

Minority Position Statement Submitted by the Arizona Court Reporters Association

TASK FORCE TO SUPPLEMENT KEEPING OF THE RECORD BY ELECTRONIC MEANS

Final Report - Dissenting Opinion
Arizona Court Reporters Association

The Arizona Court Reporters Association (ACRA) respectfully submits this Minority Position Statement in response to the Arizona Task Force to Supplement Keeping of the Record by Electronic Means (SKREM) final report.

Although the SKREM Final Report and Judge Thumma's transmittal letter point out some of ACRA's concerns, our organization feels it is important to express our objections more fully to help the Court avoid taking improvident action based on the Final Report.

ACRA thanks the Arizona Supreme Court for including representatives of our association on the Task Force. We also wish to thank the Task Force Chair, Judge Samuel Thumma, and the members of the committee for respectfully listening to the views we expressed personally and through our attorney, Richard S. Plattner.

ACRA has worked on several statute/rule/administrative code amendments over the decades. We bring a unique and unparalleled expertise to bear. No one else speaks the language of record keeping as proficiently and informatively as a Certified Reporter. We know what is needed to create the record in a professional, skilled, and ethical way. We know where and when the potential for fatal flaw is most likely to occur. We offer the wisdom and experience of decades, the technological promise of the future, and the insider expertise of the present. We have always and unstintingly offered that expertise and our time to the judiciary.

The reporting community and ACRA are painfully aware of the inexplicable and seemingly inexorable bias held by some against our profession. This can only be explained by a lack of understanding of what we do and how we do it. Using a reporter is like flipping a light switch: you don't know, or even want to know, how it happens, but you expect that light to come on. Our skill set cannot be replicated by a recording device and transcriber or any other technology currently touted in the marketplace, although sales pitches will tell you otherwise.

We reporters are dedicated professionals whose careers are devoted to accurately and impartially making a record of legal proceedings. When a Certified Reporter is used, the switch is flipped, activating in one person the technology, skill, and experiential know-how that has never been mimicked by any bifurcated ER/transcriptionist or other system. The well-known and inherent inefficiencies and random and unpredictable failures of the ER/transcriptionist system are exactly why the judiciary has limited its use. ACRA understands the courts must employ a blended system using both court reporters and ER/transcriptionists. However, we believe the proposal to remove all limitations on the ER/transcriptionist method is imprudent and unnecessary, particularly given the rationale of the order.

To give some historical perspective, Administrative Order 2003-104 established the Keeping the Record (KTR) Committee. The KTR Committee's final report was published in December 2005. KTR's duty to safeguard the record is made clear in Administrative Order 2003-104:

"PURPOSE: The Committee shall review current methods used for keeping the record of judicial proceedings and shall conduct a comprehensive review of relevant state statutes, court rules and administrative code sections. The Committee will develop recommendations for changes to statutes, rules or code sections necessary to permit courts to utilize the most appropriate methods for capturing and preserving a verbatim record of a judicial proceeding. In its deliberations and in developing its recommendations, *the Committee shall give highest regard to ensuring the integrity, completeness and accuracy of the record made.*" (emphasis added)

ACRA believes this guideline is not only relevant today, but even more important, given the multitude of problems that occur with alternative methods of capturing the record, namely electronic recording (ER) and digital recording (DR), and which will continue to occur throughout courtrooms employing those methods. The purpose of the Task Force per Administrative Order 2019-49 states: "The Task Force shall develop recommended changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to *supplement* court reporters and to prevent delay in resolving disputes in the trial court and on appeal." (emphasis added)

Although the SKREM Final Report acknowledges that it has not addressed fundamental policy questions, it has nonetheless recommended changes as though the policy questions had been decided in a particular way. Furthermore, the report mentions ways to make the best of electronic recording, such as adding human courtroom monitors, providing standards for transcriptionists, and using auditing and reporting mechanisms, but makes no specific recommendations to implement these suggestions. Our reality is that those same cautions were expressed 14 years ago during KTR, and in the ensuing years, there have been no efforts to implement those admittedly necessary provisions. So, if these changes are made, they are made without guarantee, or realistic hope, that any standards or success metrics for both the recording system and transcribers will be made. This historic and predictive lack of necessary provisions creates a serious danger to the reliability of the record of Arizona court proceedings.

This is not a criticism of the Task Force, which was given a specific mandate to suggest changes, but no mandate to address the underlying policy concerns, and an extremely short timeline in which to work. The Task Force worked diligently to comply with AO 2019-49, but ACRA is concerned that drafting proposed changes in a policy vacuum is inherently dangerous and could lead to the improvident implementation of statutes, rules, and regulations. As stated in the order, "Production and preservation of a record of proceedings in a court of record are fundamental functions of the Judicial Branch." Fundamental functions should not be altered piecemeal.

