

# COMMITTEE ON KEEPING THE RECORD FINAL REPORT

## A. INTRODUCTION

During the past two years, the Arizona Supreme Court's Committee on Keeping the Record (hereinafter "the Committee") undertook an examination of the current court reporting environment in Arizona and elsewhere with the aim of identifying methods to ensure the verbatim record of court proceedings is made by the most reliable, efficient, and accurate means reasonably available to courts statewide.

Around the country and in some Arizona counties, traditional stenographic reporting has been replaced or supplemented with digital recording equipment to fill vacancies in court reporting personnel, to assist in meeting the public's rising demand for accelerated case processing in the face of rising case volume, and to reduce costs associated with court reporting. In most superior court locations in Arizona, clerks now use digital recording equipment in the courtroom to assist them in preparing minutes of proceedings and to replace shorthand skills which are no longer taught in schools. The legal community's growing familiarity with computer technology has raised interest in public access to these recordings, which can be easily copied onto compact discs.

In the last ten years, digital recording equipment has substantially improved in both quality and affordability and now offers many advantages over traditional tape recording equipment. Digital equipment is used in many courthouses nationwide with varying reports of satisfaction, but the trend is unmistakably moving toward wider use of this equipment. At the same time, the availability of court reporters has been reduced in some rural areas of the state, because, in part, of a new and rigorous court reporter certification program, and also because of a decline in the number of students attending court reporting school, a trend which reportedly has now reversed to some degree.

The Committee was asked to evaluate this phenomenon and to ensure that technology upgrades are pursued with appropriate foresight and an understanding of their administrative implications. The Committee learned much from the experiences of local courts that use digital equipment and discovered several areas in which statewide standards and policies are needed to assist those courts that may choose to integrate this new technology into their operations in the future.

### Summary of recommendations

- ◆ New statewide rules and rule amendments are needed to:
  - Prioritize use of court reporters and electronic recording technology;
  - Preserve the parties' right to request a court reporter;
  - Regulate the preparation of official transcripts from electronic recordings;
  - Resolve issues raised by the recent rule changes for videotaping depositions;

- Prohibit public access to unofficial electronic verbatim recordings made by clerks for use in drafting minute entries;
  - Ensure orderly management of transcription services when the official verbatim record is an electronic recording; and
  - Modify language in existing rules and statutes to accommodate alternative methods of making a record other than stenographic reporting.
- ◆ Administrative standards are needed to guide courts in procuring and integrating electronic recording technology into their operations.
  - ◆ Courts using recording technology need to educate judicial officers, staff, litigants, and lawyers in courtroom procedures required to ensure an audible record is made.

## **B. FINDINGS AND RECOMMENDATIONS**

Administrative Order No. 2003-104, attached as Appendix A, asked the Committee to address a number of specific issues. The balance of this report identifies the Committee’s recommendations and findings with respect to these issues.

1. Best practices in use in Arizona and elsewhere for making and storing the record of the various types of court proceedings.

(a) National Perspectives

The Committee was asked to identify the best record-making practices in Arizona courts and around the country. Identifying the “best” practices is problematic because record-making policies are shaped by funding, availability of qualified reporters, and legal requirements for verbatim recording. Consequently, there are as many variations in reporting practices as there are jurisdictions. Many states use a combination of court reporters and electronic recording technology. In 2002, the Superior Court in Maricopa County conducted a survey of seventy-five general jurisdiction courts in thirty-three states that revealed use of electronic recording devices to some degree in seventy percent of the responding courts. This survey also showed use of electronic recording in all case types, but with a preference for court reporters in major felony and complex civil trials.

The Committee focused on those jurisdictions with the most experience with recording technology, including Alaska, Illinois, Kentucky, Michigan, New Jersey, California, Connecticut, and the United States District Courts. A bibliography of materials considered is attached as Appendix B. Reporting technology is improving and becoming more affordable, and many states have employed some form of either analog or digital recording technology for many years. Parallel advancements in court reporters’

computer-aided systems are also offering improved transcript turn-around times, electronic searching, storage, and “real-time” reporting capabilities.

