



February 3, 2016

Judicial Council of California
Attn: Leadership Services Division, Special Projects
2860 Gateway Oaks Drive, Suite 400
Sacramento, CA 95833
FuturesCommission@jud.ca.gov

Dear Hon. Members of the Council:

The Deposition Reporters Association of California (“DRA”) writes to raise our concerns regarding the Futures Commission’s apparent consideration of electronic recording of judicial proceedings as an adequate substitute for a licensed court reporter.

Deposition Reporters Association of California

DRA represents more deposition reporting professionals than any organization in California and is the largest organization in the nation solely devoted to representing such professionals. DRA is affiliated with the National Court Reporters Association (NCRA).

DRA was founded in 1995 by freelance deposition reporters seeking to preserve the impartiality and independence of their profession. In the early nineteen nineties, certain deposition companies and firms began the practice of offering certain services or prices to one party in litigation but not to others. DRA was founded to combat such practices.

DRA worked with the National Court Reporters Association to establish and fund Citizens for Impartial Justice, a nationwide organization that coordinated successful efforts across the country to preserve the impartiality of the deposition reporting profession. As a result, court rules or laws preserving the impartiality of freelance deposition professionals were passed in fourteen states including California, Hawaii, Texas, Minnesota, Utah, West Virginia, New Mexico, Georgia, Louisiana, Nevada, Kentucky, Michigan, Arkansas, Indiana, and North Carolina.

Background: Court Reporters Are Highly Trained Professionals

The term “court reporter” broadly refers to two kinds of licensed professional: those licensees who are full-time employees of county courts and work in courtrooms, reporting and transcribing official proceedings (called “officials”) and those licensees who are hired by attorneys to report and transcribe depositions (called “freelancers”).

The importance of this licensed profession to the reasoned and credible administration of justice is hard to overstate. This was judicially confirmed in 2011. In *Serrano v. Stefan Merli Plastering Co.* (2011) 52 Cal.4th 1018, 1027, the Supreme Court held that court reporters who take depositions are “ministerial officers of the court,” meaning officers charged with

non-discretionary, *inherently judicial* duties. This is why freelancers, for example, who report depositions are empowered to swear-in witnesses, and this is why the Code of Civil Procedure strictly regulates what they do: they are extensions of the judge working in a private setting.

Like other trusted professionals such as physicians, engineers, and accountants, court reporters are licensed by and subject to discipline by a regulatory board in the Department of Consumer Affairs. Indeed, the Legislature's Joint Committee on Boards, Commissions, & Consumer Protection correctly underscored the importance of this frequently taken-for-granted profession in 2005 when it wrote:

An accurate written record of who said what in court is essential if the outcome of a judicial proceeding is to be accepted by the litigants and the public as non-arbitrary, fair, and credible.

In criminal cases, for example, courts of appeal rely exclusively upon [] written briefs and a written transcript to adjudicate the lawfulness of what occurred at trial. A conviction – and thus in some instances the life or death of an accused – can stand or fall based entirely upon what a witness said, what a lawyer said, what a juror said, or what a judge said, as solely reflected in the written transcript.

In civil cases, millions of dollars, life-long careers, and the fate of whole business[] enterprises can hinge on what was said or what was not said in a deposition or at trial.

Moreover, the testimony in civil and criminal cases is often thick with technical jargon. A medical malpractice case where specialist experts from both sides contradict one another can involve complex technical medical terminology; criminal cases can involve scientific language related to DNA identification; anti-trust cases can involve diction from economic theory, and so on. No matter how obscure or technical, such jargon must to-the-word accurately be reflected in the written transcript.

Court reporters are highly trained professionals who transcribe the words spoken in a wide variety of official legal settings such as court hearings, trials, and other litigation-related proceedings such as depositions.

A common misperception is that court reporters simply and passively take dictation. As any serious litigator will tell you, and as a glance at the many and complex Code of Civil Procedure and Government Code sections dealing with court reporting confirms, that is very wrong. As officers of the court who administer oaths, as the custodians of the record during and after the deposition (when corrections are made by the witness) or hearing, court reporters are required to ensure that the transcript is accurate, and that often means intervening in the proceeding to ensure that the words witnesses speak can be accurately reported and transcribed. This must all be done under sometimes extraordinarily stressful circumstances, with emotional witnesses, and furious (and often screaming) attorneys jockeying for any advantage.

