



JAVS PERSPECTIVES SERIES:

EFFECTIVE USE OF DIGITAL RECORDING
TECHNOLOGY IN THE LEGAL SYSTEM

MILLENNIAL EXPECTATIONS OF TRANSPARENCY IN THE COURTROOM

BY JULIE A. HELLING, JD¹

This white paper is provided courtesy of JAVS, a company dedicated to capturing and protecting the court record for over 35 years.

COPYRIGHT 2016

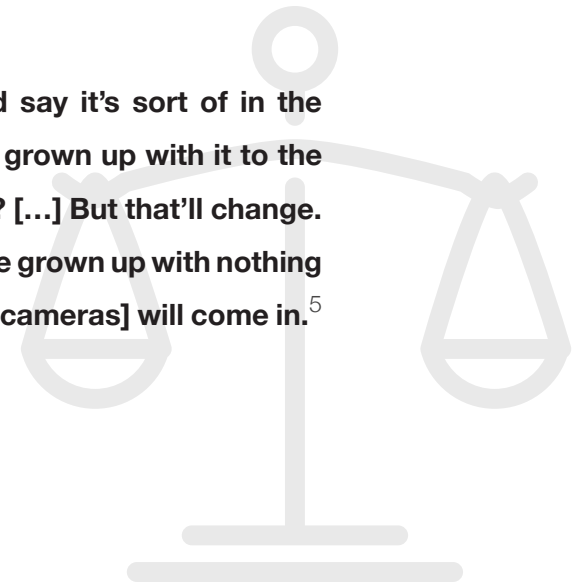
If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals.

- NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (Cal. 1999)²

EXECUTIVE SUMMARY

While transparency has long been considered an important value of the American legal system to promote accountability and public education, the expectations of the Millennial Generation (generally considered those born after 1980 until late 1990s)³ bring an even greater sense of urgency to the equation. Millennials expect quick, easy, digital access to data and are accustomed to important information being readily available online for free. Today, advances in digital technology mean that most of the highest appellate state courts already put audio or video recordings of their proceedings on the Internet.⁴ The trend toward the A/V recording of court hearings—and away from the cost and delay of obtaining written transcripts—will only increase as Millennials move into positions of power and shape the legal system even more directly. In 2014, U.S. Supreme Court Justice Stephen Breyer recognized this effect when he remarked during the Conversations on the Constitution at the National Archives:

[C]ameras in the courtroom? At this stage, I'd say it's sort of in the middle. I mean, I'm not in the generation that's grown up with it to the point, I actually can remember radio, you know? [...] But that'll change. And eventually people will be on the court who've grown up with nothing but that, and I believe it'll change and probably [cameras] will come in.⁵



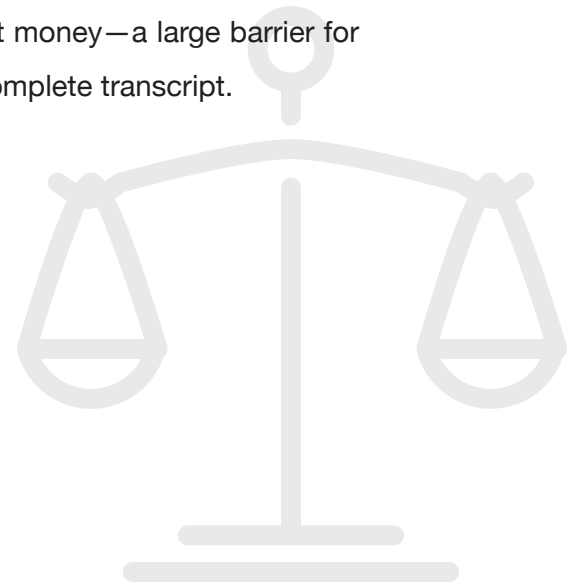
Advances in A/V technology mean that it is easy to capture court proceedings digitally and make them available quickly and at low cost to the public. Given Millennial comfort with technology and low tolerance for delays, this technology is a tool that the court can use to meet expectations and further public education on the legal system.

