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EFFECTIVE USE OF DIGITAL RECORDING
TECHNOLOGY IN THE LEGAL SYSTEM

GETTING THE WHOLE STORY:

**WHY CAPTURING NONVERBAL
COMMUNICATION IS AN IMPORTANT
PART OF THE VIDEO COURT RECORD**

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Fatigue at the end of the day, multiple speakers, or communication in a foreign language all may easily mean that the verbatim communication is lost by court reporters for purposes of written transcripts—but an A/V record does not get tired, and different audio tracks or video angles in the courtroom can be parsed out for greater clarity.

EXECUTIVE SUMMARY

While written records have served an important court function historically, a transcript does not provide the same degree of accuracy as an audio/video recording. Research demonstrates the significance of nonverbal communication, which is not included in a written record.² 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 such as pointing, counting on one's fingers, and facial expressions are discernible only on video. A witness answering, "yes, I am a criminal mastermind," may mean just the opposite if she rolls her eyes at the time of speaking. To ensure due process through complete accuracy and transparency, a full video court record is required to capture the nonverbal communication provided by a witness, attorney, or judge.

The Old Way: Written Transcripts

Traditionally, court reporters have provided stenographic recording for courts, but in the last few years, digital recording technology has advanced significantly. This advancement has allowed important progress in the making of official court records, such that Jim McMillan and Lee Suskin of the National Center for State Courts concluded, “Many state and local courts successfully use digital recording as an accurate, cost-effective means to produce and obtain the verbatim court record.”³

Court reporters, like all of us, are subject to human error. For example, while a prosecutor, this author was once called at home by a court reporter seeking clarification after the reporter was unable to read her notes on statements made in an earlier court hearing.

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is lost by court reporters for purposes of written transcripts—but an A/V record does not get tired, and different audio tracks or video angles in the courtroom can be parsed out for greater clarity. A Washington State Superior Court judge was pleased to have the complete A/V record of a hearing where the

witness spoke in a foreign language to the defendant in the courtroom. With the audio and video available, the comment was played back for a translator later, and it was determined that a mistrial was not necessary

Courts are starting to recognize that the information captured by written transcripts and full A/V recordings are different as evidenced by allowing parties to recover costs of both the written and video-record

depositions in a case. As Judge Nanette K. Laughrey held in *Letterman and Letterman v. Burgess*, No. 5:12-CV-06136-NKL (U.S. Dist. Ct., W.D. Missouri, Feb. 26, 2016):

*Furthermore, Plaintiffs may recover the costs of both the written and video-record depositions. It was reasonable to believe that videotape would be necessary at trial if any of the witnesses were unable to testify. See Rohrbough v. Hall, 2010 WL 4940954, at *2 (E.D. Mo. Nov. 30, 2010). “Additionally, it cannot be said that a videotape of a deposition is wholly duplicative of a transcript of the same deposition because the transcript only captures verbal communication, while the videotape captures both verbal and nonverbal communication.” Id.*

Another way that courts have recognized the deficiency of a written transcript is in the matter of determining the competency of child witnesses to testify. As the Washington State Supreme Court held in *State v. Swan*, 790 P.2d 610, 645 (Wash. 1990):

The determination of competency rests ‘primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review. Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.’

Citing [State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 \(1967\)](#); see also [State v. Griffith, 45 Wn. App. 728, 733, 727 P.2d 247 \(1986\)](#).

As the court concludes, a written record is not a complete picture of what happened in the courtroom; it does not allow for observations of the witness and the witness’ “manner.”