Moreover, court reporters don't just show up unprepared. Call, for example, a freelance deposition reporter on the weekend prior to a patent or trademark-related deposition and you will discover it is commonplace for them to be busy reading the underlying patents or pleadings to familiarize themselves with the jargon and what the jargon means, all to better ensure the accuracy of transcribed testimony. This mastery of context is how the best reporters will know whether one technical chemical compound, for example, is uttered over its similarly sounding cousin.

Audio Recording Has Been Rejected Time and Time Again by the Legislature Because It Is Inferior to a Licensed Professional

When the best lawyers in the nation need to take a deposition of a witness, they almost without exception choose a human professional. Why? Because only a person knows whether they are getting it all down when the lawyers yell at each other, when the witness is sobbing, or a child is whispering. And only a licensed person can be trained and held ethically accountable for their impartiality and competence. Only a person feels pride in a job well done or can confess when he or she can't make out testimony or argument when that argument or testimony is occurring.

Regrettably, the instances of electronic reporting snafus are many, with devastating consequences. Here is an excerpt from a 2012 case in New York involving a prisoner and a "technical error with the hearing tape." The court observed that:

“[t]he petitioner's transcriber documented numerous and lengthy gaps in the hearing tape, which rendered much of the transcript unintelligible. Based upon the foregoing, the Court found that the condition of the transcript was such that it, indeed, precluded meaningful review of the disciplinary determination.”

Here is another 2012 excerpt from a case involving assault, from Kentucky:

“Subsequently, due to failure of the courtroom recording equipment, the trial court entered a summary of the trial proceedings[.]”

And, another 2012 case, from Louisiana:

“During presentation of the testimony of Ted Higginbotham and Dr. Glenda Richardson, the court's recording equipment malfunctioned. Thus, none of Ted Higginbotham's testimony was transcribed and only part of Richardson's testimony was transcribed.”

Plus, audio recording makes no sense fiscally. Under this proposal, new recording equipment will have to be purchased, warehoused, repaired, serviced, and maintained, and either additional court personnel will have to be hired to handle this or outside contractors will have to be paid for these services. ER monitors will have to be employed and trained, adding new salary and employee-benefit expense to court budgets. The point is that when one adds up the cost of the equipment, repairing it, replacing it, and on top of that the cost to the court of hiring the human beings who are required to operate and monitor the recording systems in each

courtroom, and then, finally, the cost to have the recorded proceedings transcribed -- presuming the equipment didn't fail to record -- so the transcript can be used without dispute by all the parties and the court, the cost savings that you may be anticipating are illusory. Compare this cost-heavy ER scenario with the highly trained court reporters currently serving as the court's record keepers, professionals who bear all the expense of purchasing, maintaining and updating their own equipment, their steno machines, computers, printers and software, everything needed for both reporting and transcribing court proceedings, without any money expended by the courts.

Moreover, family law matters are highly emotional and frequently the subject of appeals. Appellate courts do not listen to audio tapes. They work off of transcripts. This means that transcripts will still need to be prepared by court-employed transcribers or outside contractors in some significant number of cases, making audio recording uniquely inefficient as applied to the family law setting.

Finally, what you may be ignoring is the fact that court reporters can and regularly do provide daily-copy transcripts for use by the court and the parties at trial and are required to do so for all capital criminal cases. The best ER equipment with an experienced monitor simply cannot do that and never will be able to do that. Transcribing from taped proceedings is a much slower process than a court reporter's computer-assisted transcription from steno. Additionally, reporters now on a daily basis in many courts throughout the State are providing visual realtime-translation feeds to their judges -- again, with equipment purchased at the reporter's expense -- and to all counsel as requested. Their immediate translation of the court proceedings is seen as an enormous benefit to all, an advantage that will be lost and sorely missed by judges and attorneys alike if these skilled reporters are replaced by the far slower and less effective ER equipment.

