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IN THE ARIZONA SUPREME COURT

In the Matter of PETITION TO AMEND VARIOUS RULES OF PROCEDURE RELATING TO VERBATIM RECORDING OF JUDICIAL PROCEEDINGS	R-05-0037 COMMENT ON PETITION

Pursuant to Rule 28 of the Rules of the Supreme Court, the undersigned hereby submits this comment to the Petition.

The undersigned has been in the private practice of civil litigation in Arizona since 1978. He has owned and used most types of electronic recording devices, from reel-to-reel tape decks with monaural microphones in the 1960s to modern digital audio equipment. He has used personal computers for twenty-five years, mostly those he builds himself. He presently uses in his practice two desktop computers (one a self-built Pentium 4 2.6 Mhz. machine, overclocked to 3.2 Mhz., using Windows XP; the other a commercially-made Pentium 4 3.0 Mhz. machine dual-booting Windows XP and Linux), and an IBM X41T tablet computer communicating over an 802.11g network that he installed and maintains.

These details are necessary because the Committee on Keeping the Record has expressed the thought (Interim Report December 2004, p.7; Final Report, Addendum L, Statement by Judge Mundell, page 8) that "stakeholders" (e.g., lawyers who actually participate in judicial proceedings)

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are "uncomfortable" with or "reluctant" about change for reasons "generational": because many of us are – to put matters plainly – ignorant old fogies. The undersigned is most assuredly a "stakeholder." But it is possible to be uncomfortable with and reluctant about the Committee's proposals for reasons other than want of technical knowledge and youthful enthusiasm. Some of those have to do with knowledge of the system we are all presumably most concerned about, *viz.*, the legal system.

Court reporters are the overlooked foundation of modern civil process. For most of common-law history there were none, and lawyers did things very differently. The parties stated their facts in the pleadings, at great length. Discovery of witnesses was by what we now call a "deposition on written questions"; a notary public administered the oath and recorded the answers in longhand. Verbatim trial records were not attempted; what look in the reports of old English cases like quotations from testimony are instead loose paraphrases based on informal notes taken by judges clerks, intended to illustrate and clarify the holding rather than to relate what the witness actually said. An appeal was in large part a recapitulation of trial.

The development of shorthand systems that could reliably produce verbatim records dates from the late 18th century. Pittman shorthand, introduced in 1837, became the basis of almost all court reporting until superseded by the Stenograph machine. The Stenograph was invented in the late 19th century; by the 1930s, it had become popular and had attained essentially its present mechanical form.

The Field Code – the first major revision of the common-law methods of pleading and practice – was adopted in New York in 1848. The Federal Rules of Civil Procedure – the basis of modern practice – were adopted in 1938.

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Those are not historical accidents. Modern law is fashioned around court reporters: notice pleading, oral depositions, appeals grounded on a verbatim trial transcript, are all due to court reporters. We have relied increasingly on oral procedure because we have had the luxury of taking the record of it for granted. I find no Arizona case under Civil Rule 11 or its predecessors in which the parties have contested the accuracy of a trial transcript; if I have missed some, it is because they are vanishing few.

This is not to say that court reporters using Stenograph machines will be forever a part of accomplishing justice. Nor, perhaps, will lawyers be. It is to say, however, that accurate, verbatim reporting is not an afterthought, an inconvenient encumbrance, or a frill fittingly victim to budget reform. Court reporters produced modern lawyers, not the other way around.

Any move away from them requires utmost caution, lest the new foundation prove not as solid as the old. "Utmost caution" is a high standard but we deal here with essentials, not with the arbitrary trivialities of other procedural rules.

The Committee's report satisfies no evidentiary standard, much less a high one.

The Committee proposes that various devices replace court reporters in many situations. The obvious question is: are those devices as good? One would have expected the Committee to look into this issue. To present data showing relative accuracy and reliability would have done the profession a service. It would surely also have done the Committee a service – for how can the monumental changes it urges reasonably be adopted *without* such data?

But the Committee did not do so. Its report offers no investigation, no tests, no findings, no data on which to conclude that machines are better or worse than court reporters. It offers "anecdotal" evidence – for both

propositions – and the simple insistence of advocates. This underscores the fact that essential evidence is missing and the essential question unanswered.

It should be said in the Committee's defense that that evidence is not easily at hand. No objective studies show that machines can equal the accuracy or reliability of court reporters. To produce that data could require time, resources, and money beyond those available to the Committee. That a lack of data is excusable, however, does not make ignorance a basis for action.

There is no special magic to the machines. Recording sound with microphones has been done for generations; recording it onto a computer hard disk is no essential advance. Microphones have become smaller and their internal technology has changed several times but their ability to discern and accurately record human speech has not improved substantially in years. (The microphones proposed for use are said to be "ultra-sensitive," a marketing term in use to my certain knowledge since the 1960s; sensitivity, however, is not the same thing as clarity.) Software vendors (whose representatives – like those of electronic recording hardware and service vendors – were very much in evidence at the Committee's meetings, according to its minutes) have produced graphical interface programs that make a computer screen look like what used to be called a microphone "mixer" (while the underlying operating program, Windows or MacIntosh, actually controls the hardware) but the software cannot increase the fidelity of the recording. Digital recording can produce a more convenient and searchable product – a CD rather than an analog tape – but, like the condensed transcripts now supplied by court reporters, convenience brings no additional accuracy. (This is presumably why the Committee's proposals, while emphasizing digital technology, include making records with tape recorders.)

