

MAKING THE RECORD: SOLUTIONS FOR TODAY AND FOR THE FUTURE

**Produced by the NCRA
Stenographic Opportunities in the
Courts Task Force, May 2012**

**Based on survey results fielded by
the National Judicial College**



Stenographic Opportunities in the Courts Task Force

Lesia Mervin, RMR, CRR, FAPR, Chair
Visalia, CA

Kristin Anderson, RPR
Kansas City, KS

Sheryl Culver, RPR, CMRS, CRI
Van Meter, IA

Cheryl Dahlstrom, RMR, CRR
Boston, MA

Paulita Kundid, RPR, CLVS, FAPR
Daytona Beach, FL

Nativa Wood, RDR, CMRS, FAPR
Harrisburg, PA

Melanie Humphrey-Sonntag, RDR, CRR,
FAPR, *ex-officio*
Wheaton, IL

Table of Contents

Executive Summary	3
Introduction	5
Reducing Court Costs Without Compromise to the Integrity of the Record	8
Stenographic Court Reporters as the Drivers of Technology within the Courts	13
Management of the Record- Making Function	16
Realtime Court Reporting as a Solution	19
The Perils of Electronic Recording when Compared with Stenographic Court Reporting	23
Conclusion	28

EXECUTIVE SUMMARY

- Largely as a result of a budgetary crisis that has enveloped state and local governments over the past several years, court systems have been compelled to make drastic cuts to all functional areas of their operations. In the midst of this crisis, it nonetheless is incumbent upon court systems to prepare for the future. This white paper presents specific concepts for how stenographic court reporters—specifically in their capacity for making and managing the official record and generally in their knowledge of courtroom policies, procedures, and technologies—are poised to be partners and agents in reducing costs and bringing efficiencies to the courts.
- This paper is based on primary research commissioned by the National Court Reporters Association (NCRA) and executed by the National Judicial College (NJC). In the spring of 2011, NJC conducted an electronic survey of judges and official court reporters through its research partner, the University of Nevada, Reno’s Center for Research Design and Analysis. In the survey, 1,602 judges were randomly sampled and 515 completed the survey for an extremely strong 34 percent response rate. A high percentage of court reporters likewise completed the survey (43 percent); however, it is the responses from judges that are used extensively to support points made in this white paper. The survey results are available on the NCRA website.
- Judges indicated in the NJC survey that over the next 15 to 20 years, budgetary considerations and integration of new technology will be the two most significant factors that will impact court systems.
- The two most important attributes of stenographic court reporters, according to judges in the survey, are the accuracy and timeliness of transcripts. Not surprisingly, given the current budgetary environment, judges indicated that the top reason courts use methods other than court reporting for capturing the record is budgetary considerations. Indeed, a mere 18 percent of judges indicated their courts used methods other than court reporters out of a *preference* for digital audio recording.
- The survey suggests that the role of the stenographic court reporter should, in more instances, grow to become that of “courtroom manager.” In this role, court reporters could assist in more effectively managing the allocation of resources and ensuring inevitable technological changes are accompanied by corresponding benefit to the courts while aligning with courtroom policies and procedures.
- One specific area that provides the opportunity for technological benefit to courts is the introduction of and/or stronger integration of electronic court management systems (ECMS) with the computer-aided transcription (CAT) and realtime systems used by stenographic court reporters. By more readily auto-linking documents and exhibits with the electronic transcript and ECMS, substantial time efficiencies ensue during later record retrieval and review. As one anonymous judge suggested in the NJC survey: “Technological advances can improve the way we do business, but judges must embrace those changes if they are to really make a difference.”
- Effective management of court reporters is key to unleashing their full potential. A managing court reporter, familiar with the inner workings of his or her court system and who is part of both the stenographic reporter and court administration teams, has the ability to bring

efficiencies to the management of the record, the management of the court reporting function, and the management of all associated technology.

- A still-underutilized tool within many court systems is the realtime court reporter. Realtime provides an array of benefits to the courts through its instant access to proceedings by attorneys, judges, and other court participants. Beyond providing access to information for the 36 million Americans who are deaf or hearing-challenged, today's realtime technology can deliver instant access to the spoken words in a courtroom to individuals who are five feet away or an entire continent away. This is accomplished at little or no cost to the court through secure, wireless Internet streaming.
- Though realtime still too often is perceived to be a luxury by judges and court systems rather than a tool for bringing efficiencies of time and cost to the courts, its support among judges hardly could be stronger. Ninety-seven percent of judges in the survey expressed support for implementation of realtime court reporting systems — more than double the percentage who expressed such support for audio recording (41 percent). Similarly, while 3 percent of judges opposed implementation of realtime systems, 58 percent opposed the implementation of audio recording.
- It is important to recognize that no state operates its court reporting function exactly like another. Each state, and sometimes each circuit within a state, has a unique reporting service delivery system, which must be carefully considered and managed in formulating new systems.
- It likewise is important to recognize that, per some state rules and statutes, audio recording may not always be submitted to an appellate court for the purpose of appeal. In such cases, a transcript must be produced to aid efficiency during appellate and other reviews, all but erasing any cost savings previously attributed to electronic recording.
- Beyond the established liabilities for courts associated with electronic recording for making the record, recent legal challenges to the use of electronic recording have focused on the shift away from the trained court reporter to the use of untrained transcriptionists. These transcriptionists typically are not officers of the court; they may be unfamiliar with established procedures for creating a transcript and handling sensitive information, potentially triggering violations of statutes that prohibit the intentional interception and disclosure of sensitive or confidential oral communications.
- Upon appeal, most appellate courts require a fully searchable, annotatable transcript. Even in the rare instances when one is not required, it takes far less time to review a written transcript than to listen to an audio file. Given the backlog of cases in appeals courts, court systems cannot afford for judges and/or staff to waste time listening to recordings.
- Finally, the process of redaction is a simple exercise for a stenographic court reporter, but it can become a laborious, time-consuming exercise with electronic recording, which typically involves two complete reviews of the audio file in order to redact confidential information.