Audio Recording Has Not Caught On In the Private Sector

Deposition reporters like those represented by DRA know that audio recording has not caught on in the private sector for the same reason it is unworthy of being considered as any kind of adequate substitute for court reporters for the public sector. It is *inferior to a licensed professional*, and those in the free market are not selecting it over licensed professionals for that reason. And, just as nobody would propose that public defenders be replaced by paralegals, the answer to the denial of justice afforded to family law litigants by misguided court reporter layoffs is not for family law litigants to be relegated to second class status.

Conclusion

For all these reasons, we ask that you reject as ill-advised any proposal to use machines in lieu of licensed professionals. Transcripts will still be needed, even if the expensive equipment being considered is purchased, and someone will still have to pay for the transcription to be done.

The best proposal is rehiring the official reporters. A better proposal would be to expand the resources of the currently existing Transcript Reimbursement Fund offered through the Court Reporters Board and funded by Certified Shorthand Reporters' licensing fees, so that it may aid more than just those who qualify as indigent litigants, especially in family law matters.

Respectfully,



Antonia Pulone,
DRA Legislative Chair

EXAMPLES OF ER FAILURES AND THE CONSEQUENCES.

Excerpts (November 2012): Somehow the machine that recorded the trial for transcription was not turned on during most of Barber's testimony. While we stop short of advocating the use of court stenography over tape recording equipment for trials, we note that choosing to use court stenography instead of tape recording equipment would tend to avoid the sorts of problems with which the parties and the court are now faced. Human error is inevitable. But, human error by a court stenographer usually does not lead to such large chunks of trial testimony being forever lost from the record below. See *State v. Middleton*, 995 S.W.2d 443, 466 (Mo. banc 1999).

Silence, country music: Missing Barber recording unexplained

Recording machine was apparently on during the trial, but failed to record anything but silence and some music from an unidentified radio station during Barber's testimony.

**By Jason Hunsicker
The Rolla Daily News
Rolla, MO
Nov. 15, 2012**



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Arnold Stephen Barber, left, speaks with Nate Owings, one of his attorneys, prior to oral arguments in his appeals case in late October in Linn County. The appellate court ruled in favor of Barber because the former local dentist's testimony was not recorded during the criminal trial.

🔍 🔍 Kirksville -- Missing testimony from the recording of Arnold Stephen Barber's felony witness tampering trial is just that - missing.

Adair County Circuit Clerk Linda Decker said during a meeting with local media Thursday the recording of last June's trial has approximately 30-35 minutes of silence when the questions and testimony of Barber should be present.

Barber had been convicted last June of two counts of felony witness tampering and sentenced to five years in prison before his successful appeal. The appellate judges ruled Tuesday in his favor because his testimony was not available to review.

It is not known when the new trial will begin.

Both the original trial recording at the Adair County Courthouse and a copy sent digitally to Jefferson City just hours after the trial feature the currently unexplained audio problem.

The silence starts when Barber's examination began. Audio returns in the middle of a sentence spoken by Adair County Prosecuting Attorney Matt Wilson during Barber's cross-examination.

Also present at one point of the recorded silence is country music from an unidentified radio station.

Decker's report of the recording's content is in contrast to the Western District Court of Appeals ruling issued Tuesday. In that document, the judges, who reversed Barber's conviction and ordered a new trial, pointed fingers at Adair County court personnel, seeming to place them at fault for the error.

"Somehow the machine that recorded the trial for transcription was not turned on during most of Barber's testimony," the filing read.

Decker said all indications are the machine was turned on, though there is no explanation for why the recording failed during those moments of the trial.

"This particular case, I still don't feel like I have a good, hard answer to what the problem was. I think there is a lot of finger pointing and I don't have any problem accepting responsibility that there was not a complete transcript made. Anything that happens in this office is and will be my responsibility and I'm happy to accept the blame for that," Decker said.

Decker said in her 22 years at the courthouse there have been no other problems with the recordings, either with the former tape system or the current digital system.

Decker would not speculate on whether the recording could have been tampered with.

"I would have no knowledge of that. I wouldn't want to say that. I'm a little concerned that there was a radio station being picked up on the recording, which has never happened before or since, but it might have been one of those unexplained occurrences," she said.