Hand in hand with increased use of reporting technology have come anecdotal reports of system failures. Committee members read a number of articles concerning courts that have received substantial media exposure about their difficulties with new electronic recording systems. Integration of this technology in courtroom operations often has been met with logistical, staffing, and training challenges that compromised recording quality, especially during the start-up phase. Arizona has had its share of difficulties, although no re-trials or reversals on appeal have been reported, with the exception of some lower jurisdiction court appeals. And although vendors of reporting equipment often claim their systems can run unattended, some jurisdictions have devoted considerable resources to developing staff, whose sole responsibility in the courtroom is to monitor equipment to ensure quality, and who are certified in troubleshooting equipment and familiarity with courtroom procedures and terminology. On the other hand, the Committee is also aware of instances in which court reporters’ stenographic notes have been lost or cannot be interpreted in order to prepare a transcript for appellate review.

The Committee did not attempt to assess whether reporting technology would represent a real cost savings compared with court reporting staff, because of the variation in equipment and support available to individual courts. To maximize the functionality of electronic recording systems, courts have begun to integrate their output with information technology networks. This arrangement obviously entails a technology infrastructure and staff whose costs potentially absorb any immediate savings expected from a reduction in court reporting personnel. On the other hand, many jurisdictions obviously have found automated systems to be sufficiently cost-effective to justify installing more equipment and hiring fewer reporters.

The 2002 Maricopa County survey results are borne out by those specific policies examined by the Committee showing a trend toward use of live reporters on the criminal side, and use of recording technology in domestic relations, juvenile, and civil matters. Pretrial proceedings are more likely to be recorded with equipment. Trials, and especially jury trials, are most likely to be reported by a live court reporter.

These policy developments demonstrate that reporters continue to be the preferred means of recording proceedings in those cases expected to result in a transcript order. This trend may be a consequence of a number of factors, including practitioners’ lack of familiarity with recording technology, concerns about the quality of the transcript prepared from an electronic recording or the quality of the recording itself, financial implications to official reporters, and the fact that very few appellate courts are willing to accept electronic recordings in lieu of a paper transcript as the verbatim record on appeal. As a matter of convenience, many judges and attorneys find it easier to index and review a written transcript than to listen to a recording.

In Arizona, the trial court with the most evolved recording systems is the Superior Court in Maricopa County. This court has some eighty reporters on staff, some of whom work out of a pool. Many courtrooms are equipped with either audio or audio/video recording technology. The court stores its recordings, including electronic notes made by court reporters, on network servers accessible by judges. A “real-time” reporter combined with video recording technology represents the best the industry has to offer at this point in time, but would be an unwarranted use of reporting resources and cost-prohibitive were it to be mandated for every hearing in every case. The Committee proceeded cautiously in developing a statewide policy that would avoid unnecessarily interfering with the various reporting practices that are working well for local courts, while accommodating courts’ need for flexibility in planning for expanding case volume.

(b) Arizona Perspectives
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Until a few years ago when the court reporting industry in Arizona sought and obtained formal certification by the Supreme Court, the Court played virtually no role in determining how reporting resources are managed apart from its oversight of a few procedural rules focused on transcript preparation and filing. Most of the laws pertaining to court reporting are found in statutes governing counties’ appointment and use of official stenographic reporters in county-funded superior court operations.

(1) The court reporting industry in Arizona

In response to a 2004 survey, superior courts in all but one county - La Paz - indicated they have difficulty finding either full-time or per diem reporters. There are 158 official court reporter positions in Arizona’s superior court and more than 500 state-certified reporters. Approximately one in three certified reporters works as an official superior court reporter. Sixty-six percent of state-certified reporters reside in Maricopa County. Eight counties have fewer than ten certified reporters in residence.

Arizona has two schools of stenographic reporting and one voice-writing school. All three are located in Phoenix. Data published by the National Court Reporters Association indicates that stenographic court reporting programs have consistently graduated ten percent of their students. Nationwide enrollment in court reporting programs declined during the 1990’s, but has rebounded in the last few years.

Voice writing is a reporting technique that employs voice recognition software instead of a stenographic machine to make an instantaneous rough transcript on a computer. The voice-writing school, which opened in Phoenix in 2004, reportedly will graduate more people in less time than the two stenographic reporting schools, and thus offers the potential to fill some of the vacancies in reporting staff in rural areas. The Certified Court Reporter Board is preparing to begin certification of voice writers in 2007.