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Lacking objective data regarding electronic recording, we are – as was the Committee – reduced to anecdote. The undersigned has had a number of exposures to machine-made records; one is illustrative. The transcript of a short hearing at a newly-built courthouse, the staff of which is quite proud of its elaborate electronics, was 2½ pages long. Three words were transcribed as "unintelligible." Court staff, upon my inquiry, were unconcerned and indicated that this was not unusual.

It is of course inconceivable that a reporter's transcript would contain anything remotely close to over one error per page. An error, moreover, that is entirely new, brought to us by the machines, impossible when the record is kept by mere human beings who can ask, "What did you say?" An astonishingly poor transcript that introduces new types of error – that is the standard to which some would have us become accustomed.

Whether anecdotes – mine or the Committee's – mean anything, of course, requires investigation. Investigation the Committee did not make. That one believes a thing perhaps to be true, based on a few experiences or on hearsay, is not something that this Court or any other would accept to resolve even the most minor dispute. How can it suffice to alter fundamental aspects of the justice system?

Another issue important to the question is that of cost. Although its final report seems to minimize the issue, the Committee apparently did pay significant attention to it, and properly so. The cost of justice is one of the system's major weaknesses. To the individual litigants, not having a court reporter at trial will make little or no cost difference; they will still pay for a record, whether it be on paper or on a CD. (Until, of course, the courts self-fulfill – by firing them – the prophecy of a court-reporter shortage, at which time it is as inevitable as the sunrise that litigants who insist on a court

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reporter will be expected to hire one themselves.) But the report acknowledges that electronic recording cannot be represented even as saving administrative costs.

This is not a welcome fact to many court administrators. The Superior Court of Maricopa County apparently represented the contrary to its Board of Supervisors in order to obtain funding for electronic capability. And the court administrators who regularly attended the Committee's meetings presumably had some interest beyond the workings of CourtSmart software. As the Final Report's addenda indicate, some will continue to insist that sacrificing court reporters will save money, despite the Committee's failure to find so after two years of trying. It is the job of administrators to focus on administrative concerns, of which saving money is certainly one. But, again: should fundamental changes in the legal system be based on provable facts or on partisan hopes?

There remains the question of why civil trial lawyers should worry about these concerns. It is of course from the standpoint of such a lawyer that this Comment is presented. If all one need do to get a reporter is to file a notice three days before trial (proposed amendment to A.R.S. §38-424 and its accompanying rule on Use of Court Reporting Services), is this not simply one more date to calendar, one more notice to file?

That that is not the effect intended by important judicial officers is made clear by Judge Mundell's Statement and by judicial comments made during the Committee's meetings. Their essential objection to the proposal is that it merely conditions, and does not eliminate, the right of civil litigants to a court reporter. It is no secret that Maricopa County, among others, does not want to provide reporters in civil cases and that its judges, or at least certain of them, will attempt to talk the parties out of using one. (This is perhaps why

that court thinks it can save money – because its desires are far more restrictive than anything this Court has authorized or is being asked to authorize.)

That will mean the eventual end of court reporters in civil cases. In theory, the assertion of a right should not be a subject of judicial displeasure and judicial displeasure should not affect the case; in practice, anyone who tries cases knows better. Lawyers will now have to explain to clients that they can either displease the court by insisting on their rights or mollify it by sacrificing a procedure afforded murderers, robbers, and rapists. What we cannot tell them is that what they will get instead is better, or as good, or even cheaper; experience teaches otherwise and the Committee's report cannot contradict it.

Clients are not fools. Just as they ask now why they cannot get their day in court for less than $50,000, they will ask – if only because, having seen years of television portrayals, they know that courts have reporters – why they, not having had the good judgment to commit a felony, do not deserve the full panoply of justice at any price. To continue to degrade their experience of the law, and to display further its unconcern for them, is not a minor thing, and not a thing ever to be understood by bureaucrats.

After two years of investigation, then, the Committee cannot present evidence that electronic reporting will be as good as court reporters or that it will be less expensive than court reporters. It nevertheless proposes sweeping changes based not on evidence, nor on any demonstrated understanding of the function of court reporters in the legal process, but on the hopes of those predisposed to want them.

In a court of law, not being able to prove one's case is fatal. The courts should not apply lower standards to themselves than they require of others.

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The Superior Court is not the Department of Motor Vehicles; its concerns rise above the bottom line. Society places in our hands its most important responsibility: to ensure that justice can be done. That responsibility not only deserves but demands the utmost caution and respect. The Petition cannot meet that standard or any other, and should be denied.

Dated this _____ day of May, 2006.

By _____
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A copy of this comment has been mailed
this ____ day of May, 2006 to:

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