

Jennifer A. Greene, Committee Staff
Committee on Keeping the Record
Administrative Office of the Courts
1501 W. Washington, Suite 410
Phoenix, AZ 85007-3222
(602) 542-9555 jgreene@courts.az.gov

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	
PETITION TO AMEND VARIOUS)	Supreme Court No.
RULES OF PROCEDURE RELATING)	R-05-0037
TO VERBATIM RECORDING OF)	
JUDICIAL PROCEEDINGS)	PETITIONER’S REPLY
)	
_____)	

Jennifer A. Greene, Staff to the Committee on Keeping the Record, files this reply on behalf of the Committee, seeking approval of the Committee’s proposed rule changes as modified herein in response to comments received.

On June 9, 2006, the Committee met to consider the comments that were filed or otherwise communicated to Committee Staff since the rule petition was circulated in January. The changes proposed in the attached Appendix A are intended to replace the Committee’s original proposals for the following rules.

1. Rules 30(b)(4)&(c) Arizona Rules of Civil Procedure (Appendix A at 1)

The proposed changes to this rule were prompted by the comment filed by Jojene Mills. She pointed out that the Committee’s original

proposal has inserted a new policy that would require the noticing party in a deposition to pay for the original transcript, regardless of who ordered a transcript. The noticing party is not always the one who orders a transcript, the original transcript is often very expensive, and the issue is currently addressed in subsection 30(c) of this rule, which states, “the party noticing the deposition or the party causing the deposition to be taken shall be responsible for the cost of the original transcript.” The Committee was not asked to recommend policy on this specific issue, and did not intend to change current practices in this area. Therefore, the original language has been deleted from the version appearing in Appendix A herein. The Committee also approves of Ms. Mills’ suggestion that the rule identify which party is responsible for paying for the cost of audio/video recording, and her proposed language has been added. The pertinent portions of Rule 30(c) have been moved to 30(b)(4), and subsection (b)(4) has been re-organized to improve its clarity.

2. Rule 55(f) Arizona Rules of Civil Procedure (Appendix A at 5)

The Arizona Association of Superior Court Clerks recommended a re-drafting of the language of this proposal to avoid a problem that has developed under the identical provision appearing in rule 44(f) of the Arizona Rules of Family Law Procedure. Practitioners have read Rule 44(f)

to require that they file a record of a default hearing with the clerk. This is causing clerks to have to store and offer for public inspection a variety of records including tapes, CD's, and DVD's. The Committee did not intend for parties to be responsible for filing a record, rather the intent was to obligate courts to maintain a verbatim record for later transcription, as needed. The new version of rule 55(f) appearing in Appendix A should avoid the unintended consequence from developing in the civil arena that has been occurring under the Family Law rules.

3. Rule 31.8 Arizona Rules of Criminal Procedure (Appendix A at 6)

The Clerks' Association requested three modifications to subsection (d)(3) of Rule 31.8, all of which the Committee supports. One changes the term "file with" to "submit to" to more accurately describe how the defendant's copy of the transcript is processed by clerks. The second modification adds the word "original" to subsection (d)(3)(ii) to identify which version of an electronic transcript should be filed with the appellate court. The other modification appears as subsection (d)(3)(iii) and establishes a limit on how long clerks are responsible for maintaining the parties' copies of transcripts.

4. Rule 91 Arizona Supreme Court Rules (Appendix A at 12)

The Clerks' Association also suggested that Supreme Court Rule

91(h) be revised to clarify the formatting standards applicable to electronic as well as paper transcripts, because at least one appellate court is now accepting electronic transcripts. The Committee's proposed change accomplishes this goal.

5. New Rule Governing Official Transcripts (Appendix A at 12)

The Limited Jurisdiction Courts Committee approved the Committee's Final Report with the qualification that the proposed rule governing transcription be modified to include in-house transcribers under the definition of "authorized transcriber." The Committee readily adopted this suggestion because an in-house transcriber offers enhanced opportunities for the court to exercise oversight and quality control of the end product.

Other Comments

The majority of comments filed in this action focused on the proposed new rule governing use of reporting resources (Appendix D to the petition). The Committee reviewed those comments and, by majority vote, determined not to adopt any of the suggested modifications to its proposal.