The July 2000 reporter testing and certification law accomplished its goal of eliminating unqualified reporters, but at the same time, the requirement has reduced the

number of reporters available to work as official reporters in Arizona courts. The average starting salary for an official reporter in Arizona is approximately \$40,000. Official court reporters are authorized by statute to charge \$2.50 per page for a transcript and \$.30 per page for a copy. Ariz. Rev. Stat. (“A.R.S.”).§ 12-224. These fees are paid on top of the reporter’s salary. There is no statutory limit on per page fees charged by private sector reporters.

During the past twenty years, stenographic reporters have aggressively integrated computer technology into their practices. Nearly all reporters now use a laptop computer connected to their steno machine to store electronic versions of their raw notes. More and more reporters are doing without paper notes altogether. Reporters’ computer software converts stenographic notes into a rough transcript instantaneously. Some reporters in Arizona have upgraded their skills to “real time” reporting, which allows parties and judges to view a somewhat more polished rough transcript on a computer monitor as it is being made and facilitates overnight transcript production. Reporters generally charge an extra fee to parties wishing to view the real time transcript during a court proceeding or deposition. Official reporters do not charge an extra fee for providing “real time” to judges.

## (2) Current practices in Arizona Courts

Section 38-424 of the Arizona Revised Statutes gives the parties the right to have a judicial proceeding recorded by a stenographic reporter in a court of record. In the absence of a request for a court reporter, the statute authorizes the court to record proceedings electronically. Section 12-221 authorizes each new superior court judge to appoint a court reporter. Under this statute, in most counties a superior court judge typically works with a court reporter who is assigned to that judge on a permanent basis.

Like many other facets of court operations in Arizona, there are many variations among courts in their record-making practices. In the superior court, four counties rely exclusively on stenographic reporters: Coconino, Gila, Navajo and Pinal. All other counties are using a blend of reporters and recording technology. The two least populated counties, Greenlee and La Paz, have no court reporters on staff, and bring in a per diem reporter as needed. To assist those courts that have difficulty finding per diem reporters when needed, the Arizona Court Reporters Association recently implemented a program to match available freelance reporters with court administration. The program involves fax or email notification from the court to the Association that is then forwarded by email to reporter/members interested in working as official reporters on a per diem basis.

Under local policies, creation of new reporter positions in Maricopa and Pima Counties has not kept pace with the number of new judicial officers. The Superior Court in Maricopa County has ninety-one appointed judgeships, thirty-nine commissioners, and eighty court reporter positions. Half of the official court reporters work out of a court reporting pool, which offers administrators the flexibility to assign reporters to the courtrooms where they are most needed. A number of courtrooms in Maricopa are equipped with digital video or audio recording equipment. In the absence of a party’s

request for a reporter, each judge has the option to use either electronic recording equipment or a court reporter. Electronic recording is used in virtually every case type, and predominates in family and juvenile court proceedings, especially in pretrial and uncontested matters.

In Pima County, which has thirty-two superior court judges assisted by nineteen commissioners and hearing officers, ten reporters work out of a pool, and another twenty-five reporters are permanently assigned to individual judges. Pima County's five electronically-equipped courtrooms are used primarily by commissioners and hearing officers.

In superior court, electronic technology is used primarily to record routine matters that rarely result in a transcript order, such as non-evidentiary hearings in civil cases, domestic relations, juvenile and probate matters. When case volume strains judicial resources, these types of hearings are typically assigned to a full-time or part-time judge pro tempore, for whom no corresponding court reporter position has been created. In recent years, it has become a common practice in Arizona and elsewhere to install electronic recording systems whenever a courtroom is remodeled or newly constructed.

Municipal and justice courts are not courts "of record," and therefore, they are not required to make a verbatim record of their proceedings. Nevertheless, those courts routinely record all their proceedings either with analog or digital systems, but on occasion a stenographic reporter will be used on a per diem basis. In some counties, the superior court accepts tape or digital records in lieu of a transcript in considering an appeal from a municipal or justice court, generally with the proviso that the record to be reviewed be less than sixty or ninety minutes in duration.

### (3) Electronic Alternatives

#### (i) Equipment

There are three primary vendors of digital recording equipment in Arizona, FTR Limited (FTR), Jefferson Audio Video Systems (JAVS), and CourtSmart. These companies each offer an automated means of making an audio or audio/video recording that is vastly superior to the analogue tape recorders of the past. Pricing of these systems has become more competitive each year and currently ranges from about \$5,000 for a basic portable system to \$30,000 for a more elaborate system. Recurring costs for these systems may include microphone replacement, maintenance, and repairs.