In a statement Wilson issued Wednesday, the prosecutor lamented the fact a court reporter was not used due to budget constraints.

Decker elaborated on that Thursday, saying while circuit judges are assigned full-time court reporters for their proceedings, the state budget does not allow for court reporters at proceedings handled by associate circuit judges.

The Barber trial was presided over by Associate Circuit Judge Karl DeMarce.

In place of a court reporter, courtrooms across Missouri use a state required digital recording system for associate court proceedings.

Decker said those recordings as well as all court business are saved to a secure local hard drive and also transmitted digitally to a backup server in Jefferson City each day around 2 a.m.

Nothing was done with the Barber case recordings until Barber's attorney J.R. Hobbs filed a request of appeal, in which he also requested a copy of the trial transcript.

When that request was made and approved, several months after the trial, Decker said she made a CD copy of the recording and sent it to the Office of State Courts Administrator in Jefferson City, where it was to be transcribed.

The OSCA notified Decker there was the missing audio segment and also country music on the recording. That was her first indication of a problem.

"I couldn't believe it when I got this email," she said.

She verified the problems on the original copy at the Adair County Courthouse, and confirmed the copy in Jefferson City contained the same strange errors.

Decker said she contacted tech experts at OCSA and requested they examine the local hard drive, but was told because more than 60 days had elapsed since the recording they would not be able to make a determination as to what caused the error.

A phone message left with OCSA was not immediately returned.

Decker then contacted the agency that services the computer itself and had the unit examined. That individual told Decker he found nothing wrong and believed the problem was "clerk error." He was not able to explain the country music.

But all indications are the unit was activated and court personnel had no reason to believe there was a problem. Decker said the record shows the clerk operating the machine was making docket entries - noting when an attorney began questioning a witness, court rulings, etc. - during Barber's testimony.

"Part of my being a little upset is one of the comments from a judge, something about a clerk not turning on a switch. That clearly did not happen," Decker said. "There was much more to it than that. We would have taken responsibility, and if a clerk has simply not turned on a switch I think she would have been aware to stop the judge at the proceedings and it could have been corrected at that time."

Decker said the clerk running the computer that day has nearly 30 years of experience. No action

was taken against the clerk, who Decker refused to identify.

“I have every confidence that she did everything that was needed to do,” Decker said.

Decker said since learning of the problems with the Barber recording she has considered investing in a backup recording system for the courthouse, calling the current set up a “ticking time bomb.”

She was not aware of any further investigative methods that could or would be pursued.

371 S.W.3d 763 (2012)

Gregory L. HARPER, Appellant, v. COMMONWEALTH of Kentucky, Appellee.

Nos. 2009-CA-002390-MR, 2010-CA-001802-MR.

Court of Appeals of Kentucky.

November 4, 2011.

Discretionary Review Denied by Supreme Court August 15, 2012.

764*764 Bruce P. Hackett, Louisville, KY, for appellant.

Jack Conway, Attorney General of Kentucky, Susan Roncarti Lenz, Assistant Attorney General, Frankfort, KY, for appellee.

Before CAPERTON, NICKELL, and WINE, Judges.

OPINION

CAPERTON, Judge:

Following a jury conviction for second-degree assault and first-degree unlawful imprisonment, the Appellant Gregory Harper was sentenced to eight years of imprisonment.[1] He now appeals the August 10, 2010, order of the Jefferson Circuit Court denying his motion for a new trial based upon the failure of the courtroom recording equipment to produce a record of his 765*765 jury trial. Following a review of the record, the arguments of the parties, and the applicable law, we affirm.

On March 30, 2009, Harper was indicted for the February 14, 2009, second-degree assault and first-degree unlawful imprisonment of his niece, Charisse Harper. Subsequently, due to failure of the courtroom recording equipment, the trial court entered a summary of the trial proceedings and, therefore, all references *infra* to testimony and events at trial are according to the trial summary...

In the trial court's "Order Denying New Trial and Addressing Trial Record," the court stated that the failure of the audio equipment was "an endemic problem with the current, somewhat dated version of JAVS which is in use in Jefferson Circuit Court. Allegedly, subsequent versions have been modified to minimize or eliminate this problem." The court determined that an attempt had to be made to reconstruct a trial record by employing a narrative statement before the court could decide whether a new trial was necessary....

