



December 22, 2024

Petra H. Mandigo Hulm  
Clerk of the Supreme Court  
North Dakota Supreme Court  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505-0530

Subject: Response to the Notice of Comment on Fiscal Policy 206 – Request for Amendment; Supreme Court Case No. 20220320

Dear Supreme Court Clerk Mandigo Hulm,

By way of introduction, we are writing this comment to you today as a newly formed association called Jeopardizing Justice to address the Request for Amendment to Policy 206 in the above-referenced court case. Our founders consist of long-time state and national court reporting association past presidents and leaders.

North Dakota's highly trained court reporters and court recorders play an important role in our justice system. They act as impartial officers of the court, present at legal proceedings to ensure an accurate record will not only be captured, but will be securely maintained, safeguarded, and distributed to all parties on equal terms. They work in conjunction with professional associations, the bench, and the bar towards ensuring accountability for producing certified accurate transcripts of North Dakota's state court proceedings. While the myriad associations provide valuable services in education, certification, and professional guidelines, they carry no regulatory or disciplinary authority, and membership is strictly voluntary. Currently North Dakota courts are responsible to create an official, objectively created record of proceedings. This process ensures the highest level of necessary transparency and accountability to the courts, litigants, and the public. There is nothing monopolistic about the process, as State Court Administrator Holewa opines in the cover letter dated November 20, 2024. The state court system operates pursuant to statute. Statute defines court reporter page rates. Additionally, Section 13 of Administrative Rule 2 states, "the presiding judge will hire and supervise all law clerks, judicial referees, court reporters, and secretaries to judges."<sup>1</sup>

As the Supreme Court knows, the appellate courts rely upon verbatim reports of proceedings on cases under review. The integrity and reliability of the official record of court proceedings must be maintained. We believe the proposed amendment put forth by Administrator Holewa seeking to replace human court reporters and recorders with recording equipment that will provide artificial intelligence (AI)/automatic speech recognition (ASR) produced rough draft transcripts and then have the court contract with outside transcriptionists to prepare final transcripts will not save the court money and will

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<sup>1</sup> <https://www.ndcourts.gov/about-us>

jeopardize the accuracy of the record for those seeking justice in North Dakota.<sup>2</sup> For that reason, we are writing to ask that you not implement the proposed amendments to Policy 206.

Additionally, we also believe that procedure Administrator Holewa is suggesting to change over to would not be in compliance with FRCP 80, which states: “If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.”<sup>3</sup> Court reporters and recorders are human witnesses to proceedings. As we all know, AI is not a person and it is difficult to provide verity of the transcript by way of certification without someone who has witnessed the proceeding to ensure what has been transcribed is what actually took place during the proceeding.

Stanford University found in a new study where they put the claims of two providers, LexisNexis (creator of Lexis+ AI), and Thomson Reuters (creator of Westlaw AI-Assisted Research and Ask Practical Law AI), to the test. “We show that their tools do reduce errors compared to general purpose AI models like GPT- 4. That is a substantial improvement, and we document instances where these tools provide sound and detailed legal research. But even these bespoke legal AI tools still hallucinate an alarming amount of the time: the Lexis+ AI and Ask Practical Law AI systems produced incorrect information more than 17% of the time, while Westlaw’s AI-Assisted Research hallucinated more than 34% of the time.”<sup>4</sup> OpenAI has published warnings that AI should not be utilized in “high risk domains.”<sup>5</sup>

“AI hallucination is a phenomenon wherein a large language model (LLM)—often a generative AI chatbot or computer vision tool—perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate (See IBM).”

Considering litigants are trusting the courts within North Dakota with the outcome of their cases, in most instances where high stakes and high dollars are involved, is trusting transcripts generated by a new and unproven AI/ASR technology wise? ABA Resolution 604 calls on organizations that are using AI to follow the guidelines below:

- Developers of AI should ensure their products, services, systems, and capabilities are subject to human authority, oversight and control.
- Organizations should be accountable for consequences related to their use of AI, including any legally cognizable injury or harm caused by their actions, unless they have taken reasonable steps to prevent harm or injury.
- Developers should ensure the transparency and traceability of their AI and protect related intellectual property by documenting key decisions made regarding the design and risk of data sets, procedures and outcomes underlying their AI.