These systems are built to be operated by a single technician. They can be turned on and run throughout the day with little oversight. Anyone familiar with a computer can generally learn how to operate them in a few hours. In Arizona, recording equipment typically is operated by a courtroom clerk, bailiff, or judicial officer. The electronic record can be stored on a CD, a DVD, a computer hard drive or a server. Some systems offer the potential to link the recording to the case management system, so a recording of

a hearing can be accessed and reviewed from a docket list of case events. Arizona's courts have not yet developed this function, but are expected to do so in the future.

One provider of digital recording equipment recommended that the digital record be monitored by a full-time dedicated equipment monitor who not only ensures that the equipment is functioning properly, but also creates an integrated log of descriptive annotations, known as "log notes," to guide reviewers and transcribers to the pertinent portion of an audio or video record. The equipment monitor can also note correct spellings of proper names and technical terms, and record the occurrence of unspoken events, such as a recess. Maricopa County's new juvenile courthouse is the first in the state to incorporate central monitoring stations, which permit equipment monitors to monitor multiple courtrooms simultaneously.

#### (ii) Transcripts and Transcription Services

Once a digital recording is made, it can be emailed or provided on a CD to the person who will prepare the transcript. At least one national firm offers its customers the option of uploading the recording to its website. The transcriber uses special playback software to create the transcript from the recording; the transcriber need not be skilled in stenography. The American Association of Electronic Recorders and Transcribers (AAERT) offers a certification program that tests transcribers' skills in recording technology operation and troubleshooting, courtroom procedures, legal vocabulary, and the federal court standards for transcript formatting.

Responses to a Committee survey indicated that transcripts are prepared by in-house staff, a professional transcription service or a freelance or official reporter. All the larger courts in Arizona contract with the same national firm, AVTronics. Private sector transcribers typically work from home, and representatives of the transcription industry in Arizona estimate there are fewer than fifty full-time transcribers working in the state. Similar to court reporters, transcribers generally are paid based on a per page rate.

The Committee also became aware of two overseas transcription firms that claim they have prepared transcripts of judicial proceedings in Indiana and California. One firm is based in Hong Kong and employs native English-speaking transcribers located in Australia and New Zealand for its English language assignments. Another firm is based in the Philippines. Both firms work through local reporting agencies as subcontractors. It is unknown whether any Arizona transcripts are being prepared by off shore companies. Use of overseas transcription firms may raise privacy and security concerns.

## 2. Rules and statutes that are obstacles to using the best and most appropriate methods of keeping the record.

The Committee was asked to identify whether any rules or statutes pose an obstacle to using the best and most appropriate method of keeping the record. Many rules and a few statutes impact the courts' ability to take advantage of newer recording

technology; most are simply in need of updating their terminology, and a few require more substantive revision. The Committee’s recommended amendments appear in Appendix C (statutory amendments) and Appendix D (rules amendments).

#### (a) Amendments Intended to Modernize Terminology

- Updating language to reflect the certification of court reporters.
- Eliminating archaic terminology such as, “books of record,” “tapes,” “typewritten,” “typist,” and “stenographic notes.”
- Amending language regarding specific technology or terminology from the “paper world” to include electronic records and electronic recordings, for example:
  - References to “papers, documents, and transcripts” was amended by adding “or any other record;”
  - Provisions that unnecessarily describe alternative means available for making a record were amended to read simply that a record should be made; and
  - Statutes and rules that describe ordering a transcript from “a court reporter” were amended to accommodate those situations in which the transcript may be prepared by someone other than a certified court reporter.
- The term “certified transcript” was added to designate a transcript prepared by a certified reporter or other authorized transcriber.
- References were added to an “authorized transcriber” to reflect the reality that people who are not certified court reporters prepare transcripts from electronic recordings and to implement the recommendation that only certified reporters or transcribers under contract with a court be permitted to prepare official transcripts.

#### (b) Other Amendments

##### (1) Statutory Amendments

- A.R.S. §§ 22-261 and 22-265

These statutes govern the process of appealing a judgment from a justice court to the superior court. The proposed changes would conform these statutes to recent amendments to the Arizona Rules of Superior Court Appeals – Civil and Criminal. One additional change, to section 22-261, would permit a re-trial of the matter in the justice court, rather than at the superior court, in those cases in which an insufficient record of the proceedings was made by the justice court. This process has been in use in Maricopa County for a few years and has dramatically reduced the number of trials de novo in

superior court. A trial de novo at the justice court would also presumably be more convenient for the parties, rather than having to travel to the superior court location in their county.