INTRODUCTION

“Why does this magnificent applied science which saves work and makes life easier bring us so little happiness? The simple answer runs: Because we have not yet learned to make sensible use of it.”

- Albert Einstein

It is perhaps as much a compliment to court systems within the United States as it is a criticism that they are resistant to change. Imparting justice to literally millions of Americans each year—on a consistent, fair, and equitable basis—requires exacting adherence to established judicial procedures. The general concept of change would appear almost at odds with such procedures. These procedures, by their nature and for their purposes, are intended to deliver consistent and predictable outcomes. They form the bedrock of our legal system and, in some cases, have been in place for literally hundreds of years, predating even the founding of our nation.

Nonetheless, substantial change is coming to America’s court systems, beyond that which already has arrived. Managing that change in such a way that courts are able to harness the capabilities of technology while reducing costs presents a formidable challenge. It is incumbent upon the courts and the leaders within to ensure that all parties are brought into discussions of such change. With such collaboration, these changes have the highest likelihood of effecting positive results without compromise to the principles upon which our judicial process and legal system rely.

Even when adoptions of new technologies promise to deliver efficiencies and corresponding cost savings for courts, they often are met with skepticism or even fear of unintended consequences. In recent years, however, fallout from one of the worst economic downturns in history has resulted in a turbulent budgetary environment for states that has necessitated unprecedented cuts in spending. No government entity—including the courts—has been spared budget scrutiny. Courts have been compelled to take immediate action and, in some cases, make drastic—even hasty—reductions in expenses.

State budgets are tight, and the outlook for the foreseeable future is grim. In such an environment, it is easy for decision-makers to fall victim to decisions that appear to cut costs in the short term but that ultimately will cause a higher price to be paid through the degradation of the quality of the court record.

There is no disputing that the creation of the official court record carries with it corresponding expenses, but there likewise are an abundance of ways that stenographic court reporters can be leveraged to streamline processes, save time, and reduce costs, without compromise to the integrity of the official record.

The budget-cutting trends established by economic crisis are not likely to abate in the near future. Indeed, a recent study commissioned by the National Court Reporters Association (NCRA) and carried out by the National Judicial College (NJC) suggests that **budgetary pressures will be the single largest factor shaping the future of court systems over the next 15 to 20 years. Second on that list is integration of new and emerging technologies.** This is according to both judges and official court reporters who participated in the NJC study.

The study included a qualitative phase during which NJC's president, the Honorable William J. Dressel, conducted one-on-one interviews with judges and court administrators, followed by an electronic survey of those two groups as well as of official court reporters. While response to the electronic survey by court administrators was not sufficient to draw any type of conclusions of their attitudes or perceptions, the qualitative phase suggested anecdotally that court administrators indeed are under pressure to reduce costs and will continue looking at all court functions—including the method for making the record—to find areas to achieve savings.

Certainly the cost of making the record should answer to the same levels of scrutiny and accountability to which all government functions generally and court functions specifically must answer. At the same time, it is critical that any necessary changes be made with methodical consideration of how courts can leverage the expertise and capabilities of stenographic court reporters to create efficiencies and reduce costs without compromise to the integrity of the official record.

A generation ago, stenographic court reporters did the then unthinkable when they introduced computers to the record-making process, integrating their stenographic machines with computer-aided transcription (CAT) systems. This brought the power of technology to the record-making process without incurring any level of compromise—only enhancement, in fact—to the integrity of the official record.

In comparative terms, it was a blink of an eye before court reporters had struck again with more innovation in the form of “realtime court reporting.” By the 1980s, court reporters and associated

vendors had created systems that allowed the verbatim record captured by court reporters to be instantly translated into text. Like many emerging technologies, the full benefit of realtime court reporting was not readily apparent at first. While there was immediate appreciation for how realtime could make court proceedings available to those who were deaf or hard of hearing, and thereby allow courts to come into compliance with the Americans with Disabilities Act (ADA), the ancillary benefits of realtime, including the efficiencies it could create, were still to be discovered.

Twenty-five years later, there are many—but still not enough—judges and attorneys who have come to recognize the power of realtime court reporting and its ability to bring efficiencies to the creation and preservation of the official record in an age where severe budget scrutiny promises to be the new reality.

But realtime is just one way that stenographic court reporters—equipped with a mastery of court procedures and serving as established leaders in bringing technological solutions into the courtroom—stand ready to assist court systems to prepare for the future. Within this white paper, members of NCRA’s Stenographic Opportunities in the Courts Task Force have identified five key areas where reliance on the service and expertise of court reporters can play an active, significant role in helping courts answer their most pressing challenges: managing tight budgets and integrating emerging technology.

These five areas form the basis of the white paper:

- Reducing court costs without compromise to the integrity of the record;
- Stenographic court reporters as drivers of technology within the courts;
- Management of the record-making function;
- Realtime court reporting as a solution; and
- The perils of electronic recording when compared with stenographic court reporting.

Finally, it is important to recognize that no two court systems operate in exactly the same manner. Differences of size, geography, and statute prevent there from being a one-size-fits-all solution to address needs and challenges. In all circumstances, however, it is clear that the future promises change, and that, within this change, technology will play a specific and dominant role. As this white paper will address in specific fashion, stenographic court reporters possess the knowledge and skills to help courts meet the needs and address the challenges of tomorrow’s—as well as today’s—court systems.

REDUCING COURT COSTS WITHOUT COMPROMISE TO THE INTEGRITY OF THE RECORD

There is no disputing that the creation of the official court record carries with it corresponding expenses, but there likewise are an abundance of ways the skills and knowledge of stenographic court reporters can be employed to streamline processes, to save time, and to reduce costs without degradation to the quality of the record nor to citizens' access to impartial justice. At the same time, however, court systems must have their eyes wide open as they make decisions that can adversely affect the integrity of the court record and, thereby, the judicial process. It would be naïve to dismiss entirely the notion that electronic recording has a role within certain court environments, but it would be reckless for courts to ignore the substantial limitations of electronic recording and fail to examine the multitude of examples where such limitations have led to catastrophe for courts and litigants.

