

## **When statutes and court rules are silenced by stipulation**

Busy litigators know that a successful deposition takes preparation and research. But they've never had to worry about the qualifications of the deposition officer. Now that may be changing. There is a risky trend infiltrating the stenographic court reporting industry in the form of video and court reporting companies encouraging attorneys to stipulate to the use of "digital court reporters" who turn on and off recording machines to monitor proceedings, rather than skilled and highly trained stenographic court reporters. Often, this practice disregards advance notice and/or agreement required by court rules, resulting in counsel being unaware of the digital substitution until after everyone arrives and the proceedings are set to begin, or worse, are provided a transcript replete with inaudibles.

How can this practice impact you and your clients? The National Court Reporters Association (NCRA), which certifies only stenographic court reporters, has gathered some troubling information, as outlined below.

## **Court reporting laws protect consumers**

All states have court rules related to who may administer oaths and act as a deposition officer. Some states also have laws that prohibit notaries from providing court reporting services.<sup>1</sup> Legislatures in more than half the states have deemed it necessary to protect the public interest to regulate the practice of court reporting. The intent of the legislation is that only individuals who meet and maintain minimum standards of competence may present themselves as court reporters.

Additionally, many states have laws and procedures in place that regulate who can transcribe audio files created in courtrooms that use audio recording equipment. No such standard exists in the case of audio-recorded deposition transcriptionists.

## **Stenographic court reporters create the most accurate record**

Even with the modern advances of automatic speech recognition (ASR) and artificial intelligence (AI), a stenographic court reporter remains the highest standard for protecting the integrity of your record. A certified stenographic reporter is an officer of the court, responsible for the record from start to finish. Realtime court reporters produce a verbatim transcript instantaneously during the proceedings with 99 percent or greater accuracy. This capability is well beyond the reach of audio recordings of any type.

Certified stenographers are charged with the responsibility of creating an unbiased, true, and accurate record. They have extensive and arduous training that in many instances includes a bachelor or master's degree, in addition to ongoing educational requirements to preserve certifications and maintain the industry's high standards.

According to NCRA's Code of Professional Ethics, a stenographic court reporter has a duty to "preserve the confidentiality and ensure the security of information, oral or written, entrusted to the Member by any of the parties in a proceeding."<sup>2</sup> Confidentiality is a bedrock and sacrosanct ethical principle of stenographic court reporters.

Attorneys have an ethical duty to adopt safeguards that protect their clients' confidential information. The American Bar Association's (ABA) Model Rule 1.6(a) states that, with limited exceptions, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed

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<sup>1</sup> Revised Code of Washington [42.45.230](#) Prohibited acts. (1) A commission as a notary public does not authorize an individual to (e) Provide court reporting services.

<sup>2</sup> [NCRA Code of Professional Ethics](#).

consent.”<sup>3</sup>

### **Digital court reporters are predominantly uncertified and unregulated**

Most digital court reporters have minimal training or educational requirements. They administer an oath, digitally record the deposition, and hand off the recording to the hiring agency to be transcribed later by someone who did not witness or report the proceeding. Important questions to consider when agreeing to use a digital court reporter are: How many people will have access to the audio file who are not regulated or subject to the same confidentiality requirements as attorneys and court reporters? Who will have access to your clients’ confidential financial, medical, or trade secret information? What is the chain of custody of the audio file? Who certifies the transcript? In contrast, stenographic reporters who attend proceedings also prepare and certify the final transcript.

The Federal Rules of Civil Procedure (FRCP) 80 states: “If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.”

In a recent Stanford study, automated speech recognition (ASR) was shown to be up to 35 percent inaccurate, a far cry from the claims of 94 to 99 percent accuracy parroted by some ASR companies.<sup>4</sup> Despite that, at least one video-based company with claims of revolutionizing the court reporting industry incorporates artificial intelligence (AI) technology in transcript production. Another national agency recently announced it will use speech-to-text technology based on AI to produce transcripts. Existing court rules do not currently address whether using AI or ASR technology as a means to transcribe the record in lieu of an authorized “person” or “officer” is permissible.