Conclusion

For the foregoing reasons, petitioner respectfully requests the court to adopt its rule change proposals as modified herein.

Respectfully submitted this _____ day of June, 2006.

Jennifer A. Greene, Committee Staff
Az Bar No. 015760
Committee on Keeping the Record
Administrative Office of the Courts
1501 W. Washington, Suite 410
Phoenix, AZ 85007-3222
(602) 542-9555
jgreene@courts.az.gov

Appendix A
(new language not previously proposed
appears UNDERLINED AND CAPITALIZED)

Arizona Rules of Civil Procedure

Rule 30(b). Notice of Examination; General Requirements; Special Notice; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) Absent a stipulation of all parties to the action or an order of the court authorizing a briefer notice, a party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action at least ten days prior to the date of the deposition. The notice shall state the date, time and place for taking the deposition, ~~the technique for recording the deposition and the protocols to be used for such recording, the identity of the person recording the deposition, the placement of camera(s) if any, and~~ the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and the name and address of the person before whom the deposition shall be taken. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

If the deposition is to be recorded by audio or audio-video, the notice shall state the technique for recording the deposition and the protocols to be used for such recording, the identity of the person recording the deposition, and the placement of camera(s), if any.

(2) and (3) [no changes]

(4) Unless the parties stipulate or the court orders otherwise, the deposition shall be recorded by a certified court reporter ~~stenographic means~~ and may also be recorded by audio or audio-video ~~sound or sound and visual~~ means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

WHEN A DEPOSITION IS RECORDED ONLY BY A CERTIFIED COURT REPORTER, the party taking the deposition shall bear the cost of the recording. IF REQUESTED BY ONE OF THE PARTIES, THE TESTIMONY SHALL BE TRANSCRIBED. IF THE TESTIMONY IS TRANSCRIBED, THE PARTY NOTICING THE DEPOSITION OR THE PARTY CAUSING THE DEPOSITION TO BE TAKEN SHALL BE RESPONSIBLE FOR THE COST OF THE ORIGINAL TRANSCRIPT. A

party may arrange to have a ~~stenographic~~ certified COPY OF THE transcription made at the party's own expense. If audio or audio-video is additionally requested by one of the parties, the requesting party shall be responsible for the cost of such recording, AND A PARTY REQUESTING AN AUDIO OR AUDIO-VIDEO COPY OF THE DEPOSITION SHALL BE RESPONSIBLE FOR THE COST OF THE AUDIO OR AUDIO-VIDEO COPY.

WHEN A DEPOSITION IS RECORDED ONLY BY AUDIO OR AUDIO-VIDEO MEANS, THE PARTY NOTICING THE DEPOSITION SHALL BEAR THE COST OF THE RECORDING. A PARTY REQUESTING AN AUDIO OR AUDIO-VIDEO COPY OF THE DEPOSITION SHALL BE RESPONSIBLE FOR THE COST OF THE AUDIO OR AUDIO-VIDEO COPY.

Any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition ~~recorded by nonstenographic means.~~

Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall

begin with a statement or notation on the record by the officer that includes (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. The officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state or note on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) through (7) [no changes]

Rule 30(c). Examination and Cross-Examination; Record of Examination; Oath; Objections

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Arizona Rules of Evidence. The examination shall commence at the time and place specified in the notice or within thirty minutes thereafter. And, unless otherwise stipulated or ordered, will be continued on successive days, except Saturdays, Sunday and legal holidays until completed. Any party not present within thirty minutes following the time specified in the notice of taking deposition waives any

objection that the deposition was taken without that party's presence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is taken telephonically and the witness is not physically in the presence of the officer before whom the deposition is to be taken, the officer may nonetheless place the witness under oath with the same force and effect as if the witness were physically present before the officer. The testimony shall be taken ~~stenographically or recorded by any other means~~ ordered in accordance with subdivision (b)(4) of this rule. ~~If requested by one of the parties, the testimony shall be transcribed. If the testimony is transcribed, the party noticing the deposition or the party causing the deposition to be taken shall be responsible for the cost of the original transcript.~~

* * * [no changes]

Rule 55 (f). Judgment when service by publication; statement of evidence

Where service of process had been made by publication and no answer has been filed within the time prescribed by law, judgment shall be rendered as in other cases, but a ~~reporter's transcript certified by the reporter as correct~~ record of the proceedings, in a form approved by the court, shall be ~~filed as a~~

~~part of the record~~ maintained BY THE CLERK OF THE COURT UNLESS DESIGNATED OTHERWISE BY THE COURT.