Attributes of a Stenographic Court Reporter

According to judges in the NJC survey, the two most important attributes of stenographic court reporters are the **accuracy of transcripts** they provide and **the timeliness of those transcripts**. It turns out that accuracy and timeliness matter more to judges than proponents of electronic recording contend. It is usually only with reluctance and out of necessity to cut budgets that court systems migrate to electronic recording. Indeed, judges indicated that the top reason that courts use methods other than court reporting for capturing the record is budgetary considerations (30 percent in the NJC survey). A mere 18 percent of judges indicated that their courts used methods other than court reporters out of a *preference* for digital audio recording.

The fact is that the supreme accuracy and timeliness associated with transcripts *do* matter to judges as they are the two most important attributes of a court reporter according to judges in the NJC survey. That is why, when courts engage in proceedings of the highest level of magnitude, they turn to stenographic court reporters in disproportionate fashion. A strong majority (72 percent) of courts use stenographic court reporters “always” in criminal cases, according to judges in the NJC survey, and an overwhelming majority (92 percent) indicate that they use stenographic reporters “most of the time” in criminal cases. As the stakes get higher—such as in capital and first-degree felony cases and in complex civil litigation—even in states where electronic recording proliferates, such as Utah, the courts still turn to stenographic court reporters to capture the record.

One verbatim response by a judge in the NJC survey seemed particularly relevant to this point. “I do not see, nor would I like to see, any effort to eliminate or reduce (the number) of court reporters,” said the judge. “My court reporter provides realtime, which is very valuable. She proofreads my decisions. She is a confidant and a teammate. From the appellate court standpoint, I would imagine they would suffer even more if court reporters were eliminated or cut back. I review digital records transcribed by court clerks, and they are, at times, horrible, mostly because of infirmities in the recording system.”

Leveraging the Stenographic Court Reporter

When judicial branches are forced to make across-the-board budget cuts, this often means layoffs, as personnel costs typically compose about 95 percent of the judiciary’s budget, unlike the legislative and executive branches, which have all manner of programs and services within. This is at a time when case filings continue to rise. As such budget cuts are made, proponents of electronic recording always are prepared to capitalize upon the notion that “cost is all that matters” when it comes to making the record. This is a sentiment with which judges wholeheartedly disagree. When specifically queried in this regard:

- 56 percent of judges in the NJC survey disagreed with the statement that cost is all that matters in making the record;
- Only 9 percent strongly agreed;
- 77 percent of judges **disagreed** that there is *not much difference between audio recording and (stenographic) court reporting*.

Unfortunately, it sometimes is only after court systems are compelled to replace stenographic court reporters with electronic recording for purported costs savings that the full role of the reporter is better understood. This occurs when the additional duties performed by court reporters are left undone or must be absorbed by others in the court system, sometimes even by judges themselves.

In many areas where there are no court attendants, for instance, court reporters perform additional duties, such as retrieving court files, making copies, and keeping the parties and attorneys on schedule. In other situations, the position of court reporter is viewed as a gatekeeper, a person to sift through the daily accumulation of electronic files and documents distributed to each judge. The court reporter frees the judge from the necessity of looking at each electronic document on his or her daily docket and

deciding what action is necessary. This gives the reporter the authority to create orders or schedule hearings that would complete a judicial event. When this resource is removed, the pace of the day slows; fewer cases appear before the court; progress is hampered; and additional cost is an inevitable result.

Much of the routine work assigned to judges involves preparing orders that could be prepared by judicial support staff, including court reporters. Beyond the obvious benefit of passing clerical duties from judges to court reporters, further efficiencies occur when a judge-and-court-reporter team work together on a regular basis.

Time Efficiency

The dramatic change that electronic court management systems (ECMS) will bring to judicial branches has the capability of causing anxiety and frustration among some workers. There are judges, clerks, and court administrators who are reluctant to part ways with established systems over the short term, a practice that will prevent the long-term time and cost efficiencies made possible through proper implementation of ECMS in their courts. As recognized leaders in bringing new technologies into court systems, court reporters are ready not just to assist the courts in the implementation of the technology itself, but also to adapt policies and procedures that will allow for the benefits of ECMS and other emerging technologies to be fully realized.

In the NJC survey, 65 percent of judges indicated that their court systems currently utilize ECMS, but that transcripts are integrated into the system only 12 percent of the time. This is likely to change in the years ahead, as 49 percent of judges foresee transcript integration with ECMS over the next 10 to 15 years. The time efficiency, and thus cost efficiency, for court systems to have the ability to access copies of the official record through ECMS literally within seconds of its request would be substantial. With court reporters' expertise in making and archiving the record in accordance with established procedures, as well as their advanced understanding of court-related technology, they are in a strong position to assist in such processes.

Individual court reporters in most circumstances purchase, maintain, and upgrade their own reporting and transcript equipment, saving the government millions of dollars. These personal investments by court reporters mean that courts reap substantial productivity benefits from state-of-the-art advances in

computer technology at no expense to the court either for initial purchase or maintenance. Stenographic court reporters also may incur associated costs of contracting with scopists and proofreaders to ensure the timely delivery of transcripts. With electronic recording, the burden of such costs is the government's responsibility.

One common myth about electronic recording is that judges, attorneys, parties, and court staff can review simple audio recordings in lieu of a transcript to realize substantial cost savings. It isn't true. Imagine a judge looking for a single 30-second passage of testimony from a full court day's proceedings who must fast forward/rewind ad nauseam until finding that single passage, which can be like finding a needle in a haystack. Compare this with the keyword searching afforded to a judge with a court reporter's electronic transcript, which takes mere seconds. Alternatively, the judge simply can ask the reporter to find and read back the passage. Despite any advancements that might have taken place with digital audio recording, the technology simply is not there to emulate a keyword search function.

