TO BOLDLY GO WHERE NO COURT REPORTER HAS GONE BEFORE:

A NEW PRIME DIRECTIVE GOVERNING THE REPORTING OF ELECTRONIC EVIDENCE AT TRIAL

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Civil trials have increasingly become multimedia events. Courtrooms are packed with HDTV displays, computers, ELMO projectors, laser pointers, sound equipment, and the like. Like James T. Kirk on the bridge of the *Enterprise*, court reporters are surrounded by this array of technical wizardry, enabling them to be masters of all they survey and to fulfill their duty of transcribing every word the jurors hear, whether those words fall from the lips of live witnesses or from spectral images on a television screen.

As if. Judges are generally protective of their court reporters, and often see the playing of videotaped testimony as a chance to give them a "break" from their duties. And court reporters hate transcribing videotaped testimony, because videotaped witnesses cannot be asked to slow down or repeat anything, and because court reporters know that somewhere there is already a written transcript against which the accuracy of their reporting can later be checked. Consequently, when videotaped deposition testimony is played to the jury, the reporter's transcript usually reflects no more than exactly that, "Videotaped testimony played to the jury." Some court reporters don't even transcribe the snippets of deposition testimony played during the cross-examination of witnesses, so that cross-examinations in trial transcripts are interlaced with frustrating notations that testimony was played but not transcribed.

For years there has been a court rule – rule 2.1040 of the California Rules of Court – intended to ensure that a complete transcript of the trial, *including* electronically recorded evidence heard by the jury, is available in the event the judgment is appealed. Up until July 1 of this year, that rule provided that "[u]nless otherwise ordered by a trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording." The transcript was supposed to be marked for identification, filed by the clerk, and included in the clerk's transcript in the event of any appeal. Furthermore, the rule provided that *unless specifically ordered by the trial judge* (not a likely event), a court reporter "need *not* take down or transcribe an electronic recording that is admitted into evidence."

The first part of this rule – that trial lawyers submit transcripts of electronic recordings played to the jury – was honored only in the breach. Most appellate lawyers have never seen an appellate record that includes such transcripts. And most trial lawyers are unaware they are required to submit such transcripts when they play the deposition testimony of an absent witness – much less a transcript for each line of deposition testimony played during an adverse witness's cross-examination.

The former rule was also problematic because it placed no time restriction on when attorneys had to submit the required transcript of electronic testimony to the court clerk. Therefore, the testimony typically would be played, the trial would come to a close, and the transcript would never be prepared or submitted to the clerk. Even if an attorney wanted to comply with the rule, in most instances it would be difficult or impossible to recreate a transcript of the deposition testimony excerpts played during cross-examination, or to provide any meaningful correlation between such excerpts and the reporter's transcript, which wouldn't even yet have been prepared.

For the past few years, the Appellate Advisory Committee of the California Judicial Council has been working to resolve these problems. After several rounds of revisions, an amended version of Rule 2.1040 was finally adopted and went into effect on July 1, 2011. The most significant change in the rule is to distinguish in subdivision (a) between electronic recordings of deposition or other prior testimony, and in subdivision (b) between *other* types of electronic recordings.

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Under subdivision (a)(1), *before* playing any videotaped deposition testimony to the jury, an attorney must lodge the deposition transcript with the court. Immediately before the testimony is played, the attorney must *state on the record* the page and line numbers where the testimony appears in the deposition transcript. This requirement applies *both* to deposition testimony played in lieu of having a live witness testimony, and to videotaped deposition excerpts played during the cross-examination of a witness. Subdivision (a)(2) then requires, either concurrently or within five days after the recorded testimony is played, that the attorney serve and file a copy of the deposition transcript cover and the relevant pages from the transcript, marked to show the testimony that was presented.

Subdivisions (a)(1) and (a)(2) thus function as "fail-safe" provisions – even if the deposition excerpts never get filed, the reporter's transcript should still reflect counsel's oral recitation of the page and line numbers where the video testimony appears in the deposition transcript, so that on appeal the testimony can be reconstructed and the record can be augmented to include it. And if the written excerpts actually do get filed, so much the better – they can then be included in the clerk's transcript (or an appendix filed by the parties) without the need for record augmentation. Attorney compliance with subdivision (a)(2) will be less burdensome than having to prepare a "typewritten transcript" of exactly what was played, as under the old rule. In fact, an Advisory Committee Comment to the revised rule clarifies that it is now sufficient to mark up the deposition transcript and that a new transcript need not be prepared.