- A.R.S. §12-221

This statute currently provides that a superior court judge “shall” appoint a court reporter. It has been interpreted differently in different counties such that we now have court reporter pools in Pima and Maricopa, dedicated court reporters in other counties, and no staff reporters in small counties such as La Paz and Greenlee, who rely on per diem contractors. The Committee recommends this statute be amended to reflect current realities and to direct the public to the new rule governing use of court reporting resources. The reference to Supreme Court rules specifically authorizes the Court to develop policy in this area through the rule-making process. Changes to this statute were considered part of the package of new policies that includes a rule governing use of court reporting resources, and therefore the proposal is set forth on page 6 of Appendix E.

- A.R.S. §38-424

This statute provides that a court of record must honor a party’s request for a court reporter, but in the absence of a request, the court is authorized to use alternative technology to record the proceeding. The Committee recommends that this statute be modified:

- to require “timely” notice from a party requesting a reporter; and
- to add a proviso that a party’s timely request will be honored.

The timeliness requirement codifies existing practices in some counties that need advance notice from the parties to arrange for the presence of a reporter. Changes to this statute were considered part of the package of new policies that includes a rule governing use of court reporting resources, and therefore the proposal is set forth on page 6 of Appendix E.

## (2) Rules Amendments

- Rule 30(b), Arizona Rules of Civil Procedure - videotaped depositions. The proposal is discussed in Issue 5 below and is set forth in Appendix F.
- Supreme Court Rule 123 - public access to court records. The proposal is discussed in Issue 7 below and is set forth in Appendix D, at page 19.
- New Rule Governing Transcription. The proposal is discussed in Issue 3(b) below and is set forth in Appendix G.
- New Rule Governing Use of Court Reporting Resources. The proposal is discussed in Issue 8 below and is set forth in Appendix E.

- Various rules governing production of the transcript for appeals
  - Rules 31.8 and 31.9, Arizona Rules of Criminal Procedure
  - Rule 11, Arizona Rules of Civil Appellate Procedure
  - Rule 1, Rules of Superior Court Appellate Procedure -- Civil
  - Rules 3 and 4, Rules of Superior Court Appellate Procedure -- Criminal
  - Rules 89, 90 and 91, Rules of Procedure for the Juvenile Court

Official reporters are familiar with the regulatory framework and processes involved in appellate transcript ordering, production, and filing. However when the official record is made electronically, there is a need for someone to step into the shoes of the reporter to ensure timely notice, ordering, and filing of the transcript. The proposed amendments to these rules provide for an in-house “transcript coordinator” and add the term “authorized transcriber” to delineate the processes to be followed. These amendments codify practices currently in use by courts that have already integrated electronic recording technology into their operations. The various amendments are contained in Appendix D.

- Rule 55(f), Arizona Rules of Civil Procedure – default.

The current rule requires a plaintiff in a civil case to pay for a transcript of a default hearing that may never be needed. The amendment under the proposal, a transcript would not be ordered unless and until the defaulting party comes forward to challenge the judgment. The amendment mirrors Rule 44(F) of the recently-adopted Arizona Rules of Family Law Procedure. This proposal is contained in Appendix D at page 5.

3. Standards needed to protect the on-going availability and integrity of the record of judicial proceedings.

The Committee was asked to identify what standards are needed to safeguard the on-going availability and integrity of the record of judicial proceedings. The Committee was mindful of the need to identify revenue-neutral solutions wherever possible, since court reporting is expected to remain a locally-funded court function into the foreseeable future. After reviewing other courts’ policies regulating courts’ use of electronic recording technology and the transcription industry, the Committee developed the following infrastructure and operational standards:

- Digital Recording Standards (Appendix H)
- New Rule Governing Transcription (Appendix G)
- Recommended Specifications for Transcription Services Contracts and a model Request for Proposal (Appendix I)
- Arizona Manual of Transcription Procedures (Appendix J)
- Guidelines for Practitioners and Parties (Appendix K)

#### a. Digital Recording Standards (Appendix H)

This set of standards establishes minimum equipment and operating standards to guide courts in procuring, installing, and operating digital recording systems. Although these recommendations stop short of requiring courts to upgrade from analog tape recorders to digital equipment, the conversion is strongly recommended because of the substantial improvement digital equipment offers over traditional tape equipment.