The role that court reporters should play—and which numerous aspects of the NJC survey point toward—is transforming the position of official court reporter into a more robust, modern role of “courtroom manager.” That transformation is a paradigm shift in courtroom management and could provide effective resource allocation. Courtroom management duties for court reporters might include:

- Making the official court record through reliable stenographic means (with realtime service available as needed);
- Being the ECMS gatekeeper;
- Creating and preparing orders for the judge's electronic signature;
- Assisting with the judge's docket; and
- Directing the court participants when court is in session.

Judges should attend to the business of judging, not occupy themselves with the chore of administering the technology around them. Without question, the choke point of ECMS is the process of e-filing judicial orders. Most judges working in high-volume courts have limited experience in quickly producing and filing electronic documents and handling exhibits. Once again, court reporters are technology specialists whose expertise should be drawn upon to fully exploit the capabilities of ECMS.

An Accurate Record

Finally, there is the threshold obligation of courts to ensure provision of an unbiased, accurate, and verbatim record of proceedings. Court reporters by training are obsessively committed to the accuracy of the record. And, from the NJC survey, it is clear that judges value such accuracy as well, considering it to be one of the two most important attributes of a stenographic court reporter. It is an axiom of our judicial process that an accurate record be captured and maintained. “There is nothing on the tape” or “we can’t find the recording for that day” are unacceptable excuses in any court system.

The maelstrom of overlapping high-speed speech, ambient noise, paper shuffling, coughing, voices with foreign accents, and variance of pitch of voices that surface in an electronic recording combine to render an electronic recording a poor substitute for a stenographic court reporter. Combine that with the ever-present challenge of identifying *who* is speaking on a recording after the fact, and the inevitable end result is a degradation in the accuracy of the official record. Despite the advancements in technology to which proponents of electronic recording may point, these challenges cannot be overcome. Only the presence of a skilled practitioner in the courtroom—the stenographic court reporter—can guarantee that all participants in the judicial process are provided their right to a reliable, accurate, verbatim record. Speaker misattribution and guesswork are the unavoidable result of an off-site transcriptionist trying to piece together a transcript from an audio recording.

Yes, there is a cost associated with the creation of an accurate, verbatim record. But it likewise is important to acknowledge the very real costs of inadequate records, lost recordings, garbled testimony, and inevitable delays in producing a transcript, to name just a few of the most serious, recurring problems associated with reliance on electronic recording to make the record.

There is a reason why judges prefer court reporters over other options for making the record that goes beyond the value-added services court reporters can provide. There is a reason why even states that use electronic recording in wholesale fashion still turn to stenographic court reporters for their most important proceedings. That reason is that, **when it comes to the official record, its accuracy simply cannot come into question.** As court systems continue to look for ways to cut costs, it is important that they simultaneously consider the costs of an *inaccurate* record, including the cost of diminishing the integrity of the process for court participants as well as for the citizens they serve.

STENOGRAPHIC COURT REPORTERS AS THE DRIVERS OF TECHNOLOGY WITHIN THE COURTS

Twenty or even 15 years ago, the percentage of the American public who had cell phones was small. The concept of smart phones, iPads, social media, or even the Internet was foreign to anyone not hiding in a Silicon Valley garage. As one contemplates what fundamental changes technology will bring to our lives across the *next* 15 to 20 years, it is safe to say that the technology that will alter the way we process, store, and access information within a courtroom setting will change in manners that we today cannot even contemplate.

Yet, even with so much unknown, according to the NJC survey, **judges have identified integration of technology as one of the two largest challenges that will reshape the courtroom over the next 15 to 20 years.** As courts make such changes, it is critical that the individuals leading that change are equipped not just with technological know-how but likewise with a sophisticated understanding of court procedures.

The Court Reporter's Role in Preparing for the Future

Technology most assuredly already possesses the ability to challenge the premises that now are considered to be hallmarks of the courts. When judges were asked in the NJC survey what court reporters could do to enhance their role in the future courtroom, their top answers all related to technology integration:

1. Provide realtime;
2. Provide electronic transcripts that integrate with electronic case management systems; and
3. Provide daily copy.

Substantial overlap—and thus synergy—exists between what court reporters must be doing to solidify their roles in the courts and the needs of court systems to harness the power and benefits of technology. That court reporters historically have proven to be innovators in bringing new technologies into the courtroom and that they possess intricate knowledge of court procedures puts them in a unique position to play an instrumental role in helping court systems on the technological front. Without such leadership in harnessing technological capabilities, the perspective of this particular judge from the NJC survey will continue to be the reality for many court systems: “The technology that we have is

unreliable, prohibitively expensive to maintain, and changes so quickly that by the time the court, staff, and attorneys have become competent using it, it has become obsolete.”

One of the key elements that promises to bring efficiencies of time and cost to courts in the future is the introduction and evolution of electronic case management systems (ECMS). Utilizing computer-aided transcription (CAT) and realtime, the court has instantaneous access to a draft of the written word. Further, the stenographic reporter has the capability to auto-link documents/exhibits into the electronic transcript for quick reference during court proceedings. This will further enhance the efficiency of record review.

Yet another application of stenographic court reporting with the potential to increase efficiency and reduce costs is reporter electronic data interchange (REDI), which eases the keystroke data entry chores of courtroom clerks and speeds up the updating of the court’s case management system by selectively marking and transferring case processing information from the realtime record. “When this feature becomes marketable, the productivity gains for the court will be substantial.” (Source: “An Analysis of Stenographic Court Reporting and Digital Audio Recording in the Courts,” by Justice Served, an alliance of court management and justice experts, 2010, for Ohio Court Reporters Association).

