

The Federal Lawyer in Cyberia

MICHAEL J. TONSING

Vox Audita Perit, Litera Scripta Manet (The Spoken Word Vanishes, the Written Word Remains): A Look at Court Reporters, Hearings, Depositions, and Deposition Technology

Ruminations on the Written Record

Many moons ago, I was an administrative law judge (ALJ) for the state of California's Public Employment Relations Board (PERB). Back then, PERB agents like me used to create written records by using a Sony™ four-track tape recorder at hearings. (See, I told you it was many moons ago!) We'd place one microphone in front of the witness and one in front of each lawyer, then we'd use the

fourth one to record our own voice. The four-track cassette tapes we created would then be shipped to a transcription unit in Sacramento, where a hearing transcript would be created.

Back then, I also served (without additional pay) as the training officer for PERB's ALJs, for which I would put together classes on such arcane subjects as receiving tangible objects into evidence. Undoubtedly, my most shining hour as our agency's training officer was a program that dealt with the art of creating good written records at our hearings. Decisions of the ALJs, issued following the hearings, were subject to appeal to a five-member board sitting in Sacramento. Appeals of board decisions then went into the court system. At least three of the cases over which I presided at the hearing stage eventually were resolved by the California Supreme Court. Thus, the creation of a record was sometimes a matter of great importance.

In putting together the training program on creating a good written record, I hit upon the idea of consulting with the transcribers, who had the thankless task of turning our cassette tapes into transcripts—spinning straw into gold, as it were. I vividly recall meeting with the transcribers in their windowless basement office and asking them whether or not they had ever had difficulties with our cassettes. The lead transcriber laughed and brought out a box that contained some of the “trophies” they had saved. These were tapes that were virtually indecipherable.

For example, one of the tapes that I remember best was produced at a hearing held on the ground floor of an office building, which was adjacent to railroad tracks. As the trophy tape ran there in the basement, one could hear the unmistakable sound of a locomotive slowly building in intensity off in the distance.

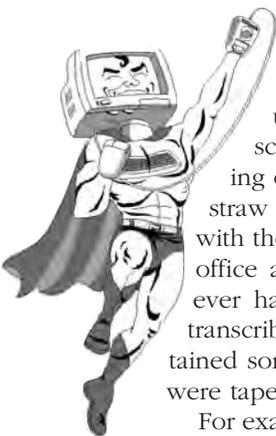
Meanwhile, the ALJ conducting that hearing was totally oblivious to the disruption, and he remained oblivious as the sound of the approaching train grew louder and louder. Soon, it sounded as though the train were running right through the middle of the hearing room! The participants' voices were totally drowned out, but the hearing went on as though nothing unusual was happening. The tape was comical in its absurdity.

The unexpected experience I had that day with the beleaguered transcribers in Sacramento led me to appreciate the magic that court reporters bring to litigation. Certainly no court reporter would have allowed a freight train to “choo-choo” through the middle of a hearing!

That brings me to the chief point I want to make in this month's column, at least the chief point before I begin to focus on deposition technology: court reporters have an important role to play in the litigation process, and the more that lawyers develop an appreciation for what court reporters do—and also develop the best means of using what they do—the better the quality of lawyering will be. Given that so many of the cases that we litigate never go to trial, transcripts can be extremely important. One might well make the case that, in today's practice, depositions are generally the most significant events in civil litigation.

Even though I have been practicing law for several decades and could shrug off anything that addresses skills that I have already acquired, I believe that it remains important to continuously hone one's already-acquired skill sets and that revisiting “old” topics can reveal new insights.

In that vein, I have recently purchased two books on deposition practice, and I would like to bring them to your attention. The first, *Deposition Guidebook*, was written by Howard Bruce Klein and was published by the American Law Institute–American Bar Association (ALI–ABA) Committee on Continuing Professional Education in 2007. The book is compact and excellent. It is available on the ALI–ABA website (www.ali-aba.org/index.cfm?fuseaction=publications.bookspage&book_code=BK52). Even though there have been some changes to the Federal Rules of Civil Procedure since the book was published five years ago, it remains a very good guide to deposition prac-



tice. It is definitely worthy of a place on your go-to bookshelf if you are a litigator—be it a rookie or a veteran.

The second book, *Taking and Defending Depositions*, is by Stuart M. Israel and it is also published by the ALI-ABA Committee on Continuing Professional Education (available at www.ali-aba.org/index.cfm?fuseaction=publications.bookspage&bookcode=BK14). Originally published in 2004, it is now in its third printing. Frankly, the book is dazzling. How could one have guessed that a writer could produce a book on depositions that is both insightful and funny? Here is a small slice of Israel's book, just to give you a taste of his unique approach to an otherwise dry topic:

As most lawyers will agree, rules are good. Rules bring order to chaos. Rules set standards. Rules communicate expectations. Rules clarify objectives. On the other hand, rules can be dangerous. They can substitute for thought, stifle creativity and cause rigidity. You are about to be introduced to the 162 essential rules for deposition witnesses. Be careful with them.

There is no shortage of rules for witnesses. Books, articles, videotapes, audiotapes, seminar materials, and lawfirm training manuals listing witness preparation rules are many and mani-

fold. ... I gathered thousands of these rules just so you don't have to sift through them at great cost in money, time and effort. I have synthesized their sage advice into the 162 essential rules for deposition witnesses.