It is recommended that these standards be reviewed annually by the Commission on Technology's Technical Advisory Council for revisions. Like many other aspects of technology, digital recording has undergone frequent improvements and enhancements in the last decade, and is expected to continue its evolution. Frequent revisions to the standards may be needed to keep pace with this trend.

#### b. New Rule Governing Transcription (Appendix G)

The Committee recommends adoption of this rule intended to regulate production of transcripts from electronic recordings and from court reporters' notes. It is designed to work in tandem with the proposed Arizona Manual of Transcription Procedures and the proposed set of recommended specifications for transcription services contracts, which requires courts to establish relationships with qualified vendors for transcript production. Arizona certified reporters by virtue of their state certification are not subject to inclusion on a vendor list and may transcribe electronic recordings at any time. The new rule identifies "authorized transcribers" of electronic recordings as either certified reporters or contractors doing business with one or more courts in Arizona. Any transcript that is filed for official use by a court on appeal or otherwise must be produced by an individual meeting these qualifications. As mentioned elsewhere in this report, the Committee hopes to see this work performed by certified reporters and court reporting school graduates, to the extent possible.

#### c. Recommended Specifications for Transcription Services Contracts and Model Request for Proposal (Appendix I)

The Committee recommends that the Supreme Court issue an Administrative Order or new provision in the Code of Judicial Administration requiring courts to enter into contracts with one or more transcription services, individual transcribers or certified court reporters to handle preparation of transcripts from electronic recordings. This requirement is intended to encourage uniformity of transcript formats and accountability by vendors. The Committee also drafted a model Request for Proposal, included in Appendix I, for courts to use in hiring transcribers who are not certified court reporters. Because local courts are subject to local procurement regulations and may not need to initiate an RFP process to establish these contracts, the specifications are intended as a guide to courts in identifying qualified transcribers. The model RFP is intended to be optional.

The Committee debated whether to recommend certification of transcribers, but decided certification is not appropriate at this point because of a number of unknowns, including the fact that it is unknown how many people who are not certified court reporters are available to prepare transcripts from electronic recordings, and how much they would be willing to pay to be certified by the Supreme Court. The court reporter certification program is funded entirely by annual membership fees, currently \$200, and testing fees. The anticipated low number of transcribers who are not already certified court reporters would not support the cost of the administrative infrastructure needed to conduct a certification program. Another unknown is how many certified reporters are interested in preparing transcripts from electronic recordings. With their formal training and experience, certified court reporters are the most prepared for this task. Representatives of the Arizona Court Reporters Association told the Committee that the organization is willing to email their membership and tell them to contact their local courts if they are interested in transcribing electronic recordings.

#### d. Arizona Manual of Transcription Procedures (Appendix J)

The use of digital recording technology permits parties to acquire a low-cost copy of the original recording for their own use. As a consequence, in some instances parties prepare and file their own “home-made” unofficial transcripts from such recordings for consideration by the court. These amateur transcripts are generally poorly formatted and unreliable. Apart from a short list of transcript formatting standards binding on certified reporters, there are no standards currently in existence to guide transcribers and ensure uniformity. Even among full-time professional transcribers, the transcription business is largely an unregulated cottage industry that includes off-shore companies. The proposed Manual of Transcription Procedures is intended for use by transcribers of electronic recordings and is based on similar publications used in Alaska, which relies exclusively on electronic recording technology for its official record. This manual establishes formatting standards that transcribers will be expected to know and meet when preparing transcripts for use in courts.

The Committee is grateful for the many hours that were donated by a number of official and freelance certified court reporters and electronic transcribers who thoroughly reviewed and edited the manual. The Arizona Board of Certified Court Reporters recently recommended that the manual be adopted as binding on certified reporters who prepare transcripts from electronic recordings. In addition, the Board has recommended that many of the manual’s provisions be incorporated into the regulations reporters follow in preparing transcripts from their own notes.

#### e. Guidelines for Practitioners and Parties (Appendix K)

Certain protocols in the courtroom must be observed to ensure a good quality electronic recording is made. The experience of courts around the country has been that some training of those people who appear in an electronic courtroom is necessary to ensure an accurate recording is produced. The Committee created a set of instructions entitled, “What Every Lawyer and Other Participants Should Know about the Electronic

Recording System in This Courtroom,” which can be distributed to trial participants for this purpose and recommends that this document, or something similar, be prominently posted inside the courtroom. Local practices and policies will influence the specific instructions to be provided.

