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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of:)	
)	
RULES OF PROCEDURE RELATED)	Supreme Court No. R-20-0013
TO CREATING THE VERBATIM)	
RECORD OF JUDICIAL PROCEEDINGS)	REPLY (SECOND
)	COMMENT PERIOD)
_____)	

David K. Byers, Administrative Director, Administrative Office of the Courts, and Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona and this Court’s September 30, 2021 Order.

I. Procedural History

On January 9, 2020, Petitioner filed a petition to amend various procedural rules to expand the authority of Arizona courts to use electronic recording technology to record court proceedings. On December 12, 2020, this Court entered an order continuing consideration of the petition until the August 2021 Rules Agenda. That same Order authorized Petitioner to request leave to file an amended rule petition by June 4, 2021.

On June 3, 2021, Petitioner filed a request to file an amended petition and submitted an amended petition. The basis of the amended petition was to conform procedural rules to Senate Bill (SB) 1267, which amends A.R.S. § 38-424 related to when courts are permitted to use electronic recording technology in lieu of a court reporter or stenographer.

On September 30, 2021, on an emergency basis, the Court entered an Order amending various rules of procedure related to creating the verbatim record of judicial proceedings. At that time, it also ordered that the public comment period be reopened until November 1, 2021, with any reply due by November 15, 2021. Petitioner files this Reply to address the comments filed during this second comment period.

II. Discussion

Several comments were submitted during the second comment period, many of which were duplicative of those submitted during the first comment period. Specifically, commenters continue to oppose any changes to Supreme Court Rule 30, urge that electronic recording is inadequate and inefficient, and oppose allowing any person other than a court reporter, i.e., authorized transcribers, to transcribe electronic recordings of court proceedings.

A. Supreme Court Rule 30

The purpose of SB 1267 and the corresponding proposed rule changes is to allow trial courts a level of flexibility by harnessing the available technology to ensure that cases can continue to move through the litigation process without delay in instances when a court reporter cannot be present due to unavailability or unforeseen circumstances.

The changes that Petitioner proposed to Rule 30(b)(3) track SB 1267 almost exactly by retaining the requirement to have a court reporter in grand jury proceedings, and in felony jury trials and initial determinations of sexually violent person status if the court timely receives a written request and a court reporter is available. Both SB 1267 and Petitioner's proposed amendments still allow for court reporters in many situations—they just require that the party requesting a court reporter give ample notice to the court, and despite comments to the contrary, this is the testimony that was provided to the legislature when SB 1267 was passed.

Prior to the Court's September 30, 2021 Order adopting amendments to various procedural rules on an emergency basis, Supreme Court Rule 30(b)(3) required court reporters in (1) grand jury proceedings, (2) capital cases, (3) felony jury trials, (4) initial determinations of sexually violent person status, and (5) requests for authorization of abortion without parental consent. While Petitioner initially proposed removing death penalty proceedings and requests for authorization of abortion without parental consent proceedings from Supreme

Court Rule 30 in order to mirror SB 1267 and based on the recommendations of the 2019 Task Force to Supplement the Keeping of the Record by Electronic Means, for the reasons stated in section II.D.a. of this Reply, Petitioner recommends reinstating the requirement that a court reporter be present in death penalty proceedings. With that, Petitioner's proposed amendments retain a method for securing a court reporter in four of the five proceedings originally delineated in Supreme Court Rule 30.

Comments suggest that proposed amendments undermine the importance of ensuring a verbatim record is captured by removing the court reporter requirement from some of the proceedings listed in Supreme Court Rule 30(b)(3). However, SB 1267 and the corresponding proposed rule amendments actually expand the court reporter requirement in criminal cases from only felony jury trials to all hearings and trials that arise out of an indictment or complaint when a timely request is made and a court reporter is available.

Petitioner's proposed amendments also included revisions to Supreme Court Rule 30(b)(4) related to designating the official record when a party provides a court reporter. Although A.R.S. § 38-424(D) designates as the official record the record of the court reporter, it does not address how to designate the official record when more than one party provides a court reporter. It also does not address how the official record will be provided to the court so that the court is not left without

a record of the proceedings, the timeframe for providing the record to the court, etc. Petitioner's proposed amendments to Rule 30(b)(4), now 30(b)(3), address and clarify how courts should handle these issues.