Fundamental Differences Between Court Reporters and Electronic Recording

The risks and consequences of electronic recording to make the record are well established. A recording brings with it every bit of ambient noise in a courtroom — coughing, sneezing, sirens, doors slamming, paper rustling, and people talking over one another. The recording creates the need for someone to type every word on a word processor to create a transcript for review by the appellate court. Picture a 1960s typing pool with dozens of people typing away on typewriters instead of word processors. Relying on an electronic recording is akin to court systems stepping back into the 1960s.

In fact, the use of the term “digital” really only should apply to the computer-integrated reporter, as it is only he or she who is using state-of-the-art technology and not relying on an intermediary transcriptionist to retype proceedings from an audio file. Few states require that transcriptionists answer to any standards of practice, certification, and training. The product transcriptionists generate is subject to all of the aforementioned shortcomings while relying on a process that is likely to introduce additional keystroke errors, further degrading the accuracy of the record. It is an inferior product.

Frequently, courts that utilize electronic recording turn to stenographic court reporters for transcription of audio files. While court reporters are able to lean on their training and expertise to make the record in accordance with judicial procedures and established professional standards, they, too, have difficulties overcoming problems associated with the original audio-file capture. When courts must ultimately need a record of proceedings, in most instances they require a *written* transcript and, in such circumstances, any perceived cost savings of electronic recording evaporate.

In a study commissioned by the California Court Reporters Association in 2009, Justice Served suggested the following: "Altering the Courts' method of managing its verbatim record from court reporting to (electronic recording) will produce unintended consequences that will negate and even surpass the projected cost savings. This is akin to projecting cost savings in a hospital by replacing equipment and supplies with inferior substitutes; the resulting loss in productivity and its consequences could be dire. Use of (electronic recording) produces substantial hidden and shifting costs. These costs will be borne by citizens and court users in the form of diminished quality of justice, reduced access to justice, substantial delays, and the need for more judges and court staff to keep up with the resulting demand."

Consider instead today's realtime court reporter, who can provide instant access to testimony on monitors for attorneys and judges that can be marked, summarized, and used to prepare for ensuing aspects of proceedings. Consider the fact that court reporters are equipped with the ability to provide daily copy of official transcripts and/or drafts of testimony that attorneys and judges can have in their hands *as they leave the courtroom*. Consider REDI (reporter electronic data interchange), which provides a largely untapped opportunity for stenographic court reporters to bring even further efficiencies to the data entry and transference of case information to ECMS. This is both the present and future in terms of the cutting edge for making the record, rather than the antiquated model of electronic recording.

Relying on the leadership of stenographic court reporters to bring emerging technology into the court system is the best way to ensure that the process of making, storing, and integrating the court record takes place with strict adherence to established court procedures. There is a definite need for education to harness the capabilities of technology within the courts, this according to at least this one judge in the NJC survey: "Judicial education on adopting needed changes in an old institution [is necessary]. Technological advances can improve the way we do business, but judges must embrace those changes if they are to really make a difference."

MANAGEMENT OF THE RECORD-MAKING FUNCTION

Anyone who has ever been involved with a wholesale technology upgrade can tell you that the largest challenges encountered in such efforts are related to making changes to established, often cemented, processes and procedures that have been in place for decades. For technology to unleash its full potential – and bring with it promised efficiencies and cost savings – the people most closely involved must be willing to challenge, or even surrender, the status quo. Failure to accept this most basic premise has historically been the reason that 80 to 90 percent of software projects fail, and half of those projects that are re-started fail a second time, according to author James Taylor in *Managing Information Projects*. These projects fail by coming in over budget, by exceeding established timelines, and/or by accomplishing little to none of the promised functions. Managing people and processes to accomplish technology-based efficiencies becomes the key, particularly when those people and those processes are engaged in activities upon which the well-being of our society and the rights of our citizens depend.

On whom a court system relies for management and allocation of its finite resources and guidance during such periods will be a decision that will greatly affect the court system's ability to realize lower costs, increase efficiency, and improve access to justice.

Effective management of court reporters is key to unleashing their full potential as a resource. A managing court reporter, intimately familiar with the workings of his or her court system and who would be part of both the stenographic reporter and court administration teams, could effectively manage three major areas:

- Management of the record;
- Management of the court reporting function; and
- Management of technology.

Management of the Record

In any courtroom situation where a record of proceedings is made, that record must be held to the highest standard of accuracy; however, not all proceedings need to be handled in the same manner. Management of the record itself should begin with a thorough assessment of the needs of a particular court. Consideration should be given to whether a particular court proceeding is one that:

- Rarely, if ever, results in the need for a written transcript;
- Would benefit from the use of realtime for litigation support, such as complex litigation;
- Requires realtime to provide access to the courts for hearing-challenged individuals; or
- Would benefit from the use of realtime as a tool for increasing productivity of the parties, judges, and other court personnel.

Management of the record should also include policies and procedures for archiving stenographic notes, completed transcripts, and reporters' transcription databases. Procedures should account for the ability to produce transcripts from reporters who are no longer available to the court system, ensuring the courts will have access to the record when needed. According to the NJC survey, 35 percent of judges indicate that it is the responsibility of stenographic court reporters to preserve the official record; 28 percent indicated it is the responsibility of IT staff; and 13 percent indicated it is the responsibility of courtroom clerks. That leaves another 24 percent of courts that use "other personnel" for this important task. Distribution of a task that requires a high degree of understanding of court procedures as well as associated training no doubt results in mistakes and inefficiencies, both of which can be reduced or eliminated through effective management.

Management of the Court Reporting Function

As courts face the challenge of reducing their budgets and making changes that promise to forever impact the landscape of the courts generally and the process of making the record specifically, consideration must be given to the substantial risks accompanying these changes. Such risks are mitigated when courts rely on the known, existing resource of stenographic court reporters, already intimately familiar with the court environment and its many intricacies and processes. Their knowledge is extremely beneficial to ensure that necessary changes will not harm the record-making process.