4. Record retention standards for paperless court reporter notes and electronic recordings.

The Committee was asked whether record retention standards should be established for “paperless” electronic notes made by court reporters and for electronic audio or video recordings of judicial proceedings. The Committee has not developed a recommendation on this question because this issue was largely pre-empted by the Arizona Judicial Council’s approval in December 2004 of a revised superior court records retention schedule proposed by a workgroup of clerks of court.

Digital records resolve some of the concerns about long-term storage of paper notes and analog tape recordings. Stenographic reporters have been using computer-aided transcription techniques for twenty years to create their verbatim record. Newer stenograph machines commonly used in Arizona do not create paper notes; all notes are created digitally and stored to either a computer hard drive, a CD, or a network server under the court’s control. This innovation offers redundancy options not previously available and extends the records’ shelf-life beyond what is possible with paper or analog tape recordings: a digital record lasts as long as the medium on which it is stored, and the quality of a digital record is not compromised by copying or re-playing. The copy is just as good as the original.

On the other hand, long-term storage of a digital file entails periodic “refreshing” of the storage media and anticipation of the need to migrate older records to a newer format when software programs are updated. Courts undertaking electronic storage of court reporter notes and digital recordings must have adequate technology resources to manage these records over time.

The Committee heard from representatives of the clerks of court’s records retention committee and agreed with their retention schedule recommendations that, for the most part, should avoid the need to migrate or refresh electronic recordings, because the retention period is shortened to ten years or less for court reporter notes and electronic recordings. If this schedule is not adopted as proposed, courts will need to be made aware of the need to plan for migration and refreshing of storage media.

The Committee’s proposed Digital Recording Standards contained in Appendix H, addresses electronic record storage in general terms for digital recording systems. More specific guidance should be provided by the Technical Advisory Council of the Commission on Technology, to ensure standards keep pace with technological innovations and to supplement and revise these Standards as needed.

5. Recording a deposition with either video or audio equipment in lieu of a stenographic court reporter.

The Committee was asked whether the Court should reconsider its 2003 rule change decision regarding videotaping depositions. The Committee reviewed one alternative amendment which the court rejected that would allow a party to unilaterally decide to use electronic technology in lieu of a reporter for recording a deposition, without the consent of opposing counsel. The Committee invited representatives of the competing viewpoints to explain their concerns about the proposal as well as the changes adopted by the court in 2003.

As a result of its investigation of this issue, the Committee proposes amendments to pertinent rules that will maintain the rule as it was adopted by the Court in 2003 along with providing solutions to some of the unanswered questions raised by the 2003 amendments. The proposed amendments are contained in Appendix F.

Under the current rule, both parties must agree to use electronic recording before forgoing the use of a court reporter. The Committee decided it was best to preserve the current policy. In the absence of a court reporter, certain responsibilities must fall to the attorneys themselves, and many stakeholders are uncomfortable with the prospect of removing the neutral third party record-keeper from the deposition process. On the other hand, when parties mutually agree to record a deposition without a reporter, they take responsibility for the consequences.

The Committee heard from a professional videographer who detailed some of the common problems that even professionals in the industry encounter in making an audible record of a deposition, ranging from faulty recording media to opposing counsel's inadvertent or intentional interference with microphones. Unless the quality control issues have been resolved to their satisfaction, practitioners should exercise caution in choosing to forgo a court reporter altogether.

At the request of the court reporting association, the Committee is recommending some amendments to the rules governing videotaped depositions to clarify ambiguities relating to these issues:

- Identification of the "officer" in a videotaped deposition:
- Custody of the original videotape:
- Responsibility for notifying the deponent of his or her right to review and correct testimony when neither attorney covers this issue: and
- Mechanics of videotape review, signing, and correction by a deponent.

6. The role of the court reporter in managing the various reporting technologies.

The Committee was asked to determine what the court reporter's role should be in managing the record regardless of how the record is made. The Committee is not proposing any major change to the role of the court reporter in this regard. The Committee is not aware of any state that has attempted to reassign court reporters to monitoring electronic recording equipment. Typically, this task is assigned to clerks or dedicated equipment monitors with considerably less background and training than is true of the graduates of court reporting schools, and their wages are considerably lower than what court reporters earn.