Significantly, the revised rule *eliminates* the discretion trial court judges formerly had to relieve attorneys from submitting transcripts of electronic testimony played to the jury. But if the parties are blessed with a trial judge who requires the court reporter to take down the recorded testimony – the cleanest way of providing a complete transcript of trial proceedings to the appellate court, especially with regard to excerpts played during cross-examination – subdivision (a)(3) relieves the attorney of having to file the marked deposition pages after the testimony is played. An Advisory Committee Comment to the revised rule – which actually prompted objections from the California Court Reporter's Association during the "invitation to comment" period – states that "it may be helpful to have the court reporter take down the content of an electronic recording," for example "when short portions of a sound or sound-and-video recording of deposition or other testimony are played to impeach statements made by a witness on the stand." Because the deposition transcript will have been lodged with the court before the testimony is played, it will be available to the court reporter for use later in verifying the accuracy of her transcription.

Subdivision (b) of the revised rule governs "other" electronic recordings – basically any recording played to the jury (a recorded telephone conversation, a video with a soundtrack, etc.) – that is not a recording of prior *testimony*. A transcript of the recording must be provided to the court, and both a transcript and a copy of the recording must be provided to the opposing parties, before the recording can be played to the jury. The latter requirement gives opposing counsel the opportunity to verify the transcript is accurate before it is played, since such transcripts are often given to the court or the jury to follow along, especially when the recording is difficult to understand. To avoid undue burden, the transcript may be prepared by the party offering the recording, and need not be certified. For good cause, the trial judge may permit the transcript to be filed at the close of evidence, or within five days after the recording is presented, whichever is later.

In contrast to the playing of recorded prior testimony, subdivision (b) provides several escape valves from its requirements for other types of recordings. No transcript is required (1) in uncontested proceedings or the opposing party does not appear (e.g.,

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protective order proceedings which typically are not attended by the responding party), unless the trial judge orders otherwise; (2) where the parties stipulate that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case; or (3) where for good cause, the trial judge orders that a transcript is not required. An Advisory Committee Comment to the "good cause" exception explains that it may apply in situations where the party offering the electronic recording "lacks the capacity to prepare a transcript" (e.g., a self-represented litigant) or the recording is of such poor quality that "preparing a useful transcript is not feasible."

The big question remaining after these revisions to rule 2.1040 is whether there will be any better compliance with the revised rule than there was with the old one. It would certainly help if the Center for Judicial Education and Research – which administers the "Judicial College of California" and provides orientation programs for new judges and continuing education for the judiciary – would provide state-wide training regarding the revised rule and its new requirements. But trial lawyers who hope to preserve their clients' rights on appeal should not assume that trial judges are aware of the revised rule's requirements. They should call attention to the rule before trial, and insist on the record that all parties comply with it when offering electronic evidence – especially recorded deposition testimony – into evidence.

To relieve much of the rule's burden, attorneys should specifically request that the court reporter take down recorded testimony that is played for impeachment purposes during cross-examination, which will eliminate the need to keep track of what excerpts have been played and which deposition transcript pages need to be filed with the clerk. And it should almost go without saying that an attorney should think carefully before stipulating that the requirements of rule 2.1040 may be waived. The testimony crucial to the enterprise of preserving a win on appeal or successfully challenging a loss may otherwise never make it into the trial court record.

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Rule 2.1040
Electronic Recordings Presented or Offered into Evidence

(a) Electronic recordings of deposition or other prior testimony

(1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. At the time the recording is played, the party must identify on the record the page and line numbers where the testimony presented or offered appears in the transcript.

(2) Except as provided in (3), at the time the presentation of evidence closes or within five days after the recording in (1) is presented or offered into evidence, whichever is later, the party presenting or offering the recording into evidence must serve and file a copy of the transcript cover showing the witness name and a copy of the pages of the transcript where the testimony presented or offered appears. The transcript pages must be marked to identify the testimony that was presented or offered into evidence.

(3) If the court reporter takes down the content of all portions of the recording in (1) that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).

(b) Other electronic recordings

(1) Except as provided in (2) and (3), before a party may present or offer into evidence any electronic sound or sound-and-video recording not covered under (a), the party must provide to the court and to opposing parties a transcript of the electronic recording and provide opposing parties with a duplicate of the electronic recording, as defined in Evidence Code section 260. The transcript may be prepared by the party presenting or offering the recording into evidence; a certified transcript is not required.

(2) For good cause, the trial judge may permit the party to provide the transcript or the duplicate recording at the time the presentation of evidence closes or within five days after the recording is presented or offered into evidence, whichever is later.

(3) No transcript is required to be provided under (1):

(A) In proceedings that are uncontested or in which the responding party does not appear, unless otherwise ordered by the trial judge;

(B) If the parties stipulate in writing or on the record that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case; or

(C) If, for good cause, the trial judge orders that a transcript is not required.

(c) Clerk's duties

An electronic recording provided to the court under this rule must be marked for identification. A transcript provided under (a)(2) or (b)(1) must be filed by the clerk.

(d) Reporting by court reporter

Unless otherwise ordered by the trial judge, the court reporter need not take down the content of an electronic recording that is presented or offered into evidence.