Nothing has changed since 2005 that would warrant changing the policy determinations previously made by the Arizona Supreme Court. Best practices have already been established by the Keeping the Record Committee, successfully in effect since December 2005, a study which took more than a year to complete, with all stakeholders represented.

The Final Report suggests modifying Supreme Court Rule 30(b)(3) to eliminate the five categories of proceedings in which this Court mandated Certified Reporters (when it made the changes to allow ER and transcriptionists in other proceedings). The five mandated areas for a Certified Reporter were selected for good reason, thus the Court concluded these areas will not be covered by a bifurcated ER/transcriptionist system, but must be covered by a state Certified Reporter. These areas are instances where people's lives and liberty are at stake. The Final Report also suggests removing the mandate that the court provide a Certified Reporter upon request. ACRA believes, and the court previously concurred, it is a fundamental

right of a party to request that a Certified Reporter (court employed or private) be present and deemed the official record.

For a “verbatim record” to fulfill its essential function in the justice system three requirements must be met:

1. The actual words spoken must be completely and accurately captured: what was said and by whom.
2. The data must be transformed into an accurate transcript.
3. The transcript must be available in a timely manner.

Additionally, those who participate in preparing the record must maintain impartiality and confidentiality of the information.

Capturing the words

The SKREM Final Report recognizes the dangers of electronic recording systems, and notes the existence of some recommended requirements for the operation of electronic recording proposed by the National Center for State Courts (NCSC). The NCSC, an organization charged with improving judicial administration, prepared a report entitled "Making the Record Utilizing Digital Electronic Reporting." As part of that study and their recommendations, they indicated that all digital recording should be overseen at all times by experienced and trained staff or court monitors, and that courts should only use top-of-the-line equipment. We know in Arizona that ER is not individually monitored. Intermittently, randomly, and regularly it has been discovered only *after the fact* that the ER was not functioning or wasn't even turned on. In courtrooms where a Certified Reporter is present, fortunately that testimony is captured by the reporter despite the ER failure. In ER-only courtrooms (and ER-only courtrooms will proliferate under this proposal) where there is no Certified Reporter and the failure is not caught until after the proceeding, *there is no record*. Although proponents and vendors of ER systems assure the courts the system has safeguards against these regular failures, ironically, it is the Certified Reporter that has proven to be its most frequent and reliable failsafe. In Arizona's most populous county, in its ER-only courtrooms, Certified Reporters are called regularly (nearly weekly) to hurry to a courtroom because the recording system malfunctioned. With these regular incidents of equipment malfunction and human error, it is the focused professionalism of the Certified Reporter that ensures the preservation of the record.

When comparing even the optimum, an individually monitored ER system, (a precaution we know is not used in Arizona) to a Certified Reporter, (who is also the guardian of the record, is professionally trained, has had a background check, has a code of ethics, provides realtime, controls chain of custody, provides rough draft and expedited transcripts), the ER system is both less cost effective and less efficient, and the Supreme Court has already determined the mandated areas in Rule 30(b)(3)(a-e) were too critical to not have a Certified Reporter present.

ACRA urges the Court not to remove the mandates of Rule 30(b)(3)(a-e). Having judicial proceedings that rely entirely on ER already places at hazard the fundamental requirement of integrity, completeness and accuracy of the record.

Creating the transcript

The Arizona Code of Judicial Administration makes reference to a set of standards for transcriptionists, but the standards for transcriptionists are not themselves a part of any rule or regulation. Even worse, the standards are totally silent as to any requirement that the transcriptionist have even minimal education or lack a connection to any of the parties or lawyers. In addition to all the other licensing requirements, the Certified Reporter must also prove a proficiency in understanding and capturing complex vocabulary; no such requirement exists for transcriptionists. A Certified Reporter must adhere to a code of ethics, including maintaining confidentiality and impartiality; no such requirements exist for transcriptionists.

A transcript will always be only as good as the recording and the transcriptionist listening to it. Since there is no set of standards for transcriptionists, one must ask: Do they have a minimal educational requirement? Do they have a criminal record? What assurance is there they will recuse themselves if they have a connection to a party or lawyer? Are they even fluent in English? Have they been trained in legal terminology? Medical terminology? Can they accurately differentiate between numerous speakers? Do they have continuing education requirements? Is there any recourse for a complaint in workmanship?

And there is no oversight for quality control. The standards require transcriptionists to indicate when there is unintelligible speech, but there is no requirement to indicate whether what is unintelligible is a word, a paragraph, or the equivalent of many pages of speech. No rule or regulation makes it anybody's job to compare the ER with the transcript.

The standards for transcriptionists do require that a transcriptionist file a report whenever there is a problematic electronic record, but there is no enforcement mechanism, and in fact no such reports are made or kept. ACRA submitted a public records request to Maricopa County for all such reports in the last three years, and were told that none exist.