Use of Video Court Records

The purpose of an official court record is to preserve an accurate record for possible appeal and uphold due process through transparency and accountability. Kentucky has been using A/V technology for courtrooms since 1985, and today all trial and appellate courts in the state use the video record as the official court record.⁴ Multiple cameras and microphones placed throughout the courtroom automatically track the person speaking. All parties, including the public, can easily get copies of the record at an affordable price immediately following a court hearing. As Susan Stokley Clary, Clerk of Supreme Court of Kentucky, concluded about video court records, “To see what actually happens as opposed to a stenographer’s version of what happens?...You want to talk about due process being ensured—we are light years ahead of anyone.”⁵

Accuracy and Nonverbal Communication

Studies reported in academic journals such as the Journal of Nonverbal Behavior or textbooks such as Nonverbal Communication by Judee K. Burgoon, Laura K. Guerrero and Kory Floyd show that nonverbal communication plays a significant role in shaping the meaning of communication. For example, the Nonverbal Communication authors summarize over 40 nonverbal codes, including 23 different eyelid positions from raised brows to staring.⁶ Important gestures can range from pointing (“That’s the person who mugged me”) to counting on one’s fingers (“I heard this many shots”) to pictorial representations such as spreading one’s hands to show length (“The fish that got away was this long”). The verbal statements alone as reported in a written

transcript or audio-only record would not include the most important information to be communicated.

Accountability and Video Records

Complaints about attorney or judicial misconduct can be fully investigated if an A/V record is made in a way that a purely written transcript cannot provide, or even an audio-only record. Tone of voice (for example, yelling or sarcasm), facial expression (anger, hostility, fear), and threatening gestures can all be captured in A/V court records.

Accountability is not always about catching people at their worst. Judges (and presumably all the other actors in the courtroom) can also be caught doing something admirable. Just ask Kentucky District Court Judge Amber Wolf, whose acts of compassion went viral in August 2016 after videos captured in her courtroom made their rounds on the internet. National media such as CNN reported the popularity of the courtroom moments where Judge Wolf demanded that the jail provide pants for an inmate and another where the judge allowed a criminal defendant to hold his baby for the first time in the courtroom.⁷ The genuine warmth of the judge and the tender moment of the defendant holding his baby, was captured only because an A/V record was made in court.

Court Security

Video cameras also contribute to the security of the courtroom by recording from multiple angles all of the people in the courtroom. If a party becomes threatening to the court or another party, this behavior is fully preserved for subsequent court action or prosecution.

Professional Standard of Care

Discrepancies can exist between written transcripts of a court hearing as different court reporters may interpret tone and nonverbal communication differently. Retired Kentucky Judge William L. Knopf (who served as a trial judge and on the Kentucky Court of Appeals) teaches attorneys that the lawyers have a professional responsibility to view all parts of a video record that are at issue to ensure that any written transcript is in fact accurate. This important point was driven home recently when Knopf undertook the defense in a murder case. The police provided one transcript of the interrogation of the defendant while Knopf had another company transcribe the interrogation from the video as well. The police transcript and the defense transcript did not match (to the detriment of the defendant). Fortunately, the video record existed to clarify exactly what the defendant had communicated, but if Knopf had not reviewed the A/V record and had a second transcript made, unwarranted harm may have befallen his client.

Scientific study has demonstrated the same result. College professors William Gillespie and Gary Shank compared a court reporter's transcript of a federal court trial to the video record.⁸ They classified errors into "form errors" (inconsistencies which the researchers concluded did not change the meaning of the utterance) and "content errors" which changed the meaning of the statement, such as missing words and phrases or switching of words. They found 23 content errors and 783 form errors. The researchers found content errors such as the reporter transcribing a key witness as saying "he thought that 'they' had the authority to do X," when he actually stated "we," and the reporter wrote "securable" when the witness had said "curable." Other significant errors were transcribed as well.

Storage Options

This author was a law clerk for the Minnesota Court of Appeals and remembers clearly the many boxes of paper that served as the court record and the accompanying awkwardly stored videos or posters that had served as exhibits in the trial. (Judges would carry the boxes at times in the trunks of their cars and meet to exchange boxes so everyone could eventually see the record.) In contrast, a video record can include videos, pdf documents, and photos right in the actual video court record, making it easy to transport, store, and find as necessary. With A/V records, multiple people can easily have copies of the entire court record with exhibits at the same time.