Many commenters take the position that Supreme Court Rule 30 should altogether remain unchanged and that a court reporter should continue to be required in the five proceedings originally delineated in Supreme Court Rule 30, citing the findings of the Keeping the Record (KTR) Committee and maintaining that there are significant inadequacies and inefficiencies with electronic recording technology. The KTR Committee was convened in 2003 (18 years ago) and issued its report and recommendations in 2005 (16 years ago). Included in those recommendations was a requirement to have a court reporter in the five aforementioned proceedings. Commenters take the position that nothing has changed in the past 16 years that would warrant re-examining this rule to ensure that it aligns with changing technologies, the declining availability of court reporters, and the needs of courts.

As Petitioner noted in his initial Reply, it is undisputable that many things have changed in the past 16 years, including exponential advancements in technology, which includes electronic courtroom recording technology. Technology has improved drastically since 2005 and will undoubtedly continue to

improve. Many of the technological constraints that were problematic decades ago have been resolved and should no longer be considered areas of concern.

B. Adequacy and Efficiency of Electronic Recording

Comments continue to raise concerns about the quality of electronic recordings when people speak over one another or the recording picks up extraneous noises that muffle speakers. As Petitioner noted in his initial Reply, technology has advanced such that multiple channels can be used for electronic recording, allowing voices to be separated in playback of the recording, if one person is speaking over the other or if extraneous noise makes it difficult to hear the speaker who is recorded.

A number of states use electronic recording to capture the verbatim record in all or most of their general jurisdiction court sessions. In some jurisdictions, the electronic recording has been the primary, and in some instances the sole, means of making the official court record for many years. This is an opportunity for Arizona to also harness the available technology and the ways it can be applied so that cases can be resolved as efficiently as possible.

Comments also raised concerns about the possibility of courtroom staff forgetting to turn on the recording or failing to notice that the system is not recording. Petitioner is confident that judges and courtroom staff who use electronic recording to capture the verbatim record, as a matter of court policy and

standing operational procedures, will make it a priority to ensure that there is a staff person to monitor the system while it is recording and ensure the quality of the recordings. Additionally, technology is such that backup systems are put in place to ensure that the entire record is not lost in the event of an outage or malfunction and that recordings are safely stored, through the use of remote and redundant records storage, automated system monitoring, and controlled access to records storage systems.

Further, education efforts regarding electronic recording in the form of best practices information will be included in judicial training and in Bench books promulgated by the Administrative Office of the Courts for use by judicial officers.

C. Authorized Transcribers

Comments continue to express concern with permitting authorized transcribers to transcribe the official record in lieu of a court reporter because authorized transcribers are not governed by a code of conduct. However, the 2019 Task Force to Supplement the Keeping of the Record by Electronic Means recommended developing a code of conduct to govern the work of contract workers who provide transcription or electronic monitoring services. Pending the establishment of such a code, the ethical conduct of transcriptionists and other persons involved in the making and preservation of the electronic record can and would be governed by contractual service terms and other administrative means,

including state and local level court provisions for quality control and integrity of the record keeping process.

D. Additional Proposed Revisions in Response to Comments

Based on the comments received, Petitioner proposes additional amendments to the version of Supreme Court Rule 30 that was adopted on an emergency basis on September 30, 2021. Proposed amendments are attached as Appendix A.

a. Requiring Court Reporters in Death Penalty Cases

Petitioner acknowledges the importance of proceedings that occur in death penalty cases. Under A.R.S. § 38-424(B) and Supreme Court Rule 30(b)(2) as adopted on September 30, 2021, it is rare that a request for a court reporter in a death penalty case would not be granted. As such, Petitioner proposes an amendment to Supreme Court Rule 30 that would add death penalty proceedings to the list of proceedings that require a court reporter.