The essential rules are all here, from "tell the truth" (rule 1) to "don't be overwhelmed by the fact that I'm giving you 162 rules, some of which contradict others" (rule 157) to "don't screw up" (rule 162). Of course, each essential rule must be scrupulously and unswervingly followed on all occasions without exception, unless there is reason to disregard it (rule 158).

Israel's book is highly recommended.

Technology

Now for the technology part. (You've been very patient.)

I have long been an advocate of the use of videography in depositions. A video deposition can be taken as a matter of right under the Federal Rules. One need only give proper notice to the opposing party and then arrange for a videographer. (Of course, the cost is borne by the party requesting the additional presence of a videographer.) Among the more compelling

CYBERIA continued on page 12

JAMS FEDERAL PANEL

ACCOMPLISHED. CELEBRATED.
ASTUTE. NOTABLE. BUT MOST IMPORTANT, "RESPECTED."

When a matter is of highest importance, neutrals in the JAMS Federal Practice are in familiar territory; they have successfully resolved disputes in some of the country's most complex and widely observed cases. With a panel of former federal court judges and neutrals with deep subject matter expertise, you can expect the utmost in experience and fairness. From intellectual property and employment to MDL and class actions, neutrals in our Federal Practice possess an invaluable body of legal knowledge and skill. To meet this impressive panel, go to www.jamsadr.com/federal.

800.352.5267 | www.jamsadr.com

THE RESOLUTION EXPERTS



reasons to take on this additional discovery expense is the fact that a video deposition tends to throw a wet blanket over a highly charged, obstreperous opponent who doesn't want to be caught on video misbehaving while the deposition is taking place. Even though there are many other reasons to create a video deposition, whenever I anticipate a problem with opposing counsel I always seek to videotape the deposition in order to make a record of his or her behavior (in case judicial intervention proves necessary) or—even better—to deter such behavior in the first instance.

An additional use of technology in support of the recording of depositions that I have come to appreciate, especially given my Sony four-track background, is the technology called real-time court reporting. Real-time recording is the act of connecting via a laptop directly to a court reporter in a deposition (or in court, for that matter) and seeing the transcript as it is produced in real time. Think of it as live closed captioning, the sort of thing that you see regularly on the evening news on television. This can be quite helpful in situations where one would otherwise need to have the court reporter read back a prior question or where an objection is made that the question has already been asked or answered. In addition, using case management tools, such as CT Summation™, Bridge™, or Transcript Manager Pro™, one can electronically create annotations, make notes, perform searches, and even create reports using multiple transcripts—all on the fly during the proceeding.

And, of course, one can also obtain (at the end of the day) a transcript of the testimony from the day, imperfect though it may be, and use it to prepare for the continuation of the deposition the following day. This advantage has proven to be very important in certain cases that I have handled.

I highly recommend the use of real-time service. Note, however, that only certain court reporters have the expertise to use this special method of taking down testimony and that one needs to make special arrangements with a court reporting service well in advance to be able to utilize this rather amazing function.

Even though I have not personally done so, it is now quite possible to arrange for real-time testimony to be posted immediately on the Internet so that another member of the firm or an expert witness can vicariously participate in the deposition from afar. For example, if I were to be taking the deposition of the anesthetist designated as an expert by the other side, I could have my own retained anesthetist watching the colloquy from his or her own office and providing me with guidance on questions to ask via text messages or phone conversations during a break. It seems to me that this method could be of inestimable value in the right setting.

However, of course, given the fact that the long-range observer will not be getting sounds, but only

words, it is true that he or she would not be able to warn me of an approaching freight train. I would have to rely on the court reporter present in the hearing room to do that.

Conclusions

As the title of this month's column indicates, "the spoken word vanishes, the written word remains," the nuances latent in a transcript—where the written word still remains—now can be made palpable with the use of videographic enhancement. (When I am making a presentation to a jury, I have quite effectively used an image of a witness looking every bit like a trapped animal as he spends 30 seconds or more squirming before answering a particularly difficult question at a deposition—a moment that would be totally lost in a mere written transcript.) Transcripts, of course, can now be synchronized with videos and accessed on the fly during a trial, enabling counsel to respond almost instantly to an unexpected prevarication by a witness.

The accurately rendered written word is the essential medium for controverting the damning testimony of the witness on the stand, but it is videos of witnesses contradicting themselves that provide the most dramatic form of impeachment possible in the courtroom. Thus, over the course of many moons, litigation has moved from my hearing room tape recorder, to court reporters, to the ability to broadcast testimony live over the Internet, and finally to the marrying of the text with an image at the time of trial. Welcome once again to Cyberia. **TFL**

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of the Law Practice Management and Technology Section of the State Bar of California. See www.TonsingLawfirm.com. He also mentors less-experienced litigators by serving as a "second chair" to their trials (www.YourSecondChair.com). He can be reached at Mike@TonsingLawfirm.com.

Editorial Policy

The Federal Lawyer is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.

The Federal Lawyer is edited by members of its editorial board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board's judgment.

The views expressed in *The Federal Lawyer* are those of the authors and do not necessarily reflect the views of the association or of the editorial board. Articles and letters to the editor in response are welcome.