AzCJA §1-602(6)(c) requires annual reports of the reliability of digital recording. Are these reports being filed? ACRA has been unable to locate any of them.

Although all this has been well-known since 2005, no measures have been taken to correct or at least try to improve the ER/transcriptionist process. Knowing this, ACRA must object to the removal of current limitations on that system's use.

Getting timely transcripts

Administrative Order 2019-49 demonstrates this Court's concern about getting timely transcripts and avoiding delays in proceedings that result from late transcripts. Former Chief Justice Bales, being accustomed to receiving transcripts from Certified Reporters, may have presupposed that delays in obtaining transcripts is a problem related to Certified Reporters. In fact, it is probable that most delays are related to the ER/transcriptionist system rather than Certified Reporters present in the courtroom.

ACRA submitted available data in this regard to the Task Force. Such data included two random snapshots from the Court of Appeals listing transcript deadlines. The majority of past-due notices are not Certified Reporters but are transcriptionists. If ER is employed for those five areas now covered by a Certified Reporter, it would increase the backlog of transcripts exponentially. It should be noted that most ER matters sent out to be transcribed are less than a half hour in length, yet they are not completed in a timely manner, while most Certified Reporter transcripts are full days of trial and the majority are filed in a timely manner.

This is another instance where the mysteries of court reporting have created a misunderstanding of how we work. When a Certified Reporter is present at the proceeding, he/she is refereeing the process and ensuring testimony is captured. The fact of the reporter's presence is invaluable to the process of finalizing the transcript. The reporter's skill and use of technological efficiencies result in timely and accurate production.

Every reporter is creating the transcript as they are present and writing the proceeding. It is part of our skill. We always write with the final transcript in mind, often finalizing it as the words are being said. With ER, the transcriptionist cannot begin typing until receipt of the recording, and the quality of the transcript depends on the quality of the recording. Every reporter that has transcribed a recording knows how much longer that process takes than when they are present in the courtroom.

Chief Justice Bales may also not have been aware that a major source of delay in transcripts from Certified Reporters is caused by delay in the Certified Reporter being notified that a transcript has been requested. An appellant's notice of appeal is filed with the clerk of the court. If the clerk of the court does not timely notify the Certified Reporter, a delay can occur. Attorneys also frequently request to supplement the record with additional transcripts, which extends dates and adds delay to the appeal process as well.

Is there a “shortage” of Certified Reporters in Arizona?

The Administrative Order reflects a perception of a regional shortage of Certified Reporters. ACRA is aware of some counties experiencing an unavailability of reporters and continues to work with those counties, securing reporters to cover proceedings and trials. During the TF tenure, ACRA representatives were in contact with reporters, judicial assistants, and court administrators statewide inquiring as to reporter availability and offering assistance. Information was provided about the Request a Reporter program being reinstated, its purpose, and how to use it, with positive responses received from all. In speaking with the reporters, ACRA representatives specifically asked if they were aware of any failures to cover cases of the five mandated by the original KTR Committee with a Certified Reporter as required. Not one instance of the five mandated proceedings was reported back to ACRA as continued or delayed because of unavailability of a court reporter. Had the perceptions stated in the AO been communicated to ACRA by court administrators, ACRA might well have been able to alleviate the problem before the Task Force was even established. ACRA has made many suggestions to the Task Force to alleviate this concern, including but not limited to:

- Reallocation or marshalling of court reporting resources on a statewide level, utilizing coverage through the Request a Reporter program
- Intrastate remote reporting with reporters based in a local superior court building
- Traveling reporters, allowing Certified Reporters to move between counties as needed utilizing the entire pool of licensed Certified Reporters throughout the state.

Also, a new state law allowing court reporters certified in other states to be certified and work in Arizona is likely to increase the number of Arizona Certified Reporters. Finally, ACRA welcomes any efforts the Task Force and the Arizona courts are willing to make to attract new and existing Certified Reporters to Arizona. If the courts employ these measures, the entire rationale for the proposed changes, a regional unavailability of reporters, will quickly be eliminated, which is another reason not to risk tossing the baby out with the bathwater: These proposed changes make Arizona seem a risky place to accept a courthouse position, a reality that will only exacerbate the stated problem the proposal seeks to resolve.

In April of 2012, the Arizona Court Reporters Association passed a resolution to pursue and support all appropriate measures that preserve the Arizona Certified Reporter's ethical responsibilities to litigants in the State of Arizona, and we still believe in and adhere to this responsibility. We follow Maricopa County's motto: as Certified Reporters, we too are committed to excellence and the principles inherent in the rule of law...every person, every day, every time.

ACRA and its members, as guardians of the record, are passionate about our role in this process. We are deeply invested in the protection of the public's interest throughout judicial proceedings, and we take seriously the integrity of the record.

We thank you again for this opportunity to participate. We look forward to continuing the conversation and exploration of viable options to further the success of the Arizona court system.

Kate Roundy
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