b. Notice Requirements When a Party Provides a Court Reporter

Several comments suggested amending the notice requirement in Supreme Court Rule 30(b)(3)(c) to allow a party to provide the court reporting firm's name instead of the individual court reporter's name. Petitioner has no objections to this amendment.

c. Time for Producing Transcripts

Several comments suggested amending the timeframe in Supreme Court Rule 30(b)(3)(d) from 30 days to 45 days for producing transcripts when a court reporter is provided by a party for the purpose of keeping the official record. Petitioner has no objections to this amendment.

d. Expenses Related to Transcript Production

Petitioner also proposes amendments to clarify that upon receiving the transcript from the court reporter, the party must file a copy of the transcript and a request that the court adopt the transcript as the official record. This requirement is important because without the filing of the transcript, the court will be left without a record of the proceeding. Moreover, if a party hires a court reporter, the party likely intends to have the record transcribed, which is why they are providing the court reporter in the first place.

In the alternative, this Court could consider having the court reporter file their notes and dictionary, but Petitioner does not recommend this approach due to the difficulty in transcribing someone else's notes if the court reporter cannot be located, has passed away, etc. The best way to ensure that the court has a record of the proceedings when a party provides their own court reporter is to require that the record be transcribed within a reasonable timeframe, filed with the court, and adopted by the court as the official record.

Additionally, several comments expressed concern about providing a copy of the transcript to the court at no cost when a court reporter is provided by a party for the purpose of keeping the official record. Petitioner proposes language to clarify that a party who provides a court reporter to keep the official record bears the expense of transcript production because if a court can create an official record using electronic recording, but a party wants a court reporter to create the official record instead, the cost for the court reporter and transcripts should be borne by the party who opted for that alternative.

e. Authorized Transcribers for Electronic Recordings

Currently, when a proceeding is recorded by electronic recording only, the recording can be transcribed by an individual or transcription service under contract with an Arizona court or an individual employed by a court whose official duties include the preparation of transcripts. Petitioner proposes adding court-employed and court-contracted court reporters to the list of people who are authorized to transcribe electronic recordings. Limiting this provision to court-employed and court-contracted court reporters is important in order to avoid the appearance of impropriety and avoid a scenario where a party requests a copy of an electronic recording, has the record transcribed by a non-court employed/non-court contracted court reporter of the party's choosing, and then asks the court to adopt the record prepared by that court reporter.

III. Conclusion

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns reflected in the comments. Based on the foregoing responses and the pressing need to provide trial courts flexibility in making the official court record, Petitioner respectfully requests that the Court permanently adopt the rules of procedure as set forth in its September 30, 2021 Order and adopt the additional proposed amendments to Supreme Court Rule 30 as attached.

RESPECTFULLY SUBMITTED this 15th day of November 2021.

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RULES OF THE SUPREME COURT OF ARIZONA

Rule 30. Verbatim Recording of Judicial Proceedings

(a) [No change]

(b) Use of Court Reporting Resources.

1. Request for certified reporter. Any party to any action in superior court may request that any proceeding in that action be recorded by a certified reporter. The court ~~shall~~must grant the request if it is made pursuant to and meets the requirements of A.R.S. § 38-424(B) or (C). The court may exercise its discretion for other requests and requests that do not meet the requirements of A.R.S. § 38-424(B) or (C). In the absence of a request for a certified reporter and except as provided by law, the record will be made in a manner within the court's sound discretion.

2. When a certified reporter is required. The court must use a certified reporter to make the record, and not solely electronic means, as follows:

a. Grand jury proceedings;

b. All proceedings in a first degree murder case, pursuant to A.R.S. § 13-1105, once the intention to seek the death penalty notice has been filed;

~~bc.~~ Proceedings brought pursuant to A.R.S. Title 36, Chapter 5;

~~ed.~~ When the trial or hearing arises out of an indictment or information and either party requests a certified reporter, if the following requirements are met:

(1) the request is in writing;

(2) a certified reporter is available on the day of the trial or hearing; and

(3) the request is made at least five court days before the trial or hearing.