“Hallucinations are the errors generated by neural ASR models. They are considered to be dangerous because of their seemingly fluid and coherent manner, but lack of connection with the source.”<sup>6</sup>

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<sup>2</sup> <https://www.thejcr.com/wp-content/uploads/2021/02/Pierce-County-2020-1108-930-Committee-of-the-Whole-meeting-packet.pdf>

<sup>3</sup> [https://www.law.cornell.edu/rules/frcp/rule\\_80](https://www.law.cornell.edu/rules/frcp/rule_80)

<sup>4</sup> [https://dho.stanford.edu/wp-content/uploads/Legal\\_RAG\\_Hallucinations.pdf](https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf)

<sup>5</sup> [Changing OpenAI's nonprofit structure could have big consequences | AP News](https://www.apnews.com/story/technology/ai/2023/04/20/openai-nonprofit-structure)

<sup>6</sup> Hallucinations in Neural Automatic Speech Recognition: Identifying Errors and Hallucinatory Models, <https://www.semanticscholar.org/reader/caa435eeef985e9251d5707e2e1276e6f0832758>

## **Emerging Ethical and Legal Issues Related to the Use of Artificial Intelligence**

Court reporters have access to and are required to protect confidential information such as financial records, medical information, and trade secrets. This also includes biometric data, which has recently been proven to be easily manipulated by and through artificial intelligence (AI) and/or automatic speech recognition (ASR) if not kept within a strictly controlled environment. The National Court Reporters Association has recently published and adopted a white paper addressing “Emerging Ethical and Legal Issues Related to the Use of Artificial Intelligence (AI), Automatic Speech Recognition (ASR), Voice Cloning, and Digital Audio Recording of Legal Proceedings.”<sup>7</sup> The American Bar Association in 2023 adopted Resolution 604,<sup>8</sup> which addresses how attorneys, regulators and other stakeholders should assess issues of accountability, transparency and traceability in AI as a result of a multi-year study.

## **Potential Harms with Technological Innovation Must be Carefully Considered**

Perceived advances in technology are not necessarily improvements and make oversight even more important. With the advancement of AI, there are currently no court rules or laws within the judicial system that regulate its use. They have not yet been written. Administrator Holewa’s suggestion that courts deploy AI within its courtrooms does not comply with existing court rules or statutes in North Dakota. There are no regulations guiding its use in legal proceedings.

AI-generated transcripts have no regulatory authority charged with oversight of the transcripts produced, and there are no requirements for the chain of custody of the transcript and the confidential information contained therein. It is unknown who will be reviewing the AI-generated transcripts and whether they will be certified by the person who is responsible for the review. Under the proposed changes put forward by Administrator Holewa, will there be multiple people involved in reviewing multi-day proceedings, whereby transcribed files are put together in multiple sections without verified chain of custody oversight? This practice has erroneously influenced outcomes in some jurisdictions, including one case where 55 pages of a deposition were left entirely out of the transcript, resulting in an adverse outcome for one of the litigants.<sup>9</sup>

## **Court Reporters Preserve the Record and Should be Fairly Compensated**

Court reporters are charged with providing an accurate record, guaranteeing the chain of custody of that record, and providing an unbiased certification to their first-hand knowledge as witnesses to the proceedings.

The simple request for an increase in the per-page compensation rate for work performed outside of regular business hours is both reasonable and justified. The current rate of compensation was established in 2014 and has remained unchanged for nearly a decade. In reviewing the U.S. Bureau of Labor Statistics Consumer Price Index, the cumulative inflation rate from January of 2014 to November of 2024 is approximately 35.50%. Calculating that number and applying the increase to the rate of \$3.25 per page from 2014 to November of 2024 brings the rate up to \$4.45 per page for the original transcript and raises the rate of \$.75 per page to \$1.03 per page for a copy. It seems to be more customary and standard in the industry that any time an original is ordered to be transcribed, at least one copy would be provided with the original. Rather than follow Administrator Holewa’s suggestion that court

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<sup>7</sup> National Court Reporters Association, <https://www.ncra.org/docs/white-paper-ai-asr>

<sup>8</sup> American Bar Association, Resolution 604

<sup>9</sup> <https://www.thejcr.com/2022/04/19/make-sure-your-court-reporter-is-really-a-court-reporter/>

reporters may only be able to charge for the original, the reporters and several judges have commented that one static fee could be charged instead, which would amount to \$5.48. The number \$5.75 has been requested and seems like a fair rate across the entire country and one that is in line with keeping up with the cost of inflation for a period of time into the future.

