



JAVS PERSPECTIVES SERIES:

EFFECTIVE USE OF DIGITAL RECORDING  
TECHNOLOGY IN THE LEGAL SYSTEM

# THE NECESSITY OF AN ACCURATE (DIGITAL) COURT RECORD

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**ACCESS**

**JUSTICE**

## Introduction

The importance of having an accurate, complete and accessible court record cannot be overstated. The official record provides a fundamental building block for the judicial system, providing transparency for the public, accountability for the judiciary and the possibility of a meaningful appellate review for the losing party. An accurate, fully reviewable record builds respect and legitimacy for the court system, promotes accountability for court participants that may behave abusively, and enhances court effectiveness. At its core, the existence of a verbatim court record supports the due process of law and ultimately the assurance of justice.

Yet despite the importance of the court record, there are different kinds of court records used currently with varying degrees of effectiveness and cost, from the notes of judges or clerks (often used in developing countries), to transcripts from court reporters and full audio/video recording of the proceedings. There are even some “courts not of record” that still function in the United States, where no verbatim court record of all that transpires in the courtroom is kept and the possibility of meaningful appellate review is severely compromised<sup>2</sup>. Courts of record can turn into de facto courts not of record when no court reporter is requested to cover the proceedings (usually because the litigants cannot afford a court reporter).

Despite advances in technology that make audio/video recording in the courtroom an easy and relatively inexpensive option, accurate and accessible court records are still not made in every courtroom for every case. Looking at both the conceptual and legal reasons for a record, the use of digital recording technology can serve as a critical solution for a truly transparent and accessible court record.

## A View from the Bench

You are in your judge's chambers, ready to start court. You wish you had a monitor in your chambers so you could double-check that the courtroom has filled up with attorneys and their clients, family members, and others interested in the outcome of the proceedings.

You take the bench and the morning calendar passes with the usual mixture of routine-but-important appearances, where you inform people of their rights, rule on motions and issue orders. You notice an observer from a court watch program, hurriedly taking notes, and you hope that any quotes taken down reflect what was said accurately.

Several college students also sit in for a time, compelled by a class assignment to learn more about the judicial system. At the end of the morning you speak with these millennial students off the record. They are excited that they can see justice in action and want to know if the court is going to make an app available to access video court records on their smart phones. They seem surprised when you tell them that only transcripts are available and that the written records may be produced a month or more after the hearing (and may cost up to \$6 per page depending on what type of case it is, who requested the record, etc.)<sup>3</sup>.

During lunch you pick up the newspaper and see that leaders of a political party have accused a judicial colleague of abusive behavior in the courtroom, alleging that she "regularly yelled at victims and defendants, cut off witness testimony and laced her rulings with unnecessary sarcasm"<sup>4</sup>. As your colleague's court keeps no verbatim record, you wonder how well she can defend herself from the allegations, or be held accountable if the allegations are true.

In the afternoon you preside over jury selection in a major criminal case that has received lots of publicity. One potential juror uses a sarcastic tone when answering questions, particularly with one side. When an attorney strikes that person from the jury, the opposing side objects that the strike is based on prejudice. As you rule on the objection you briefly wonder if the person's sarcastic tone will come across from the written transcript when the inevitable appeal comes.

Later in the day, though you feel that the jury selection process could proceed for a bit longer without undue wear on the parties, attorneys, or potential jurors, the court reporter is only contracted for a set time. Overtime is not in the court's budget. Accordingly, you end court for the day. Later in your chambers your clerk notes that a reporter who was unable to attend the proceedings in person called looking for information on the case. The clerk referred the reporter to the written record kept by the court reporter. You wish there was an official court record in your control where the media and public could easily access what was actually said in court in a relatively quick and low cost way.

## The Difference Having a Court Record Makes

At every turn in the above example of a day in a trial court, the existence of an accurate, thorough and accessible court record would make a difference by making transparent what the court (and attorneys and witnesses) actually did in the courtroom. This transparency is a cornerstone in assuring the integrity of the court and the proper functioning of a democracy.

Whether a court keeps a detailed record of all that happens in the courtroom and is therefore considered a “court of record” makes a big difference legally. If a court has such a record, “appellate judges can scour the entire trial court proceedings to ensure that the defendant received a fair trial.”<sup>5</sup> This ability to understand what happened at the lower court level is at the heart of appellate review in determining if the lower court is in error.

In contrast, “courts not of record” do not keep an official verbatim record of the court proceedings. A number of states still use courts not of record in 2015. These courts not of record may be known as Municipal Courts (Oregon), Justice Courts (Utah), or General District Courts (Virginia) among other names.

When a defendant appeals the decision of the court not of record, it typically results in a new trial (and this new court in some jurisdictions may not keep a complete court record itself). This approach has been subject to criticism for a long time as “[s]ignificant problems were found with the lack of a formal record, which resulted in numerous trials de novo on appeal...”<sup>6</sup> This consequence led in turn to concerns over wasted judicial resources because of holding two trials for the same case.