Transparency and Millennial Expectations

As U.S. Supreme Court Justice Louis D. Brandeis famously wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁶ But this is not the only benefit that transparency in the judicial branch can provide. Professor Lynn M. LoPucki concluded that:

Transparency would provide an array of benefits. They include exposing and reducing corruption and impropriety, enhancing legislative control over the courts, apprising the public of the real rules by which they are governed, enabling lawyers and parties to predict the outcomes of their cases, providing a substantial new source of general knowledge, reducing legal malpractice, and increasing court-system efficiency.⁷

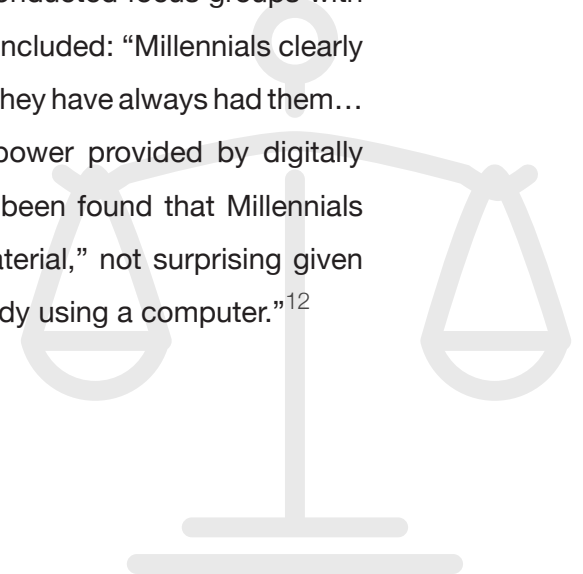
Most court proceedings are already open to the public to view if one is able to come in person to the courthouse. However, access relies on the person having time to attend, transportation to the court, and even the simple knowledge that court hearings are open. It is possible to request written transcripts from court reporters for many proceedings, but this usually costs significant money—a large barrier for many people—and it may take a while to receive the complete transcript.



Real court transparency means not only the right to observe courts in action, but actual access to an accurate, verbatim court record. With A/V technology today, you can see what transpires, hear the tone of voice used, and receive the record as a digital file the same day of the proceeding, or even possibly view it on the Internet. Thus, bringing digital technology into the courtroom means the promise of judicial transparency can truly be achieved.

The Millennial Generation is comfortable with computers and digital technology. In a single hour on the Internet, a member of the Millennial Generation might get travel directions, surf for a world of information, film a video, and deposit a check by snapping a photo of it and sending it to the bank online. And that is just with their ever-present smartphone (according to the Pew Research Center, 86% of those ages 18-29 have a smartphone).⁸ There are also many Millennials who engage in challenging video games, and many who use complicated computer applications, and even many who create their own apps and do their own coding. Millennials have grown up around technology and put it to use constantly as a matter of course.

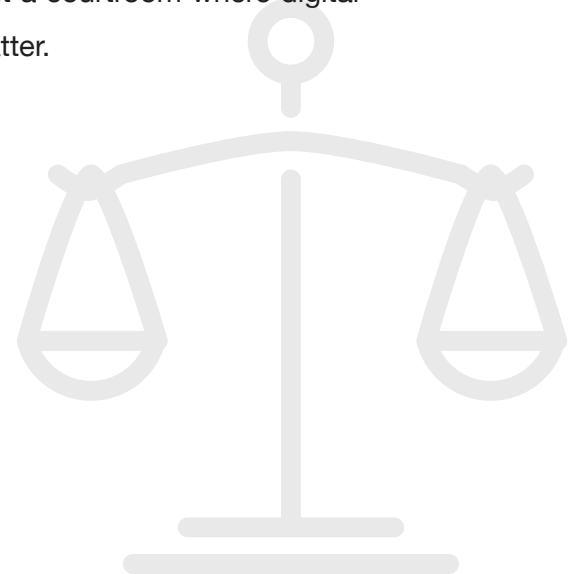
Members of this generation are often called “digital natives” to emphasize their comfort level with technology. As business professors Andrea Hershatter and Molly Epstein noted, “the Internet itself is a member of the Millennial Generation” as the TCP/IP suite that enables it to exist was established in 1982.⁹ The Millennials grew up with word processing, email, the Web and social networks, and some researchers such as UCLA neuroscientist Gary Small have mapped “actual changes in neural circuitry that develop with the acquisition and repetition of technological skills.”¹⁰ University librarian and researcher Richard Sweeney conducted focus groups with college-age Millennials about their expectations and concluded: “Millennials clearly adapt faster to computer and internet services because they have always had them... they expect the speed, convenience, flexibility and power provided by digitally provided services and resources.”¹¹ Indeed, it has been found that Millennials “prefer video, audio and interactive media to print material,” not surprising given that “by age 5 the majority of the Millennials were already using a computer.”¹²