Having reviewed the record and applicable law, we believe that resolution of this appeal ultimately turns upon the clear and unequivocal language of CR 75.13. That provision provides that:

(1) In the event no stenographic or electronic record of the evidence or proceedings at a hearing or trial was made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient electronic recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. ...

STATE OF LOUISIANA Appellee, v. BOBBY D. HIGGINBOTHAM Appellant.

No. 46,975-KA.

Court of Appeals of Louisiana, Second Circuit.

April 25, 2012.

RACHEL I. CONNER, HARRY DANIELS, III, Counsel for Appellant.

BOBBY D. HIGGINBOTHAM, Pro Se.

JAMES E. PAXTON, District Attorney, LINDA K. WATSON, ANITA T. MACK, DAMON D. KERVIN, Assistant District Attorneys, Counsel for Appellee.

Before BROWN, WILLIAMS, and CARAWAY, JJ.

CARAWAY, J.

On May 19, 2010, a six-person Tensas Parish jury convicted Bobby Higginbotham of malfeasance in office and felony theft for his actions as mayor of the Town of Waterproof. La. R.S. 14:134 and 14:67. During a lengthy recess of the trial and after the full presentation of the state's case on three charges contained in the indictment, a partial mistrial was granted on the charge of public contract fraud, a violation of La. R.S. 14:140. Higginbotham received concurrent sentences of five years at hard labor, two years suspended for the malfeasance conviction and seven years at hard labor, three years suspended for felony theft. Higginbotham appeals his convictions and sentences including a claim that the granting of the partial mistrial on the public contract fraud charge was in error. For the following reasons, we reverse the convictions. ...

In April of 2010, during the recess of the trial, Higginbotham filed a motion for mistrial based upon the defectively transcribed testimony of two state witnesses which he claimed prejudiced his defense. During presentation of the testimony of Ted Higginbotham and Dr. Glenda Richardson, the court's recording equipment malfunctioned. Thus, none of Ted Higginbotham's testimony was transcribed and only part of Richardson's testimony was transcribed. ...

In his defense, Higginbotham called his first witness to testify and after the completion of her testimony, the court issued the following admonishment to the jury regarding the partial mistrial:

All right, ladies and gentlemen of the jury, if you would, listen closely, because this is an instruction of the Court that is important. During the recess, it was discovered that due to malfunction or human error, there is an incomplete recording of the trial testimony of Dr. Glenda Richardson and no recording of the trial testimony of Mr. Ted Higginbotham. Because testimony must be recorded, this Court has granted a partial mistrial as to the charge of public contract fraud, only, and admonishes and instructs you to disregard any and all testimony by Dr. Richardson and Mr. Higginbotham. And further admonishes and instructs you to disregard any documents or physical evidence offered by either the State or Defendant during the testimony of Dr. Richardson or Mr. Ted Higginbotham. ...

Regardless of all the other issues raised by defendant surrounding the procedural rulings before, during and after the trial, the technical problem regarding the incomplete transcription of the testimony was a clear error. In view of our law and the jurisprudence dealing with such a problem, the state made concessions to both the trial court and this court during the recess of trial that it should not proceed on the charge of public contract fraud because of the error in the transcription of the evidence.

2012 NY Slip Op 32717(U)

In The Matter of FRANK J. POVOSKI, JR., Petitioner, v. BRIAN FISCHER, Respondent, For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Docket No. 3599-11.

Supreme Court, Albany County.

September 6, 2012.

Appearances: Frank J. Povoski, Jr., Inmate No. 05-B-2531, Petitioner, Pro Se, Great Meadow Correctional Facility, 11739 State Route 22, P.O. Box 51 Comstock, NY 12821

Eric T. Schneiderman, Attorney General, State of New York, Attorney For Respondent, The Capital Albany, New York 12224 (Cathy Y. Sheehan, Assistant Attorney General, of Counsel),

DECISION/ORDER

GEORGE B. CERESIA, Jr., Justice.

