

INSIDETRACK

BI-WEEKLY NEWSLETTER OF THE STATE BAR
OF WISCONSIN

FEBRUARY VOLUME NUMBER
2017 9 3

Proposal Eliminates Court Reporters in Work Comp Cases, Other Hearings

Audio recording devices could replace court reporters in certain administrative hearings, including worker's compensation trials, under a state agency budget request.

JOE FORWARD



Feb. 1, 2017 – Plaintiff and defense counsel oppose a proposal to allow audio recorders to replace court reporters in cases that fall under the Division of Hearings and Appeals, which annually hears thousands of cases, including worker's compensation cases.

A provision in the Department of Administration's 2017-19 biennial budget request calls to "eliminate the requirement that the Division of Hearings and Appeals have a court reporter at every hearing and implement electronic recording of hearings."

The **Division of Hearings and Appeals** (DHA) is an independent entity that conducts administrative hearings on disputes involving 15 state agencies. The DHA is "attached" to the Department of Administration (DOA), which controls the DHA's budget.

Court reporters are generally stenographers who capture legal proceedings verbatim as part of the court record. Cutting court reporters from DHA hearings is a bad idea, especially in worker's compensation cases, according to various bar groups.

“ Court reporters are needed to obtain a clean and accurate record. ”

“Using audio recorders would cause big problems,” said Patricia Epstein Putney, chair of the State Bar of Wisconsin’s Litigation Section. “Both sides, plaintiff and defense counsel, agree that court reporters are needed to obtain a clean and accurate record.”

The Litigation Section’s Board, which represents almost 2,000 section members, both plaintiff and defense counsel, voted unanimously to actively oppose the proposal.

The Wisconsin Defense Counsel, the Wisconsin Association for Justice, and the Wisconsin Association for Worker’s Compensation Attorneys also oppose the proposal.

In a [joint statement](#), those associations outlined the various problems that could arise if digital audio recorders replace court reporters in worker’s compensation hearings.

“An audio recording of a trial, by its nature, cannot perform the functions of a court reporter,” the statement to Gov. Scott Walker notes. “A tape recorder simply records sound. It does not distinguish who the speaker is, cannot direct witnesses to speak louder or more clearly, and is not guaranteed to function properly. Even if the audio recording is completely intelligible, it still would likely result in the need for transcription.”

Preserving the Record

Administrative law judges conduct DHA hearings. In 2015, DHA received more than 17,000 cases, mostly from the Department of Corrections and the Department of Health Services, which administers state health care and food share programs.



Joe Forward, *Saint Louis Univ. School of Law 2010*, is a legal writer for the State Bar of Wisconsin, Madison. He can be reached by [email](#) or by phone at (608) 250-6161.

Prior to 2016, administrative law judges within the Worker’s Compensation Division of the Department of Workforce Development (DWD) exclusively adjudicated all disputed worker’s compensation matters. However, the 2015-17 state budget moved worker’s compensation matters from the Worker’s Compensation Division to the DHA.

[Fiscal papers](#) in 2015 indicated that the worker’s compensation system receives more than 5,300 applications for contested hearings per year. As of 2015, they were handled by 24

administrative law judges, seven court reporters, and other administrative staff.

Bar groups are particularly concerned about preserving accurate records in worker’s compensation cases, which often involve high dollar amounts. In addition, parties often appeal adverse decisions, and appeals require a transcript of the proceedings.

“These are trials,” said Laura Lyons, president of the Wisconsin Defense Counsel. “You have a judge listening to evidence on both sides. Court reporters are capturing the testimony that’s sworn under oath and handling evidence. Even if you have crystal clear quality, it’s not going to be the same as having a person there who can work with all the individuals involved to make sure things are accurate and are well managed.”

““

Even if you have crystal clear quality, it’s not going to be the same as having a person there who can work with all the individuals. . . . ”

Epstein Putney noted that when initial decisions are appealed, the reviewing tribunal needs an accurate record of fact-finding proceedings. For instance, the Labor and Industry Review Commission reviews worker’s compensation decisions, and some of those make their way to the circuit court, the appeals court, or the state supreme court.