What can an enhanced management program do to leverage this essential court resource?

- Act as liaison between court administration and stenographic reporters;
- Promote accountability and efficiencies by monitoring production and workload;
- Identify models for the most effective assignment of stenographic reporters;
- Create a realtime team consisting of reporters that are already certified;
- Set training goals for reporters preparing to become realtime reporters; and
- Identify areas where stenographic reporters can assist other court personnel.

Management of Technology

The implementation of technology should enhance the efficiency of the entire judicial system and not merely place Band-Aids on areas that seem to be a problem. Managing the technology associated with providing a record of court proceedings encompasses so much more than mere tape recording or videotaping. Realtime court reporters in the role of information managers are singularly capable of leveraging technology to not only capture the spoken word, but also to provide instantaneous readbacks, provide streaming testimony, provide access to court proceedings for the hearing-challenged, and produce immediate draft transcripts for use by the parties, the court, or the court's staff. **This constellation of services provides the best technological support to the courts.**

Even in situations where electronic recording is used extensively, having a professional managing court reporter in the mix is invaluable. Without a court reporter in the middle serving as the information manager, the burden of listening to the tapes of a proceeding falls elsewhere, often to judges or law clerks, who simply do not have the time to listen to hours of tapes to find what they need. Not only is it not good use of technology, but it also is fiscally irresponsible.

Additionally, because technology changes so rapidly, court reporters and court administrators always should be working together to explore new ways of streamlining any process, which would relieve the court's workload, such as integration of the record into electronic court management systems (ECMS) and implementation of reporter electronic data interchange (REDI) systems.

REALTIME COURT REPORTING AS A SOLUTION

Introduced to the marketplace in the 1980s, realtime court reporting presented a cutting-edge application of technology that promised to revolutionize the process of making the record. Its name was as it suggests: The spoken word is filtered through a computer (by a stenographic court reporter) that translates machine shorthand into English to provide instant — or “realtime” — access to proceedings. In turn, those proceedings can be immediately distributed to court participants.

Realtime pioneers initially suffered through the same challenges that early adopters of any emerging technology encounter: It was perceived by many as a luxury, and, thus, as an unnecessary expense. Over the better part of three decades—as desktop, notebook, and, most recently, tablet computers arrived in the courtroom—the full power of instant access to proceedings by attorneys, judges, and other court participants became more apparent. Attorneys could mark testimony as a trial unfolded and ready themselves for cross-examination. Judges could more efficiently prepare for upcoming proceedings. And while the instant text produced by a realtime reporter in itself was not ready to serve as the official record, it did allow for draft transcripts to be put in the hands of attorneys and judges as the proceedings unfolded, along with enabling faster, more accurate production of the official record.

It would be remiss not to mention the extraordinary benefit that a realtime record provides to parties in a complex case involving expert witnesses. Often, these experts travel hundreds of miles at substantial expense. They then wait to deliver testimony or are required to sit in the courtroom day after day to physically listen to others’ testimony. A newer realtime capability is to “stream” text outside of the courtroom via the Internet. Under a controlled environment, this provides a useful and timesaving process, with further time and cost efficiencies, by reducing the need for witnesses to be present in the court. Although this promises to be the “wave of the future,” realtime reporters likewise already are capable of assisting with the implementation of this important technology in *today’s* courtroom. (NCRA produced a white paper on realtime streaming technology in June 2011, entitled “The Secure Delivery of Transcripts Using Wireless and Internet-Based Realtime Method,” which is available on the association’s website).

As technology continues to evolve, including secure wireless streaming and Internet streaming, realtime delivery systems have progressed to the point that virtually anyone wanting access to the spoken word can have it provided securely, whether they are sitting in the courtroom or are an entire continent away.

Even if too many court participants still view realtime as a luxury—72 percent of judges in the NJC survey have that view—its support among judges hardly could be stronger. From the NJC survey:

- A full 97 percent of judges expressed support for implementation of realtime court reporting systems.
- This compares with 41 percent who indicated support for audio recording and 35 percent for video recording.
- To extend the point, 58 percent of judges *oppose* the implementation of audio recording systems, and 66 percent oppose video recording, while only 3 percent oppose the implementation of *realtime*.

Reducing Costs

Still, there remains an urgent need for courts to reduce costs—and realtime is capable of delivering part of the answer. The most common compensation model for court reporters within a judicial setting is unique compared to most professions. They typically earn a salary that is modest in relation to their skills and training. It is justified and implemented based on their opportunity to earn supplemental income from the government or from third parties when transcripts of proceedings are requested. For court reporters, the time involved with editing and producing transcripts is substantial, usually taking place at night and on weekends.

Realtime reporters bring a higher level of efficiency to the transcript production process. By filtering their verbatim shorthand notes through realtime software, they arrive with a product that, from the start, is often more than 90 percent accurate. Not surprisingly, the time it takes to produce a finished, certified transcript from that as a starting point is greatly reduced. Indeed, realtime reporters estimate it takes substantially less time to produce a transcript than it otherwise would. It is simple mathematics that a court reporter spending much less time on transcripts can be far more efficient in transcript production.

Extending the mathematical equation, if the amount of time available outside of working hours to work on transcripts is an obstacle to court reporters' capability to cover more court proceedings, those producing transcripts in nearly half the time—realtime reporters—would have the capability to cover more court proceedings. In practice, this presents the opportunity for courts to make wider use of realtime reporters in the courtroom. Such availability likely never would allow court reporters to take on *double* the responsibility in the courtroom, but their time efficiency certainly allows for downtime to be

reduced. Courts thereby can get much more production out of a single realtime reporter than a non-realtime reporter — and at no additional expense. This could reduce or even eliminate the need to explore less reliable options for capturing the record.