In addition, Millennials grew up in a world where entire trials such as the OJ Simpson trial for murder in 1995 have been broadcast on TV stations such as Court TV (a station which ran 1991-2007, then was re-branded as truTV). Video coverage of prominent trials was offered to the viewing public through the 24/7 cable station, allowing the public to watch the justice system in action.¹³ The Millennial Generation is not only comfortable watching video of court trials, they are also comfortable with taking their own videos. It is common for people to take amateur video of events they find disturbing such as the beating of Rodney King in 1991 or the death of Eric Garner in 2014, videos that often end up as evidence in subsequent trials. Law professor Seth F. Kreimer noted in his article “Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record” that:

As digital technology proliferates in camera phones, iPhones, and PDAs, almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted worldwide. We live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private.¹⁴

Today, there is a call for police to wear body cameras to accurately document their interactions with the public. This is not an argument for or against body cameras, or for putting trials live on TV. It is simply an argument that the Millennial Generation, for better or worse, grew up with an expectation that the image and the sound of important events will be easily available. I have taught pre-law students for the past 16+ years, and they are always amazed when they visit a courtroom where digital recording of the events is not occurring as a routine matter.



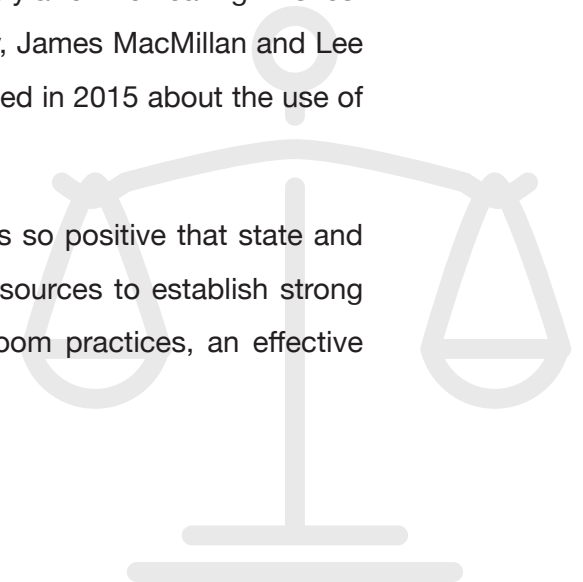
Current Technology

With the technology available today, Millennials conduct much of their lives online. As Gordon M. Griller, author of the 2015 Leadership and Technology Brief for the National Center for State Courts found, Millennials have “owned digital wireless device all their lives” and are therefore “intimately familiar with them and use them as much as six hours per day.”¹⁵ Through smartphones, laptops, tablets, and desktop computers, Millennials already access government services online in a variety of settings involving sensitive data:

- **Pulling accident reports**
- **Viewing court records (for example, PACER--Public Access to Court Electronic Records--operated by federal courts since 1997 which makes court case files publicly available over the Internet)**
- **Filing income taxes**
- **Making Freedom of Information Act requests**
- **Online education**

Using digital recording technology in courtrooms is a logical extension of leveraging computer technology to satisfy Millennial expectations of quick and easy access to important information. Fortunately, A/V technology has advanced well beyond the scratchy video images and garbled sound of the past. Today, cameras focus automatically on the person who is speaking, and microphones throughout the courtroom switch to the current speaker. Digital recording in courts provides an accurate, verbatim record of the proceedings in a format that is easy to store, easy to copy, and can produce a complete record immediately after the hearing finishes. Given the high quality of A/V recording available today, James MacMillan and Lee Suskin of the National Center for State Courts concluded in 2015 about the use of A/V court records that:

The payoff for transitioning to digital court recording is so positive that state and local court systems are justified to invest time and resources to establish strong governance and oversight programs, effective courtroom practices, an effective

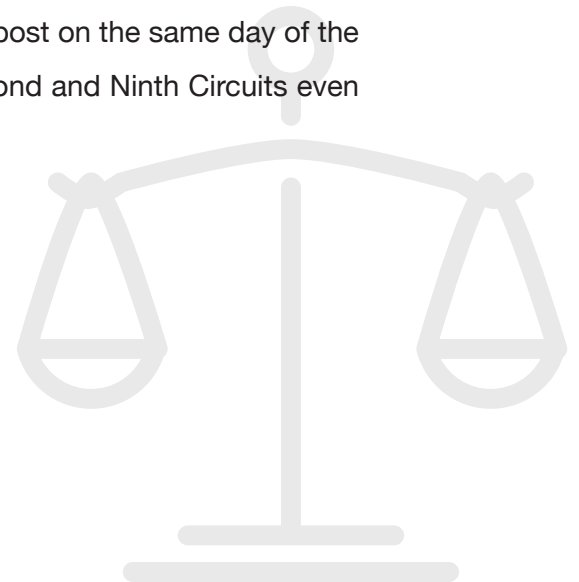


transcript management system, and minimum standards for digital-recording systems, software, and equipment.¹⁶

In fact, the technology for A/V recording is so effective that Kentucky Court of Justice has already made the video recording the official court record over written transcripts. (If a written transcript is desired, it could be made from the video as well, making digital recording an all-around win.)