If those were just audio taped, “you wouldn’t know who was saying what,” Putney said. “You wouldn’t know what document was being marked. And these are cases that can involve hundreds of thousands, if not millions of dollars. Many are appealed.”

Court reporters can tell witnesses to speak louder or repeat something. “That may not happen with an audio device,” Epstein Putney said. “These are important proceedings to the litigants. Having trained court reporters is the best way to get a clean record.”

Court Reporters are Trained and Educated

There are currently 292 “official” court reporters working for the Wisconsin Court System. Other court reporters contract to provide freelance services as needed, and others contract with attorneys to capture out-of-court proceedings such as depositions.

Sheri Piontek, a court reporter for the Brown County Circuit Court, is the president of the Wisconsin Court Reporters Association, which also opposes the proposal.

“I know digital recording is a cheaper way of doing things and I understand that I’m talking as a court reporter,” Piontek said. “But the attorneys have a concern with digital because they have experienced problems when court reporters are not involved.”

Piontek says most court reporters use steno machines to transcribe the proceedings. The steno machine produces an electronic file. Upon a transcript request, the court reporter uses software to translate the shorthand, then makes edits from there.

Some certified court reporters use software that produces real-time transcripts for judges who may want to read simultaneously what the parties are saying.

“Our education requires classes in stenography at various speeds and is knowledge based,” Piontek said. “For instance, we take courses to learn medical and legal terminology. Without understanding the terminology, you may end up with inaccurate or phonetic transcripts.”

Live 1

“

Without understanding the terminology, you may end up with inaccurate or phonetic transcripts.”

”

Piontek says digital audio recording as a substitute for a court reporter is generally reserved for lower level cases such as small claims cases or non-jailable misdemeanors when a court reporter is unavailable. In those cases, it's not likely a transcript will be required or requested.

But when you start talking about replacing court reporters in higher level cases like worker's compensation, Piontek understands why attorneys are quick to object.

“A transcript may come back with phonetic spellings,” she said. “If the audio file is bad, parts may be flagged as ‘inaudible.’ These are unacceptable gaps in the transcript.”

Piontek says a bad transcript may even force the parties to redo the proceedings, which strains the court system and costs the attorneys (and clients) more money.

Victor Forberger, a labor and employment attorney in Madison, represents parties in unemployment insurance cases. Those hearings are audio recorded and no court reporters are used.

“At times, problems can occur if the judge doesn't notice that the recording has stopped. The technology matters a great deal. You need the right microphones and all that,” Forberger said. “It's also more expensive if you want a transcript from a recording.”

However, transcripts aren't usually required in unemployment insurance cases because the facts aren't usually disputed and the hearings are relatively short, Forberger said.

In contrast, worker's compensation hearings are often complex, have disputed facts, and may require more than one day of testimony spaced out over months or years.

Up Against a Wall?

Opponents question the wisdom of replacing court reporters with digital audio recorders in higher level cases such as worker's compensation. But with limited budgets, government agencies will increasingly explore

technology as a way to cut costs.

In this case, cutting court reporters would not necessarily benefit taxpayers directly, since assessments against insurers fund the administrative costs of Wisconsin's worker's compensation system, including the costs associated with hearings.

Live 1

But a 2015 publication for the National Center for State Courts notes that "a number of states and territories have made the transition to digital recordings in their courts."

And Piontek acknowledged that some courts in Wisconsin are using digital audio recording in rural or other areas where court reporters are unavailable.

Piontek said she would be "very hesitant to certify any transcript that was not stenographically taken down verbatim by a court reporter. These are cases that can hinge on a single word," she said. "Having a court reporter who has graduated from an accredited court reporting program is the best way to produce an accurate record."

Proposal Eliminates Court Reporters in Work Comp Cases, Other Hearings

Leave a comment