If a request for a certified reporter was granted because the requirements in (b)(2)(~~ed~~)(1) through (b)(2)(~~ed~~)(3) were met when the request was granted but a certified reporter later becomes unavailable, the court may begin the trial using an electronic recording device if doing so is necessary to comply with a victim's or defendant's right to a speedy trial.

~~de.~~ When a trial or hearing is held pursuant to A.R.S. Title 36, Chapter 37 and either party requests a certified reporter, if the following requirements are met:

(1) the request is in writing;

(2) a certified reporter is available on the day of the trial or hearing; and

(3) the request is made at least five court days before the trial or hearing.

3. Official record.

a. In all circumstances, when court-employed or court-contracted certified reporter records a proceeding in a superior court, the court-employed or court-contracted certified reporter's record is the official record.

b. In the absence of a court-employed or court-contracted certified reporter, the court's electronic recording of a proceeding is the official record, unless a party provides at least five-days' written notice to the court and all other parties of the intent to provide a certified reporter to ~~make~~ keep the official record. In that case, the party's certified reporter's transcription is the official record once the transcript has been filed and adopted by the court as the official record. If more than one party provides this notice, the parties may stipulate to which certified reporter's ~~transcription is~~ will keep the official record and must notify the court of this stipulation at least three days before the proceeding. Absent timely notification of a stipulation, the court will designate prior to the proceeding which certified reporter's ~~transcription~~ will ~~be~~ keep the official record ~~before the proceeding~~.

c. The notice required in (b)(3)(b) must contain the name and business address of the certified reporter or court reporting firm the party intends to use.

d. A certified reporter who keeps the official record under (b)(3)(b) must agree to transcribe their notes ~~and provide the transcript to the court, at no cost to the court,~~ within ~~30-45~~ 45 days of the conclusion of the proceeding. The party whose certified reporter keeps the official record under (b)(3)(b) shall bear the cost of the transcript. Upon receiving the transcript from the certified reporter, the party must file with the court the transcript and a request that the court adopt the transcript as the official record. Upon a request and at the expense of a party, the certified reporter must provide a copy of the transcript to that party.

e. A certified reporter provided by a party and who is selected to keep the official record under (b)(3)(b) must take and subscribe to the official oath which must be on the record and administered by the judge.

f. For a proceeding that is recorded by electronic recording equipment only, the official record is the transcript prepared by a court-employed or court-contracted certified reporter or an individual specified authorized transcriber as defined in (a)(2)(b) and (a)(2)(c).

g. The transcript in any case certified by the certified reporter or ~~other~~ authorized transcriber as defined in (a)(2)(b) and (a)(2)(c) is prima facie a correct statement of the testimony taken and proceedings held. No

transcripts of the proceedings of the court are to be considered official except those made from the records certified by the designated certified reporter, court-employed or court-contracted certified reporter, or ~~other~~ authorized transcriber as defined in (a)(2)(b) and (a)(2)(c), unless the court orders otherwise.

[2021] COMMENT

Rule 30(a). [No change]

Rule 30(b). In the absence of a timely request for a certified reporter, the court may still approve use of a certified reporter or electronic recording device to make the record of court proceedings. In exercising its discretion under subsection (b), the court should consider the following factors: the unique demands of making the official verbatim record in felony jury trials; ~~particularly first degree murder cases in which the State has filed a death penalty notice~~; and initial determinations of sexually violent person status; the availability of a certified reporter; the probability that a transcript will be requested; the number of litigants; convenience of the parties and the court's schedule; sufficiency of another form of record to convey the substance of the matters discussed at the proceeding; whether testimonial evidence will be presented at the proceeding; presence of non-native English speakers as witnesses or parties; the likelihood that technical or otherwise difficult terminology will be used; the need for formal or informal proceedings; the need for a real-time transcript; the likelihood that daily transcripts will be required; and any other factor which in the interests of justice warrants a particular form of record, or as otherwise required to serve the interests of justice.

Rule 30(b)(3)(b). In designating the official record, the court should consider factors such as which party filed notice first, whether the notice was timely, and whether the notice included the required information about the certified reporter.