From an evidentiary perspective, it would be hard to impeach a witness or defendant who testifies inconsistently in the two trials without a verbatim court record for each trial. In addition, whether the court in question is a court of record can at times determine the scope of judicial immunity to suit<sup>7</sup>, which writ is appropriate to the case<sup>8</sup>, and even if there is sufficient evidence to prove a predicate offense in a criminal prosecution. As authors Marla G. Decker and Stephen R. McCullough note: “Year after year, incomplete or missing documentation from courts not of record has bedeviled prosecutors... when prosecutors attempt to establish prior convictions or adjudications.”<sup>9</sup> A complete court record would be an easy step to assure that criminal defendants are not avoiding responsibility for the full weight of their crimes.



## The Best Kind of Court Record

It is important to remember that the ultimate goal of the official court record is to provide a complete account of what actually happened in court. Traditionally, court reporters have provided stenographic recording for courts, but in the last few years digital recording technology has advanced significantly. As Jim McMillan and Lee Suskin of the National Center for State Courts conclude, “Many state and local courts successfully use digital recording as an accurate, cost-effective means to produce and obtain the verbatim court record.”<sup>10</sup>

While written records serve an important function, a transcript does not provide the same degree of accuracy as an audio/video recording does. Cold words on a page simply do not convey as much information as A/V does. Tone and inflection can be heard on audio, while gestures and facial expressions are discernible on video.

Yet, though frequently framed as competing options, a written transcript and a digital recording are not mutually exclusive. Cases can be routinely recorded through A/V, lowering costs and staffing, reducing space needed for storage of records, and speeding the accessibility of court records for the media and the public. With digital recording the court maintains more control of the day’s start and end time (not depending on a court reporter’s schedule), keeps its own records (as opposed to a court reporter keeping the record), and can make those records available to people relatively quickly (instead of waiting the average 60+ days for a transcript to be typed up). But if a written transcript is desired, a party or court can simply order one in addition to the A/V record. Nothing is lost and substantial cost savings is gained with the implementation of a digital recording system to safeguard the court’s official verbatim record.

## Conclusion

Every day courts make decisions that have a critical impact on the lives of the people that come before them. Judges may sentence defendants to jail, decide parental rights and award sums of money to an injured party. Even relatively “routine” decisions such as releasing a defendant on bail, requiring a parent to undergo drug counseling, or overruling an evidentiary objection can have enormous consequences on the litigants and the community. The due process behind all of these decisions needs to be fully documented for the court to maintain the respect and trust of the public. An accurate, complete and accessible digital court record ensures the necessary transparency.

## About JAVS

At JAVS, we believe that everyone has a basic, universal right to an open, transparent society and that the only way to safeguard that right is through an accurate and accessible audio/video record of due process. For more than 30 years, JAVS (1-800-354-JAVS) has specialized in using A/V technology to create, store and publish the official verbatim record of the court. Integrated within more than 6,000 courtrooms throughout the U.S. and across 3 continents, JAVS promotes accuracy and efficiency through AV recording solutions, guaranteeing the preservation of the record for tomorrow’s court system.

Visit us at [www.javs.com](http://www.javs.com) to learn more.

1 Author Julie A. Helling is a graduate of the University of Michigan Law School. She served as a prosecutor before becoming a college professor.

2 Samuel P. Newton, Teresa L. Welch, Neal G. Hamilton, “No Justice in Utah’s Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah’s Infamous Local Courts,” *Utah L. Rev.* 27, 56 (2012).

3 Matt Temmel, “Planning Study—Court Reporter Issues—Pierce County Superior Court,” 21 (Nov. 2, 2006).

4 Amy J. Dillard, “Separate and Obedient: The Judicial Qualification Missing from the Job Description,” 38 *Cumb. L. Rev.* 1, 19 (2007-2008) (in 2001 political leaders accused a Virginia General District Court judge of exhibiting “bizarre behavior.” Because these courts were not of record, there was little evidence to review).

5 Newton, Welch and Hamilton, “Utah’s Justice Courts” at 56.

6 Newton, Welch and Hamilton, “Utah’s Justice Courts” at 34.

7 J. Randolph Block, “Stump v. Sparkman and the History of Judicial Immunity,” *Duke Law Journal* 879 (1980).

8 James E. Pfander, “Article I Tribunals, Article III Courts and the Judicial Power of the United States,” 118 *Harv. L. Review* 643, 727 fn 380 (2004).

9 Marla G. Decker, Stephen R. McCullough, “Criminal Law and Procedure,” 43 *U. Rich. L. Rev.* 149, 179 (2008) (citing Virginia law).

10 Jim McMillan, Lee Suskin, “Digital Recording Makes the Record Effectively,” *Trends in State Courts--Leadership & Technology* 45 (2015).