Additional Benefits of Realtime

There are additional benefits to having a realtime court reporter in the courtroom. The near-perfect nature of realtime is not merely the result of training. It likewise is the result of careful preparation. Preparation for hearings and trials involves the review of pleadings and other filings made by the parties in order to become familiar with the particular terminology of the upcoming testimony. The realtime reporter proactively catalogs technical terms, phrases, witness names, company names, street names, product names, and technical terms and phrases that are likely to be part of proceedings. All of this preparation reduces the likelihood that the court reporter will have to interrupt proceedings for clarifications, which saves time, preserves continuity of proceedings, and increases accuracy of the appellate record, with accuracy being a highly desired quality, according to judges in the NJC survey.

Perhaps the most important application of realtime in the courts is its use to make legal proceedings available to the 36 million Americans who are deaf or hearing-challenged, allowing full participation as jurors, litigants, spectators, or counsel. For judges, court administrators, and others without hearing disabilities, having court proceedings instantaneously visible on a screen might register as a luxury, but it is indeed a *necessity* for the deaf and hearing-challenged, whose access to the judicial system is guaranteed under the Americans with Disabilities Act (ADA).

The Most Efficient Means to Make a Transcript

The efficiencies of cost and time made possible through realtime begin with immediate access to the record, which equips court personnel with the capacity to highlight, review, and search text, substantially reducing the time it takes to rule on objections, prepare filings, or clarify witness testimony. As mentioned, certified transcripts are more quickly available from realtime reporters as a result of their “front-loaded” case knowledge, preparation, and expertise.

Other methods of making the record rely on multiple steps to produce a transcript. It begins with an electronic recording and ends with a transcript at some time in the future. That “future” is unpredictable

given the complexities of litigation and lack of professional certification by typists and transcriptionists in most states, who typically thus answer to no standards of accountability in areas such as preparation of transcripts and handling of exhibits. In addition to wasted time and effort, and thus money, shortcomings of electronic recording can have severe repercussions on the quality and, thus, the integrity of the record.

Realtime Enters Its Prime

The tragic irony of larger numbers of court systems replacing stenographic court reporters with electronic recording is that they are doing so during an era when the benefits of realtime are becoming more apparent and widely accessible through streaming technology. Now more than ever, courts need to be exploring the efficiencies and possibilities that realtime streaming provides.

Courts are filled with more and more complex litigation cases in the aftermath of the recession. The small cases are settling, and it's the big cases that make their way to the court, and that is where courts need realtime court reporters the most. Now is not the time to lay off court reporters; now is the time to truly put the full capability of realtime court reporters to use to solve problems and to prepare for the future.

THE PERILS OF ELECTRONIC RECORDING WHEN COMPARED WITH STENOGRAPHIC COURT REPORTING

As court systems negotiate the dual challenges of inadequate funding and preserving the constitutional rights of citizens, they are committed to identification and pursuit of innovative ways to prepare courts for the future. These challenges sometimes appear at odds with each other, but that does not have to be the case when it comes to making the record. To understand the court reporting process in trial courts across the country, one fact must be made abundantly clear: No state operates its court reporting function exactly like another. Each state, and sometimes each circuit within a state, has a unique reporting service delivery system dictated by any number of factors. These variations must be carefully considered and managed in formulating legal and operational changes designed to improve the effectiveness and efficiency of court reporting services.

As a result of budgetary crises, courts have been compelled to consider alternative options for capturing the record, one of which is digital audio recording (DAR). Courts that choose to capture the record through DAR typically provide only an audio recording to the recipient. This shifts the transcription costs to other parties (e.g., the public defender, state attorney, conflict counsel, and the general public), which allows the court to reduce certain expenditures, but it likewise creates potential conflict when different transcriptionists create different versions of the same proceedings. These can be individuals who are unknown to court personnel and who, in most states, are not required to possess specific training or answer to professional standards or certification.

Something often overlooked is that not all court proceedings that are digitally recorded at the government's expense are actively monitored. Yet it is the person who monitors the recording who certifies the validity and quality of the audio recording, which presents inherent difficulties and conflicts when the DAR system is unmonitored.

Per some state rules and statutes, audio recording of a proceeding may not be submitted to an appellate court for the purpose of appeal. In such cases, a transcript must be produced to aid efficiency during appellate and other review, all but erasing any cost savings.

Addressing professional standards and certification, the court reporter in most states bears responsibility for archiving and retrieval of the record. Without established, consistent standards provided by certification and training, digital audio operators/transcriptionists in many states can be left to their own interpretations of where their responsibilities lie. Without specific experience and training in archiving the record, the accountability for these functions can be murky at best and has resulted in costly retrials in cases where the audio file and/or transcribed record go missing.

Privacy and Disclosure of Confidential Information

In today's world—and no doubt tomorrow's—the issue of privacy, of protecting the personal and confidential information of court participants, has become a serious issue. When it comes to the capture of sensitive information and later the transmittal, redaction in some cases, and presentation of sensitive information, it is more important than ever that an intricate understanding of associated policies and procedures is held by those responsible for capturing, storing, and transferring the record. Stenographic court reporters possess exactly that type of training and expertise.

Recent legal challenges to the use of electronic recording have focused on the shift away from trained court reporters toward the use of untrained transcriptionists **who are not officers of the court**. The potential of confidential information contained within digital recordings being provided to transcriptionists without training in handling such sensitive information triggers violation of statutes that prohibit the intentional interception and disclosure of oral communications.

A courtroom participant with a realtime feed can immediately notice inadvertent disclosures and correct the record on the spot, alleviating the need for later redactions and/or modifications. For example, court reporters who work within federal courts have strict guidelines that must be applied with regard to redactions of certain types of information, as required by the Public Access to Court Electronic Records (PACER) online database. Without the expertise of a court reporter engaged in the record-making process, the likelihood of sensitive personal information, such as Social Security Number, names of minor children, and home addresses can and will end up in the public domain. As privacy laws become more stringent, such expertise will take on additional importance, while such infractions will be considered more severe.