Transcript	Audio-Only	Audio & Video
Reporter must be present (unless they, too, use the A/V record to transcribe record later)	Clerk can handle	Clerk can handle
Only reporter can type up	Multiple companies can make transcript from tape	Multiple companies can make transcript from tape
(No view)	(No view)	Multiple camera views switch to speaker; can show entire courtroom
Doesn't convey nonverbal and verbal cues	Audio cues conveyed such as pitch and inflection and tone	Nonverbal cues such as pointing or expressions visible on record
Can't preserve foreign languages and/or multiple speakers easily	Capture different audio tracks, but not video and nonverbal	Can record video exhibits played for court of jury right in the video record
Written transcripts take more space if kept in physical form	Easy to store and export online	Easy to store and export online
Need reporter to decipher codes	Easy to play back	Easy to play back
Takes days to months to provide transcript	Can provide copies immediately	Can provide copies immediately
Human error can factor in (ability to hear, see, and keep up with rate of speech)	Audio is verbatim	Video is an "unblinking" eye capturing the whole court

Conclusion

Finally, 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 expediting 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.

Why not keep an A/V record of all court events, and then if a transcript is thought necessary because an appeal is actually made, the reporter can make one from the video record? The initial installation of a video system does require an upfront cost, but requiring a court reporter at every court proceeding is much more expensive in the long run. With the advances of technology and manufacturing processes, audio and video recording systems are more affordable than ever before. Mid-sized courtrooms can be installed for under \$20,000 and scale up from there. In contrast, the Bureau of Labor Statistics reported that the mean annual wage for court reporters as of May 2014 was \$55,000 and the top 10 percent earned more than \$94,140.⁹ This does not include the additional benefits such as health insurance that court employees may earn. Thus, though the physical presence of a court reporter

in a courtroom may feel familiar to some, it comes with substantial, continuing costs.

Ultimately, as respected Kentucky criminal lawyer Alex Dathorne noted, video court records are “records that speak for themselves—what was said and how it was said.” He concluded, “Why wouldn’t we want that? It leads to full disclosure of what occurred [in the courtroom].”¹⁰

About Justice AV Solutions (JAVS)

Justice AV Solutions (JAVS) is the global leader in digital courtroom recording solutions integrated in over 10,000 courtrooms throughout the United States and across four continents. Clients across the world have trusted the JAVS solution to accurately capture, store, and publish the official verbatim record of the court for 35 years. From public address to remote arraignment to open source access, JAVS promotes truth and accuracy by preserving the record for tomorrow’s justice system. Call us at 1-800-354-JAVS or visit www.javs.com to learn how your court system can use A/V recording technology to your best advantage.

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. See, for example, Judee K. Burgoon, Laura K. Guerrero and Kory Floyd, *Nonverbal Communication* (Pearson Education 2016).
3. Trends in State Courts 2015: Leadership and Technology at 45 (National Center for State Courts).
4. Judge William L. Knopf (Ret.), “The Use of Audio Video and Digital Technology in the Courts: A Judge’s Personal Perspective,” paper prepared for the 7th IACA Conference in Sydney, Australia 2014; also Knopf phone interview with author on 8-31-2016.
5. Clary interview by phone with author on 8-31-2016.
6. Judee K. Burgoon, Laura K. Guerrero and Kory Floyd, *Nonverbal Communication* (Pearson Education 2016) at 120.
7. Doug Criss, “Judge finds viral video fame ‘mindboggling’”, CNN.Com (August 12, 2016).
8. Keith A. Gorgos, Lost in Transcription: Why the Video Record is Actually Verbatim, 57 Buff. L. Rev. 1057, 1084-1085 (2009), citing William Gillespie & Gary Shank, Technological Innovations and the Quality of Court Records: Comparing Accuracy of Automatic Videotape Recording Systems with Court Reporters (2002).
9. U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, May 2014, Court Reporters, on the Internet at <http://www.bls.gov/oes/current/oes232091.htm>.
10. Dathorne interview by phone with author on 8-31-2016.