Administrator Holewa suggests that innovation has made court reporters' jobs easier and for that reason they should be compensated less. I'm not sure other members of the judicial system of North Dakota would agree with the notion that they should receive decreased compensation due to technological advances that may make the practice of their profession more efficient. That argument is not well made in light of the increasing demands of the profession for more instantaneous real-time production of transcripts. As the judges of Unit 2 so succinctly stated in their written comment, "Given the rising cost of living, the increasing demands of the profession, and the additional pressures of working outside of regular business hours, an adjustment in the per-page rate is not only reasonable but essential to ensure fair compensation for this crucial work."

Our justice system is founded upon the premise of providing fair and equal access to justice for all. Certified Court Reporters must be held to the highest standards, especially at a time when trust in the courts is waning. Most citizens who become entangled in court proceedings find it a daunting and sometimes intimidating experience. It is imperative that they know they will be treated fairly to maintain the confidence of consumers.

Thank you for your time and careful consideration of this critically important matter. We hope we've provided useful information for you to consider. We are happy to provide further documents or answer any questions you may have.

Sincerely,

JEOPARDIZING JUSTICE

*/s/ Phyllis Craver Lykken*

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1 UNIFIED JUDICIAL SYSTEM

2  
3 Policy 206

Effective ~~March 31, 2021~~

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5 FEES AND EXPENSES FOR  
6 PREPARATION OF TRANSCRIPTS

7  
8 FEES

9 A. Fees.

10 1. For the preparation of a transcript from shorthand notes or recording device, except  
11 as indicated below, the court reporter, court recorder, or other individual employed by the  
12 judiciary to prepare a transcript is entitled to receive per page compensation of \$5.75. ~~\$3.25 for~~  
13 ~~the original, and \$.75 for copies.~~ If a party requests that a transcript be prepared and delivered  
14 within 14 days, and the expedited preparation and delivery is not required by statute or supreme  
15 court rule, then the per page compensation may be increased by \$1.00 per page. ~~to \$4.25 for the~~  
16 ~~original and .75 for copies.~~

17 Transcripts are provided to parties electronically in .pdf format. Paper copies of  
18 transcripts will be provided upon request.

19 Time spent in preparation of transcripts in which a per page compensation is  
20 allowed is not eligible for overtime compensation and should ordinarily be outside of regular  
21 business hours.

22 2. The court reporter or other individual employed by the judiciary shall not  
23 receive per page compensation for the preparation of the following:

24 a. Criminal or juvenile case transcripts requested by the Indigent Defense

25 Commission for the purpose of appeal or for any court proceeding that  
26 occurred prior to the appointment of counsel; transcripts of preliminary  
27 hearings; and transcripts required for post-conviction relief hearings, to  
28 prepare for re-trial following a mistrial, or appeals;

29 b. Criminal or juvenile case transcripts requested by the state's attorney  
30 for the purpose of appeal and transcripts required for post-conviction relief  
31 hearings, to prepare for re-trial following a mistrial, or appeals;

32 c. Transcripts of the judge's and state's attorney's official statements to  
33 the Pardons Advisory Board; and

34 d. Transcripts prepared at the direction of a district court judge or  
35 referee.

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37 Preparation of the transcript is defined as an original to be filed in the office of the clerk, one  
38 electronic copy for each party separately represented, and, if parole or probation be granted, one  
39 copy to the division of parole and probation, and, upon request of any of the preceding parties, a  
40 paper copy.

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42 **EXPENSES**

43 A. Expenses Associated With Recording the Proceeding.

44 1. The state will pay for expenses associated with recording the proceedings  
45 and maintenance of stenographic equipment owned by the state.

46 B. Expenses and Equipment Use.

47 1. The court reporter may use the court reporter's equipment or state-owned

48 CAT equipment.

49 2. The court reporter or other individual employed by the judiciary to  
50 prepare a transcript will be responsible for costs associated with  
51 producing a transcript if entitled to a fee for preparing the transcript,  
52 including paper, copying, binding, etc. The state will pay for associated  
53 expenses if there is no fee compensation.

54 C. Computer-CAT System.

55 1. The state court administrator may approve the purchase of computers,  
56 software, stenowriters, and other CAT related expenditures upon approval of a  
57 statewide CAT implementation plan.

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59 Approved by Supreme Court 10/20/82; amended 07/01/97amended; 09/30/98; amended 03/21/01  
60 amended 11/06/02; amended 08/03/05; amended 06/27/07; amended 06/24/10 effective  
61 07/01/10; amended 09/10/2014 effective 10/01/2014; amended 05/04/16 effective 07/01/16;  
62 amended effective