The Committee is recommending certain rule amendments that identify responsibilities of a transcript coordinator. *See, e.g.*, proposed changes to Ariz. R. Crim. P. 31.2, Appendix D at pp. 8-9). Section 8.7 of the proposed Digital Equipment Standards (Appendix H at p. 4) requires courts to "assign a staff member to act as a transcript coordinator to ensure timely production of transcripts required for appellate proceedings," and recommends that "[t]his staff member should be familiar with the rules and practices involved in transmitting the verbatim record to the appellate court."

Many jurisdictions, including some Arizona courts, have assigned this role to a managing court reporter. The Committee did not think it was necessary or desirable to specify who should fill this role. Most courts do not have a managing reporter, and staffing decisions are subject to local budgetary considerations. Nevertheless, court reporters are most likely to have the requisite familiarity with transcript production and appellate rules and should be considered for this assignment, when possible.

Similarly, given their transcription skills, familiarity with courtroom procedures, legal terminology and the process of preparing transcripts for appeal, court reporters are ideal candidates for preparing transcripts from electronic recordings. The Committee's proposed new rule governing transcript production (Appendix G) is designed to encourage courts to develop working relationships with certified reporters for transcription of electronic recordings. There currently are few local individuals with the necessary skills and experience to prepare the transcripts from electronic recordings apart from certified reporters.

7. Public access to electronic recordings of court proceedings made by courtroom clerks to assist in drafting minute entries.

The Committee was asked to determine whether to prohibit public access to the electronic verbatim recordings some courtroom clerks create in lieu of shorthand notes to assist in minute entry production. The Committee recommends Supreme Court Rule 123 be amended to prohibit public access to those recordings. The potential for confusion in the face of multiple records of the same proceeding are obvious. Furthermore, clerks

should not be burdened with maintaining or copying recordings that serve merely as a backup for drafting their minutes of proceedings. These recordings are essentially taking the place of shorthand notes and should not be deemed official records of a proceeding anymore than the shorthand notes have been. The specific proposal is contained in Appendix D at page 19.

8. Electronic recording technology should be officially sanctioned as a permissible means of making the record in certain types of hearings and under certain circumstances.

The Committee was asked to determine which proceedings and under what circumstances electronic recording technology should be authorized as the official means of recording a judicial proceeding. The Committee recommends authorizing the use of electronic recording technology within the guidelines set forth in the Committee's proposed new rule governing use of court reporting resources. The rule appears in Appendix E. Under this rule, court reporters must be used to make the official record in grand jury proceedings, capital case hearings, and felony jury trials, as well as initial hearings to determine sexually violent person status (A.R.S. §36-3706), and hearings on a minor's request for an abortion in the absence of parental consent (A.R.S. §36-2152). These types of proceedings typically are reported by court reporters even in those courts that currently use electronic recording systems. Additionally, they typically involve high transcript volume, and exacting due process standards that argue in favor of maintaining the traditional record-maker.

The rule also preserves the statutory requirement that judges honor a party's request for a reporter for any type of hearing. In keeping with the proposed change to A.R.S. §12-221, the rule adds a timeliness requirement to ensure courts have sufficient notice that a reporter will be needed. Additionally, the rule specifies that when both a reporter and a recording system are in use, the reporter's notes are deemed the "official" record.

The rule is intended to work with several proposed amendments of existing civil, criminal, juvenile, and domestic relations rules of procedure governing pre-trial conference hearings. These amendments will safeguard the parties' right to request a reporter for a trial by ensuring that the issue will be included in the pre-trial conference.

Development of the reporting resources rule consumed considerable time and attention. The Committee struggled with striking a balance between local practices that appear to work well and the need to preserve the statutory right of practitioners to choose the manner in which the verbatim record of a proceeding would be made. In addition, the Committee identified certain proceedings in which the use of a certified court reporter has been the customary practice, namely, grand jury proceedings, cases involving major criminal offenses, and complex, multi-party civil matters. Given the current practice in this state, and also in many other states, the presumption is that such proceedings will be recorded by a certified court reporter.

Unlike all other recommendations contained in this Report, the Committee was not able to reach complete consensus on this rule. The members approved the rule by a vote of 15 to 7. Some dissenters felt the proposal over-inclusive; others believe it under-inclusive. The minority positions are included in Appendix L.

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