter or other personnel. The use of the phrase “other personnel” is necessary because in many courts the actual electronic or digital recording of a proceeding is done by a bailiff or other court personnel rather than by the reporter.

**2301.24-** Existing R.C. 2301.24 requires that the reporter provide, where more than one transcript of the same testimony or proceeding is ordered, a copy of the transcript at public records cost or an electronic copy free of charge. The proposed change to this statute provides that an additional transcript provided of the same proceeding, a duplicate copy of a transcript, and an electronic copy of a transcript shall be provided at “actual cost” as provided for in Superintendence of Court Rules 44-47. The change to have “actual cost” determined under Superintendence of Court Rules 44-47 is appropriate and necessary because court transcripts are court records, and public access to court records, and related issues, are governed by Superintendence of Court Rules 44-47 and not by public records law. In this regard, Superintendence of Court Rules 44-47, which became effective on July 1, 2009, set forth specific procedures regulating public access to court records and replace the public records request procedures contained in R.C. 149.43 with respect to requests directed to an Ohio court. *State ex rel. GMS Mgt. Co., Inc.*

*v. Vivo* (7<sup>th</sup> Dist., 2010), 2010-Ohio-4184, at ¶ 25; *Cleveland Constr., Inc. v. Villanueva* (8<sup>th</sup> Dist., 2010), 186 Ohio App.3d 258, 262, 927, N.E.2d 611, 614, 2010-Ohio-444, at ¶18.

It should be noted that the definition of “actual cost” in Civ.R. 44(A) is exactly the same as is provided in R.C. 149.43 for public records. Typically, “actual cost” would not include the cost of labor for a public employee who responded to a request to make copies of public records because the employee has already been compensated for performing his/her duties concerning the records request. *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 626, 640 N.E. 2d 174. However, many reporters operate on a contractual basis with courts and are not public employees. This relationship often inures to the benefit of the public entity because transcripts are often prepared on short notice after hours, and through contractual relationships courts are not required to pay overtime. The result is that the overall cost to the court is less. However, by requiring court reporters to provide copies of transcripts on their own time and with that time being uncompensated under existing R.C. 2301.24, the end result will almost certainly be increased costs to the public entity, and there also may be less reporters being available to provide this service. This difficulty is the primary reason for including in the proposed revision to R.C. 2301.23 a provision that personnel cost may be added to the actual cost where the duplicate copy is made by a court reporter whose time in making the copy is not being compensated by a public entity. This difficulty is also the primary reason for the proposed language providing that a copy of a transcript shall be obtained from the clerk of court when the transcript has already been filed with the clerk and shall be obtained from the court reporter in those situations where a transcript has not yet been filed. This is also consistent with the clerk already having the responsibility of providing copies of filed documents. Ultimately, it may be appropriate through the rule-making process for consideration to be given to amending the Superintendence of Court Rules to specifically allow a reporter who is responding to a request for an additional transcript or for a copy of a transcript to include in the cost a reasonable charge for the reporter’s time.

Existing R.C. 2301.24 provides that an electronic copy of a transcript shall be provided free of charge. The proposed revision to R.C. 2301.24 provides that “actual cost” can be charged by the court reporter for the electronic copy. If there is any cost associated with providing an electronic copy, there is no reason why the person obtaining the copy should not reimburse the court reporter for that cost. However, since the “actual cost” for providing an electronic copy would not include any personnel cost, it is expected that this cost would be very small.

In most situations, only one transcript of a proceeding will need to be filed either with the trial court (usually for impeachment purposes) or with an appellate court. In those situations, duplicate copies of transcripts will be provided to certain parties at “actual cost” as referenced above. With regard to appeals, it is sometimes necessary for a transcript of the same proceeding to be filed in multiple cases. This happens, for instance, where there are codefendants who are tried together and who are filing separate appeals. As a result, the proposed language provides that additional transcripts will be provided to a prosecuting attorney or to an indigent defendant, who are most likely to be involved in a situation where multiple transcripts of the same proceeding are required, at “actual cost” so that the full transcript price does not need to be paid under these circumstances. This makes sense because both the public defender and the prosecutor needs are paid for by the County and the state. For other parties, the additional transcript would be provided at a cost fixed by the court but not exceeding one-half the compensation allowed for the first transcript. As to these other parties, it is preferable to apportion the costs in this manner than to assess all, or almost all, of the costs to the party who commenced the appeal.



The proposed language provides that compensation and payment for a reporter with respect to a grand jury transcript is the same as provided in R.C. 2301.24.

**R.C. 2301.25-** Although the compensation for transcripts requested by the prosecuting attorney or an indigent defendant in criminal cases are paid from the county treasury and taxed and collected as costs pursuant to R.C. 2301.24, a reporter may require a deposit to be paid toward the cost of a transcript or may require that the transcript be prepaid. The proposed language in R.C. 2301.25 clarifies that if a defendant in a criminal case has prepaid or made a deposit toward the cost of a transcript, and court costs are ultimately assessed to the defendant, the defendant shall receive credit against and not be charged for any amount(s) he/she paid toward the cost of the transcript. Conversely, if the court costs are ultimately assessed to the state, the defendant is entitled to a refund for any amount(s) he/she paid as a deposit or prepaid toward the cost of the transcript if the cost is included as part of the court costs.

**2301.26-** This statute is outdated and needs to be removed from the Revised Code.