

The Case for Compliance



Stenographic Means?

Active Reporting involves at least three compliance determinations: Can proceedings be conducted remotely? Can the oath be administered remotely, and by whom? Is the method of capturing the testimony compliant? In response to the COVID-19 pandemic, rules relevant to these questions were modified with rapid speed and depth, both temporarily and permanently, to keep justice moving. Remote proceedings and oaths became mainstream.

Rule 30 in some jurisdictions specifies that testimony should be captured “by stenographic means”, and the pandemic didn’t drive a need to revise that language. As the new category of Active Reporting grows, how can we assess compliance with that governing rule?

Naturally, we have extensive research and interpretations for the rules in each jurisdiction in which we operate. Attorneys selecting methods for conducting depositions will form their own legal opinions, and these are some points to consider.

Origins

Let's start at the beginning with the purpose of the transcript and the reasons for the rule. Prior to reporting by an independent party, transcripts were often taken in longhand by attorneys and judges. It was laborious and slowed the pace of proceedings dramatically. Witnesses were even directed to slow or pause their speech. Perhaps more importantly, the transcripts captured by parties rarely matched, and assessment of the credibility of each transcript became a primary topic in appeals.

The rules were adopted for the purpose of ensuring accuracy and objectivity in a period in which the technology itself was just barely capable of capturing verbatim accuracy and lacked the safety net of an audio recording to polish the transcript in the wake of gaps from the shorthand.

Rule 30 Allows Alternatives

Rule 30 for Federal jurisdiction, and replicated in many states, verbatim says,

“Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.”

Importantly, that part of the rule also specifies that the method selected must be stated in the notice. The rule also allows for additional methods. So, for example, if

audio is the stated method, Active Reporting can fall under the additional method allowance. Unlike typical steno practices which protect audio recordings as work product, Readback offers recordings to customers.

Deviations from Steno are Everywhere

When the steno machine was introduced, it was into the courtroom. It was a natural extension to deploy it to the deposition room. However, for many compelling reasons, most courts have moved entirely away from the steno machine. While they are not covered by Rule 30, it is a direct recognition that the 20th century inefficiencies are too heavy a cost to bear in an era of clear digital audio recordings.

The shortage of steno operators makes it literally impossible to capture the record of all proceedings by that method alone. Due to the shrinking workforce with that skill, alternatives have been proliferating for decades. Voice Writers dictate what they hear to a digital recording device in a labor intensive process that delays production of any text. An entire category of so-called *digital reporting* has been growing for decades. Digital is generally considered a lower tier service because no written record is produced until sometime after the proceeding.

Unlike the other alternate methods of capture, Active Reporting provides counsel with near-time access to the text so they can have immediate confidence that a correct record is being captured. Access to the Rough in one hour and the certified transcript in one day further instills confidence. Finally, Active Reporting provides access to the audio record which gives unprecedented access for verification of accuracy.

Deviations from the stenograph machine are everywhere, and Active Reporting provides multiple assurances that the other options lack.

Stipulations

Attorney and best-selling author Jim Garrity observed, “Depositions are the new trial.” As civil litigation is conducted primarily in discovery, the courts expect parties and their counsel to conduct as much work as possible outside of the courtroom. While that work should be consistent with rules, there is very little reason for a court, or anyone else for that matter, to intervene on a topic for which the parties are in agreement. That is especially true when the outcome of such agreements is entirely consistent with the reasons for the rules.

In other words, when counsel can choose technology that promotes their ability to serve their clients and accelerates the process while saving costs, that becomes a game changer.

Counsel often agree to stipulations, including rules, to govern depositions, and that is appropriate for Active Reporting as well. We recommend starting with the language in the notice and also verbally briefing opposing counsel who are unfamiliar with Active Reporting to help them orient with minimal concern.

Finally, what is Stenography?

Does “by stenographic means” mean using a stenograph machine?

Sometimes, the technology of a period shifts common perception of words. That might be the case here. Stenography is defined as the “process of writing in shorthand”. Clearly, writing can be by a person, a machine, or a combination thereof. Shorthand is defined as “a method of rapid handwriting using simple strokes, abbreviations, or symbols that designate letters, words, or phrases (distinguished

from longhand)”. In fact, stenography existed as a word and a practice for hundreds of years prior to the invention of the keyboard stenograph machine.

The stenograph machine started out as a mechanical shorthand. Over more than a century, it has morphed into a microcomputer that runs software to perform translations. Shorthand abbreviations were adopted for the simple reason that nobody could produce longhand verbatim transcripts at the speed of normal speech. Fortunately, that is no longer the case. With technology and the Active Reporting model, longhand transcripts can be made without the awkward step of abbreviating only to later expand.

Early in the stenograph period, no recordings were made of proceedings so there was a necessary lack of fidelity to precise verbatim transcription. In recent years, steno operators have made recordings to assist with editing transcripts to the point of certification.

In Active Reporting, a machine captures spoken words and converts them to imperfect text approximating longhand. Sound familiar? Then, people transcribe or edit that first approximation into a verbatim transcript with the help of recording audio to promote fidelity. Moving further toward high fidelity to verbatim, Active Reporting provides the audio to participants for verification.

So, while Active Reporting is certainly inconsistent with the recent, urban vernacular of “stenographic means” implying the machine, is it inconsistent with a literal interpretation of the language of most of those rules? We don’t believe it is.

Granular Analysis Over Time

Written Q4, 2021, this white paper is intended to provide a broad overview of compliance topics at a snapshot in time.

The Readback App Site where proceedings are scheduled and conducted is maintained with more granular updates by jurisdiction, and that information is made available as proceeding reservations are requested.

Naturally, since our customers are attorneys, we expect that they will reach their own legal opinions and determinations. We're merely providing information for consideration and not legal advice.