The petitioner, an inmate currently at Great Meadow Correctional Facility, commenced a CPLR Article 78 proceeding to review a disciplinary determination dated November 25, 2010 in which he was found guilty of violating prison rules. Specifically, he was found guilty of violating Rule 108.13, possession of escape paraphernalia. Because the respondent did not serve an answer to the amended order to show cause and petition, the Court, pursuant to CPLR 7804 (e), on November 16, 2011, directed that the respondent either serve and file an answer or make an appropriate motion, within twenty days. The respondent complied with the order by making a motion to dismiss the petition, which also requested that the Court remand the matter to the respondent to conduct a *de novo* administrative hearing. In support of the motion, the respondent submitted the affidavit of

Albert Prack, Director of Special Housing and Inmate Disciplinary Programs of the New York State Department of Corrections and Community Supervision ("DOCCS"). In his affidavit, Director Prack indicated that "due to a technical error with the hearing tape of December 6, 2010, respondent requests an Order from the Court directing that petitioner be given a re-hearing." The Court reviewed the petition, and noted that a major argument advanced by the petitioner was that the determination must be annulled by reason that large portions of the hearing tape were inaudible. . . . The Court also reviewed a transcript which the petitioner had caused to be prepared from his audio tape of the hearing. The petitioner's transcriber documented numerous and lengthy gaps in the hearing tape, which rendered much of the transcript unintelligible. Based upon the foregoing, the Court found that the condition of the transcript was such that it, indeed, precluded meaningful review of the disciplinary determination

STATE OF MISSOURI, Respondent, v. ARNOLD STEPHEN BARBER, Appellant.

No. WD74279.

Court of Appeals of Missouri, Western District.

Filed: November 13, 2012.

Before Division IV: James Edward Welsh, Chief Judge, Mark D. Pfeiffer, Judge, and Gary E. Ravens, Special Judge.

MARK D. PFEIFFER, Judge.

Arnold Stephen Barber ("Barber") appeals the judgment of the Circuit Court of Adair County, Missouri ("trial court"), finding him guilty, after a jury trial, of two counts of tampering with a witness in violation of section 575.270 RSMo 2000. We reverse the judgment and remand for a new trial.

Factual and Procedural Background

In 2007, R.C. ("Mother") and J.C. ("Stepfather") (or collectively, "the family") ran a family business in Kirksville, Missouri. In August of 2007, Mother and Stepfather learned from their fifteen-year-old son, Z.C. ("Minor"), that Minor claimed to have been sexually molested by a patron of the family business who had become a friend of the family. Mother and Stepfather contacted the police, told them of Minor's story, and the alleged perpetrator was arrested. Barber, another patron of the business and friend of the family, was also a longtime close friend of the alleged perpetrator. As a courtesy to Barber, Mother and Stepfather asked Barber to come to their business so that they could tell him, in person, about the molestation allegations.

Subsequently, Mother and Stepfather hired attorney Seth Shumaker to represent their and their son's interests in any possible civil action arising out of the molestation allegations. Shumaker agreed to work with another local attorney, Brent Mayberry, on the family's possible civil claim.

On January 16, 2008, Mayberry contacted the alleged perpetrator's criminal defense attorney and asked him whether his client "would be open to paying some money to settle the civil case and make this all go away." Mayberry asked the alleged perpetrator's criminal defense attorney to make an offer on his client's behalf. The criminal defense attorney responded that he "didn't have any authority" and further stated: It's not the way you do things. Normally if somebody is going to file a lawsuit, they tell you how much they want rather than say how much will you give me. So it was a little different in that regard. But he indicated that in response to a query from me I said, "What's your demand? How much do you want?" He didn't want to tell me. Finally I said, "Well, give me a ballpark number of what you're talking about." He said, "Well, if [the alleged perpetrator] thinks this is going to go away for less than \$150,000, he's mistaken."

The next day, Mayberry called the alleged perpetrator's attorney again and mentioned the \$150,000 figure. The defense attorney passed the "offer" on to his client, who was accompanied by Barber when he visited the defense attorney's office.