Even the U.S. Supreme Court is facing a growing call for video access to its oral arguments. At the request of the Committee on the Judiciary of the U.S. Senate, the U.S. Government Accountability Office (GAO) released a report in April 2016 titled “U.S. Supreme Court—Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings.”¹⁷ This report surveyed appellate courts regarding coverage of their proceedings by the media (TV or audio), or coverage by the court itself for posting online or broadcasting. This use may be slightly different than using it to record the official court record, but providing digital recordings in this manner demonstrates the growing awareness by courts that technology can aid in judicial transparency.

As the GAO report noted, the U.S. Supreme Court began posting audio recordings of its oral argument on its website at the end of each week beginning with the October 2010 term. Recognizing the need for quick access for more people than just the 240 members of the public who can sit to hear an oral argument in person, the Court even allows access to the audio recording on the same day of the argument in select cases. Ten of the thirteen U.S. Courts of Appeals generally post audio recordings of oral arguments on their websites; nine of the courts post on the same day of the oral argument. The U.S. Courts of Appeals for the Second and Ninth Circuits even allow video coverage of oral arguments.



The GAO report also noted that almost all of the courts of last resort in 49 states have video or audio of oral arguments available online. And the highest appellate courts in Australia, Canada, and the United Kingdom allow video coverage of oral arguments. The trend towards digital recording of court hearings as key to court transparency and public expectations is undeniable.

Conclusion

Ultimately, as Gordon M. Griller, consultant to the National Center for State Courts determined, “Tech-savvy consumers will place increased pressure on courts to reimagine and reinvent the adjudication process.”¹⁸ Millennials, the quintessential tech-savvy generation, will drive court changes as both consumers of and actors within the legal system. With their expectations for easy and quick access to government information and their comfort level with technology including the use of video and audio, Millennials will expect to access court records of court proceedings using A/V technology. This is a Millennial expectation that can and should be met by the court system.



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. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 360 n. 28 (Cal. 1999).
3. Bruce N. Pfau, Harvard Business Review (April 7, 2016).
4. GAO Highlights for Report GAO-16-437 of U.S. Government Accountability Office, "U.S. Supreme Court-- Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings," (April 2016).
5. Justice Stephen Breyer, Conversations on the Constitution, National Archives (Jan. 14, 2014).
6. Justice Louis D. Brandeis, "What Publicity Can Do," Harper's Weekly (Dec. 20, 1913).
7. Lynn M. LoPucki, "Court-System Transparency," 94 Iowa Law Review 481, 494 (2009).
8. Monica Anderson, Pew Research Center, "Technology Device Ownership: 2015," (October 29, 2015).
9. Andrea Hershatte and Molly Epstein, "Millennials and the World of Work: An Organization and Management Perspective," Journal of Business Psychology (2010).
10. Id. (Hershatte and Epstein).
11. Richard Sweeney, "Millennial Behaviors & Demographics," (2006).
12. Kari Mercer Dalton, "Bridging the Digital Divide and Guiding the Millennial's Research and Analysis," 18 Barry L. Rev. 167, 168 (2012).
13. Angelique M. Paul, "Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?," Ohio State Law Journal, vol. 58, no. 2 (1997).
14. Seth F. Kreimer, "Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record," 159 U. Pa. L. Rev. 335, 337 (2011).
15. Gordon M. Griller, Principal Court Management Consultant, National Center for State Courts, Trends in State Courts, "How the Digital Revolution is Changing and Will Transform the Court Workforce," at 57 (2015).
16. Jim McMillan and Lee Suskin, Trends in State Courts, Leadership & Technology, "Digital Court Recording Makes the Record Effectively," at 4 (2015).
17. U.S. Government Accountability Office (GAO) report GAO-16-437 titled "U.S. Supreme Court--Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings" (April 2016).
18. Griller at 57.