A proceeding recorded by an unlicensed, uncertified digital reporter also raises concerns about the consequences of equipment failure and the safety of digitally stored media. Storage of digital media on traditional hard drives is only as reliable as the drive itself. Analysis of hard drive lifespans has led to the conclusion that only 80 percent of hard drives will reach their fourth anniversary without malfunctioning.<sup>5</sup>

### **Digital, AI, and ASR files can be easily manipulated.**

A new technology warranting serious concern is the capability of nearly imperceptible manipulation of digital, AI, and ASR audio files. “The authentication of digital multimedia is an emerging challenge. It has become extremely easy to manipulate recorded audio contents using various handy and free software tools.”<sup>6</sup> In cases with hundreds of millions of dollars at stake, the very real possibility now exists that files can be easily manipulated in a way that could improve one side’s legal position in a case. The risk for manipulation increases when files are transmitted via nonsecure means to various transcription, AI, and/or ASR companies around the globe -- companies that are not bound by the court reporting industry’s strict ethical rules and guidelines.

For many years, the litigation arena has seen analog and digital recording equipment in courtroom proceedings. For those same number of years, consumers of court system services have seen transcriptions of those recordings littered with inaudible and/or unintelligible parentheticals in addition to unidentified speakers. Although courtroom recording equipment is often monitored by court personnel

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<sup>3</sup> [Rule 1.6: Confidentiality of Information \(americanbar.org\)](#).

<sup>4</sup> [PNAS](#), “Racial Disparities in Automated Speech Recognition.” Allison Koenecke, et al., April 7, 2020, Institute for Computational & Mathematical Engineering, Stanford University, Stanford, Calif.

<sup>5</sup> Extreme Tech, “How long do hard drives actually live for?” Sebastian Anthony, November 12, 2013.

<sup>6</sup> International Journal of Engineering Applied Sciences and Technology, 2020, Vol. 5, Issue 3, ISSN No. 2455-2143, Pages 162-165.

who operate under predetermined court standards, this is certainly not universal. The recordings themselves are still often transcribed by remote employees or contractors who have no knowledge of the speakers, have no standard guidelines on transcript preparation, and have no requirements in place for security or preservation of the actual transcription.

The process of digital recording does not transfer well from the courtroom setting to the regular deposition setting, in that there are no universal standards or requirements related to the recording equipment used in depositions. Unfortunately, recording and transcription standards are widely diverse and largely unregulated. “A container format (also referred to as a ‘wrapper’) defines the overall structure of the (digital) file, including how the file’s metadata, video/audio information and index information are multiplexed together, but does not explicitly define how the video/audio information is encoded.”<sup>7</sup> However, stenographic court reporters have individual watermarked stenographic notes stored electronically on redundant backups in addition to a synchronized digital audio recording.

“The basic requirement for authentication or identification of evidence is found at Evidence Rule 901(a), which requires the proponent to ‘produce evidence sufficient to support a finding that the item is what the proponent claims it is.’ Conceptually, this is one of the easiest evidentiary concepts to grasp; in practice, its application can be a challenge, especially when applied to digital evidence.”<sup>8</sup>

### **A trained stenographic court reporter remains vital**

When parties expect a certified court reporter but are instead ambushed with a non-certified digital reporter, it causes strife among the litigants, deceives the unwary, and may lead to unwitting violations of court rules and state laws. Make sure your notice of deposition states it will be taken before a stenographic court reporter. A deposition that is impartially attended and accurately transcribed by the person who reported it imports the verity vital to the integrity of the justice system.

*This article was written by members of the NCRA STRONG Committee, Phyllis Craver-Lykken, RPR; Angie Starbuck, RDR, CRR, CRC; Lisa Migliore Black; Liz Harvey, RPR; Christopher Day, RPR; Jason Meadors, FAPR, RPR, CRR, CRC; and Dineen Squillante, RPR, to educate consumers about the risks associated with using digital recording, artificial intelligence, and automatic speech recognition in legal proceedings. For more information, contact [pr@ncra.org](mailto:pr@ncra.org).*

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<sup>7</sup> Bruce E. Koenig and Douglas S. Lacey, BEK TEK, “Forensic Authentication of Digital Audio and Video Files” 2015.

<sup>8</sup> American Bar Association, “Authenticating Digital Evidence” April 2, 2019.