Sometime in February of 2008, Barber called the office of the family's other attorney, Shumaker, and made an appointment for February 21. Unbeknownst to Barber, Shumaker made audio and video recordings of the meeting.[1] Barber told Shumaker that he had come up with \$150,000. Barber stated to Shumaker, "[A]s you may or may not know, [the alleged perpetrator's] a pretty good friend of mine."

After discussing how difficult it had been for Barber to raise the money, he asked Shumaker to "just pass that along for me."

Shumaker said, "Well, I, I, I think I will. I think I have to because I guess it's an offer. I guess it, I'm, I'm still a little confused if it's for the civil end of this thing or just not to be cooperative with the prosecutor." Barber answered, "Well I guess just to, just to clear the situation in whatever way that it could be done above board and legally." Then the transcript of the conversation says "inaudible."

After Barber left Shumaker's office, Shumaker contacted the highway patrol and gave them the recordings that he had made of the conversation he had had with Barber. On February 29, Shumaker, accompanied by highway patrol officer Steve Wilhoit, attempted to call Barber seven times. When Barber returned Shumaker's call, Shumaker told Barber that he had passed their conversation on to Stepfather and that the family was "intrigued." Shumaker then asked Barber "what assurances is everybody going to want if this would happen?"

Barber responded, "Oh, just the normal ones and not being in the [law] business, I'd have to have somebody kind of look at that."

Officer Wilhoit contacted Barber at his business. Wilhoit told Barber that he was investigating an allegation that Barber offered a substantial amount of money to the victim in a sexual molestation case. Wilhoit told Barber that Shumaker had recorded their conversation. According to Wilhoit, Barber's demeanor became "very much more guarded."

On June 23, 2009, the State obtained an indictment charging Barber with two counts of the Class C felony of tampering with a witness—one count corresponding to Mother and one for Stepfather. The State filed an amended information on June 1, 2011.

Trial began on June 1, 2011. Both Shumaker and Wilhoit testified for the State, Shumaker testifying as to what he thought Barber's intentions were when Barber made the appointment to meet with Shumaker at his office and then later met with Shumaker. Shumaker testified about what he thought different parts of the videotaped conversation meant.

Barber testified in his own defense, and the alleged perpetrator's criminal defense attorney also testified in Barber's case in chief. The jury returned guilty verdicts for Barber on both counts and this appeal follows.

Legal Analysis

Barber's appeal alleges seven points of error, including that the evidence was insufficient to support his convictions, and that the trial court should have excluded Shumaker's testimony and the recorded conversations between Barber and Shumaker because Barber went to Shumaker seeking legal advice on how to structure a settlement with the family. Barber alleged at trial, and alleges here, that because he went to Shumaker to seek legal advice, an attorney-client relationship was established and, therefore, that their conversation was privileged.

Barber requested a copy of the trial transcript to submit to this court on appeal. However, the entirety of Barber's direct testimony and much of his cross-examination were not transcribed. Somehow the machine that recorded the trial for transcription was not turned on during most of Barber's testimony. ...

On the other hand, in *Lynn v. Plumb*, 808 S.W.2d 439, 440 (Mo. App. S.D. 1991), the court found prejudice and reversed for a new trial where one of three tapes of trial testimony, which included part of the testimony of one of the defendants and the entire testimony of two other witnesses, was missing and unable to be transcribed. ...

In this case, we find it impossible to conduct meaningful appellate review of Barber's claimed trial court errors without the missing transcript of the bulk of Barber's testimony at trial. The missing portion of the transcript includes Barber's entire direct examination and much of his cross-examination. ...

This court simply cannot conduct meaningful appellate review of Barber's claims on appeal without the ability to review the relevant portions of trial testimony of the very individual accused of criminal wrongdoing by the State. We are mindful that the State's attorney is not at fault for the mistake occurring

when someone fails to press the "record" button on the recording equipment at trial.[3] It is, however, the State that seeks to take Barber's freedom from him ...

Because it is impossible for this court to conduct a meaningful review of Barber's criminal trial without having a transcript that includes Barber's testimony, we reverse the judgment of the trial court and remand for a new trial. the State's *prima facie* evidentiary showing, is crucially relevant to Barber's defense. For this reason, the missing testimony is material to the issues on appeal.