Upon appeal, most appellate courts require a fully searchable, annotatable transcript. Even in the rare instance when not required, it takes far less time to review a written transcript than to listen to an audio file. No one wants to waste time, and given the backlog of cases in appeals courts, neither the judge's time nor the time of his or her staff should be spent needlessly listening to recordings. An established best practice is for a written, searchable, certified transcript.

Courts recognize and define court "records" as the contents of the court file, which may include documents, exhibits, electronic records, videotapes, or stenographic digital notes/files. In many jurisdictions, digital recordings of judicial proceedings that have not been filed with the clerk of court and are not part of the court file do not meet the definition of court records.

Courts recognize privacy and public-record disclosure laws or rules designed to protect the record. The experience of many courts has been that a post-recording review of DAR to detect information protected from disclosure by statute or rule or privileged attorney-client conversations has been time-consuming, costly, and cumbersome. The word "record" can mean different things to different aspects of the legal system.

Today, many courts recognize the "official record" as the written transcript for appellate purposes. In cases where digital audio is utilized, the "public record" is the digital audio recording with the sensitive and confidential information redacted. The public records disclosure laws add an extra layer of issues for the record, an area where DAR has limitations.

Because raw, unedited DAR may contain privileged attorney-client conversations and matters made confidential by statute or rule as well as by privacy disclosure laws, they are not the final evidence of the knowledge to be recorded and may be characterized as preliminary to the final record and therefore are not the official record – adding more hidden costs to the budget equation.

It should also be noted that a number of concerns have been expressed about unrestricted dissemination of DAR of judicial proceedings. These include:

- The possibility of the presence of confidential communications;
- The possibility of modification of the recordings;
- The possibility of multiple versions of the official record of proceedings;

- Preparation of transcripts from recordings by untrained, uncertified persons who are not officers of the court; and
- Loss of court control over recordings and the possibility of intended or unintended misuse outside the courtroom to embarrass or humiliate individuals.

Redaction

The process of redacting sections of electronic recording is laborious, time-consuming, inefficient, and costly. After proceedings are recorded, the recording is reviewed, typically twice. Each section requested to be redacted is identified and marked. The monitor only then is able to redact the confidential information from the recording. This wastes time by creating independent file segments of each redacted section, not providing one complete file of all segments of the electronic recording. To say the least, this can be confusing and cumbersome to the listener. After the modified, redacted file is created, it is retrieved and burned to a CD.

Consider, for example, how this process would play out for an eight-hour proceeding. It would take a *minimum* of an additional eight hours to review and identify confidential information, re-mark, retrieve each segment, and then burn the independent files to a CD. This creates time delays for litigants, and in some courts, monitors will take up to 30 days to prepare a single day's court proceeding that requires redaction to place on a CD.

At that point, only half the job is completed because the litigant must take the CD to a transcriber for production if the court does not provide for transcription. Upon receipt of the transcript, only then can an individual actually make use of the official record, which is, by definition and statute in most states, the written transcript, denying access to justice in the interim.

The difference between electronic recording and a realtime court reporter when it comes to redaction is stark. During a trial, the realtime reporter can simply be asked on the record to redact the confidential information. When attorneys receive a transcript later and stipulate the removal of any additional inadmissible material, the court reporter can quickly locate and redact those portions as necessary without reviewing those segments, which is a huge cost savings.

Even the most severe budgetary crisis does not excuse courts from the responsibility to ensure constitutional due process rights. Judges are charged with preserving the constitutional rights of those

who appear before them and must provide an accurate, accessible, and useable record for the public whose rights are undermined when the integrity of the official record is compromised.

CONCLUSION

“In any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing.”

- Theodore Roosevelt

No one who sets the wheels in motion to change the manner in which the official record is created does so with intention to damage the integrity of the judicial process. Such degradation begins out of perceived necessity to reduce expenditures. Once a compromise takes place — such as acceptance of a DAR recording as a viable substitute for the stenographic record — the line blurs and “good enough” or “close enough” becomes the new standard. With the technology and the innovation taking place in our world and with the ability of stenographic court reporters to provide realtime, “good enough” is not the standard to which U.S. courts can or should aspire.

As courts look to the future, the changes that will arrive in the next 15 to 20 years still are difficult to imagine.

- A generation ago, no one would have predicted that today we would be spending so much of our lives behind the glow of a computer screen, staring at text, images, and video on this “thing” called the Internet.
- A generation ago, no one would have predicted that a witness 3,000 miles away could testify in a courtroom using a phone to capture the sound and video.
- A generation ago, no one would have predicted that a global economic crisis caused by toxic mortgages and investment banks could trickle down and fundamentally change the way court systems conduct their day-to-day activities.

But a generation ago, it was court reporters who first brought computers into the courtroom to revolutionize the process of making the record. Shortly thereafter, they introduced realtime and have spent the subsequent years honing technology to provide increasing benefit to the courts and the legal system at large.

There is nothing that will stop the inexorable forces of change, whether those forces are economic, technological, or social in nature. What court systems have at their disposal is the ability to synthesize information and make decisions in accordance with established court procedures, in line with best practices for making the record, and in thinking ahead to emerging technology.

When it comes to making the record, stenographic court reporters are perfectly positioned to assist court systems in making those tough decisions while answering to established high standards for making the record.

- It's not just that, through realtime, court reporters possess the ability to bring time and cost efficiencies to the court system without degradation — indeed with enhancement — to the quality of the official record ... though that is true.
- It's not just that court reporters possess the knowledge and expertise to assist courts in making the most effective use of technology ... though that is the case.
- And it's not just that the integrity of the court record should be considered sacred and that court reporters are in the best position, through technology, to ensure that occurs in the future ... though that is true as well.

The reason that court systems should rely on the substantial expertise of stenographic court reporters as authorities and partners in preparing for their common future is that their close involvement will allow courts to continue to bring not just the latest technology, but the attendant efficiencies of time and cost, to the process of making the record.