Arizona Rules of Criminal Procedure

Rule 31.8. The record on appeal; transcript; duty of the ~~court reporter~~ authorized transcriber.

a. *Composition of the record on appeal; additions; deletions.*

(1) Composition. The record on appeal to the appellate court shall be a certified copy of the transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file— (other than subpoenas and praecipes not specifically designated) - shall constitute the record on appeal, and if authorized by the appellate court, an electronic recording of the proceeding.

(2) Additions and deletions.

(i) *By the appellant.* Within 5 days after the filing of the notice of appeal the appellant may file with the clerk of the trial court a designation to include in the record the subpoenas and praecipes ~~he or she~~ appellant deems necessary, and to delete from the record all the documents, papers, books and photographs he or she deems unnecessary.

(ii) *By the appellee.* Within 12 days after the filing of the notice of appeal the appellee may file with the clerk of the trial court a designation to include

in the record those subpoenas and praecipes ~~he or she~~ appellee deems necessary, and any document, paper, book or photograph deleted by the appellant.

(iii) [no changes]

b. *Certified Transcript: Composition, additions and exclusions.*

(1) For the purpose of these rules, an “authorized transcriber” is a certified court reporter or a transcriber under contract with an Arizona court.

~~(1)~~ (2) *Composition.* Except in cases where the death penalty has been imposed, ~~the transcript shall consist of the reporter's~~ a certified transcript of the following proceedings shall be provided:

(i) through (v) [no changes]

~~(2)~~ (3) *Composition where the death penalty has been imposed.* The certified transcript shall consist ~~of the reporter's transcript~~ of all recorded proceedings ~~at which a court reporter was present~~, including grand jury proceedings.

~~(3)~~ (4) *Additions and deletions.* Within 5 days after the filing of the notice of appeal, the appellant may request the certified court reporter or the court's designated transcript coordinator, if the record was made by electronic or other means, to add to the certified transcript any proceeding not automatically included, and to exclude from the certified transcript any

portion of the proceedings the appellant deems unnecessary for the proper hearing of his or her appeal.

Within 12 days after the filing of the notice of appeal, the appellee may request the certified court reporter or the court's designated transcript coordinator, if the record was made by electronic or other means, to add to the certified transcript any portion deleted by the appellant or not automatically included under paragraph (1).

c. [no changes]

d. *Duty of the ~~court reporter~~ authorized transcriber; payment for certified transcript; number of copies.*

(1) The ~~court reporter~~ authorized transcriber shall prepare the certified transcript promptly upon receipt of a notice of appeal by the state or a notice of appeal indicating that the appellant proceeded as an indigent at the determination of guilt or at sentencing.

(2) Within 5 days after the filing of the notice of appeal or within 5 days after denial or a request to proceed as an indigent, an appellant who is not proceeding as an indigent shall make arrangements with the ~~court reporter~~ authorized transcriber to pay for the certified transcript. Thereupon the ~~court reporter~~ authorized transcriber shall promptly prepare the certified transcript.

The ~~court reporter~~ authorized transcriber shall notify the appellate

court if the appellant fails to make satisfactory arrangements within the prescribed time.

(3) The ~~court-reporter~~ authorized transcriber shall promptly make any additions and deletions requested by the parties.

(i) For non-electronically filed transcripts. The ~~court-reporter~~ authorized transcriber shall prepare an original and two copies of the certified transcript unless further copies are ordered. The ~~court-reporter~~ authorized transcriber shall file the original certified transcript with the clerk of the appellate court within the time for the clerk to file the record pursuant to Rule 31.9(a). When the state is the appellee the ~~court-reporter~~ authorized transcriber shall send one copy of the certified transcript to the Office of the Attorney General. When the state is the appellant, the ~~court-reporter~~ authorized transcriber shall send one copy of the certified transcript to the agency that prosecuted the case in Superior Court. The ~~court-reporter~~ authorized transcriber shall ~~file~~ SUBMIT the copy for the defendant ~~with~~ TO the clerk of the Superior Court, who will retain the copy for release to the defendant's appellate counsel or to the defendant if he or she is proceeding *pro se*, unless there is a local rule or administrative order providing otherwise, in which case the ~~court-reporter~~ authorized transcriber shall distribute the defendant's copy as provided by such rule or order. Notice of service of the certified

transcript shall be filed with the appellate court reflecting when and upon whom service was made.

