A legal note from Marshal Willick about the use and abuse of Court Minutes

For the third time in a few weeks, this office has seen opposing counsel dispute the terms of a proposed court order based on the Court Minutes – leading to a large waste of time and money all around. Attorneys should know better – and district court judges should sanction the thundering dunderheads who don't make the modest effort to do so. Finally, directions should be given to the court automation company to give priority to work that would lower costs to the public, rather than simply making things easier for the bureaucracy.

I. WHAT ARE "COURT MINUTES" AND WHY DO THEY EXIST?

"Minutes" are notes, often taken in shorthand or abbreviations, by the court clerk and later (sometimes, ***much*** later) transcribed as a summary record of what transpired in a court hearing. The practice of having the clerks take such notes has been around a long time – probably for as long as clerks have attended hearings.

The purpose of those notes is to provide some summary record of what has and has not happened in a case, for judges to refresh their recollection, or to quickly come up to speed on the high points of a case being transferred. In the days before "paperless" courtrooms, the Minutes had their own special spot in the court file.

Most court clerks are dedicated and sometimes overworked; they have several different tasks for which they are responsible. While they have some procedural training, they are virtually never lawyers, and cannot be expected to be familiar with the statutory or case law, nevertheless technical terminology or matters of legal theory. Usually, they do not read any of the moving papers. It is therefore not surprising that their notes often misapprehend what is being asked, argued, and ordered; it would be much more amazing if they ***did*** capture all proceedings under such circumstances.

II. COURT MINUTES ARE NOT AUTHORITATIVE; WHAT IS AN APPROPRIATE BASIS FOR A COURT ORDER

Conspicuously absent from the rules of civil procedure, or the local rules, is any hint that Minutes should be relied upon for any purpose. That is a good thing, since they tend to be incorrect to a larger or smaller degree in nearly every instance.

The minutes are almost ***never*** complete or accurate, so most attorneys do not rely on them for any serious purpose, such as order drafting, preferring instead to review the video record and take the orders (and time indexes for those orders) directly from that source. The video provides a complete record of what ***actually*** occurred in every hearing in every district courtroom. That record, and ***only*** that record, should be the normal basis for any court order.

Of course, in some circumstances, the issues might be so simple that the Minutes provide an adequate recap of proceedings. There are also cases without sufficient funding to permit review of

the video record, and perhaps emergency situations where there is not time to do so. This note does not address those circumstances.

Other than in those exceptional circumstances, why would an attorney rely on Court Minutes as a record of what actually occurred? One word: laziness.

III. WHY JUDGES SHOULD SANCTION COUNSEL WHO TRY TO BASE ORDERS ON COURT MINUTES

It would be foolish to propose conforming the formal orders of court to what a non-attorney clerk ***thought*** he or she heard and scratched a note about while attending to multiple other matters.

And (with apologies to Shakespeare), only an idol of idiot worshipers* would challenge an order referencing the video record by submitting a competing order based on the clerk's notes. Yet we have seen attorneys do precisely that – three times – in the past month.

The result of submission of such competing orders based on the non-record that is the clerk's Minutes is a waste of both client funds (on both sides) and all court resources expended on reviewing and addressing the dispute. The appropriate judicial response is to award 100% of the fees expended by the party responding to submission of a competing order based on the Minutes. Any ***other*** response shifts financial responsibility for lazy, thoughtless practice onto the party preparing the order correctly.

IV. THE PROPOSED COMPLETE BREAK FROM 19TH CENTURY PRACTICE

The court clerks should not be taking Minutes. Rather, court staff should directly prepare the order from the hearing, at the time of the hearing. Counsel should normally walk into court with a dispute, and walk out with an enforceable order – rather than spending the next several weeks, large sums of client money, and an undue amount of court time, trying to get an order on file.

There are multiple ways this could be accomplished. The simplest is to have counsel submit proposed court orders with their moving papers, and have the Court (in a majority of cases) execute one or the other order right at the hearing. More flexible would be having the clerk equipped and trained to take specific judicial direction at the conclusion of each hearing and produce the order in real time. The technology is readily available, and largely already installed in the courtrooms.

Either way, the benefit to litigants of actually obtaining a court order at a hearing – as opposed to waiting for weeks, and having to pay counsel to do further work after hearings – is immense, and includes these practical advantages:

a. Enforceable orders would be immediately available. This will ameliorate a host of current problems, from police enforcement to school registration.

b. The cost to virtually every party in every motion hearing would be reduced, since the entire step of getting counsel to draft, submit, and file orders would be eliminated.

c. Some gamesmanship with creative interpretation (or legitimate errors) in orders could be eliminated.

d. Hopefully, allowing all parties to review the order before leaving the courthouse on the day of hearing will reduce the number of things forgotten and inadvertently omitted from orders.

e. On the Court's side, front-loading the work would eliminate multiple verification and entry steps.

Obviously, real-time order generation will not always be possible. If the matter is taken under advisement, for example, the order cannot be written until a decision is reached. And if detailed or technical findings have to be drafted, attorney involvement in order-drafting may still be necessary.

But such should be the exception, not the rule. As to the routine custody, visitation, support, and fees orders, the great majority could be decided, ordered, signed, and filed before anyone leaves the courthouse. The process would be faster, the cost to litigants would decrease, and sparing the court the ***current*** interminable process of waiting for orders and checking them for accuracy weeks or months after hearings should actually ***lower*** net personnel time and costs.

So with all those advantages, why has this not been done? Bureaucratic inertia. A group of lawyers and judges tried to put a pilot program of real-time order generation in place two years ago, but County I.T. folks were just "too busy" to implement the necessary programming to Odyssey. They promised to get back to the working group in weeks – which then stretched out to months, and then years. We never heard from them again.

This is – unfortunately – just one example of how the court automation process has been turned to ease the tasks of those working inside the court, while maintaining (or greatly ***increasing***) costs and inconvenience to the attorneys and public accessing the court. That subject, however, deserves more time and attention than it can be given here, and will await another day.

For now, the powers that be in the judiciary should give direction to the companies automating court processes to give priority to creation of systems that actually make the justice system faster and cheaper ***for the public*** – even if it inconveniences court staff to learn to do so. Eliminating clerk minutes in favor of real-time order generation would be one huge step in that direction.

* – Shakespeare, *Troilus and Cressida*, Act V, sc. 1.

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.