(ii) For electronically filed transcripts. In courts that accept electronic filings, the authorized transcriber shall file the ORIGINAL certified electronic transcript with the clerk of the appellate court within the time for the clerk to file the record pursuant to Rule 31.9(a). When the state is the appellee, the authorized transcriber shall send an electronic copy of the certified transcript to the Office of the Attorney General and the appropriate county attorney's office, if any. When the state is the appellant, the authorized transcriber shall send an electronic copy of the certified electronic transcript to the agency that prosecuted the case in Superior Court. The authorized transcriber shall SUBMIT the electronic transcript for the defendant TO the clerk of the Superior Court, who will provide the electronic transcript to the defendant's appellate counsel or to the defendant if he or she is proceeding *pro se*. If a paper transcript is required or requested in lieu of an electronic transcript, the authorized transcriber shall SUBMIT the paper copy for the defendant TO the clerk of the Superior Court, who will retain the copy for release to the defendant's appellate counsel or to the defendant if he or she is proceeding *pro se*, unless there is a local rule or administrative order providing otherwise, in which case the

authorized transcriber shall distribute the defendant's copy as provided by such rule or order. Notice of service of the certified transcript shall be lodged with the appellate court reflecting when and upon whom service was made.

(iii) RETENTION OF TRANSCRIPT COPIES. COPIES OF TRANSCRIPTS RETAINED UNDER THIS RULE SHALL BE RETAINED FOR 90 DAYS.

e. *Responsibility for payment.* Non-indigent parties shall pay for all portions of the record on appeal and certified transcript which they have designated or requested. In addition, non-indigent appellants shall pay for those portions of the record on appeal and certified transcript required under Sections (a)(1), (b)(1), and (b)(2) and not deleted.

(f) [no changes]

g. *Agreed statement as the record on appeal.* In lieu of the record on appeal as defined above, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court, setting forth only so many of the facts averred and proved or thought to be proved as are essential to a decision of the issues presented. Notice that a statement is being prepared shall be served promptly on the appropriate ~~court reporter or reporters~~ authorized transcriber and on the clerk

of the trial court.

The agreed statement shall be submitted for the trial court's approval within 20 days of the filing of the notice of appeal. The court may make such additions as it considers necessary fully to present the appeal.

(h) [no changes]

Supreme Court Rules**Rule 91. Superior courts and clerks.**

(a) through (g) [no changes]

(h) *Uniform size of pages of ELECTRONIC AND PAPER transcripts.*

(1) The certified transcript of testimony of any proceeding shall be furnished by the ~~court reporter~~ authorized transcriber FORMATTED FOR ~~on~~ 8 1/2 by 11 inch paper having 25 lines per page with ~~a left hand margin of 1 3/4 inches and a right hand margin of 3/8 inch~~ total combined margins of text not to exceed 2 and 1/8 inches.

(2) [no changes]

(i) [no changes]

Rule ____ . Transcripts of court proceedings; standards

A transcript is a document containing a verbatim record of the spoken words of a court proceeding prepared from either the certified reporter's notes or

other verbatim record of the proceeding. Transcripts certified for use by any court shall be:

1. Prepared and certified by an authorized transcriber in accordance with the standards set forth in the Arizona Manual of Transcript Procedures. The current version of this manual is available from the Administrative Office of the Courts.

2. For purposes of this rule, an “authorized transcriber” means:

- a. a certified reporter;
- b. an individual or a transcription service under contract with an Arizona court; OR
- c. AN INDIVIDUAL EMPLOYED BY A COURT WHOSE OFFICIAL DUTIES INCLUDE THE PREPARATION OF TRANSCRIPTS.

COMMENT

This rule is not intended to prevent a party from retaining a transcriber, at the party’s expense, to prepare an unofficial transcript of all or part of a proceeding. An unofficial transcript cannot be referenced or used in any court proceeding.