

Making The Record – Helpful Hints for Attorneys

(From the CLE seminar “Making the Record – the Good, the Bad, and the Ugly” presented by the Alaska Shorthand Reporters Association and from NCRA’s “Making the Record” booklet)

INTRODUCTION

The reporter’s transcript is an important document before, during, and after a trial. The transcript is used for trial preparation, briefs, impeachment purposes, and, of course, for appellate review. Property, freedom, and life all can depend on a clear and accurate record. Many cases lost in trial courts are subsequently won on appeal because the record was carefully made in the trial court.

Here are some reminders and tips to help you make a clear record. Many of them are common sense, but they are precisely the kinds of things that often are overlooked or forgotten during a trial or a deposition. We hope this will help you remember to take the greatest care in making the record.

YOU AS RECORD-MAKER

The responsibility for preserving the record rests with the court reporter, on whom the bench and bar rely with confidence to accurately report the judge, counsel, and witnesses.

The primary job of making the record belongs to the attorneys participating in the case. You, as counsel, may have an excellent theory and a winning strategy, but you must match your preparation with a careful regard for the record so that that record will accurately and completely reflect the merit of your case to the appellate judge.

AWARENESS OF THE RECORD

You are already aware of the effect your courtroom methods have on the jury, but you also need to keep in mind that your words, as reported, may be read by opposing counsel, appellate judges, legal scholars, future generations of law students, and maybe even by Supreme Court justices.

When you keep this fact in mind, you take a big step towards creating an effective record that will suit your purposes and your requirements. Remembering that your words are being reported for the record will help you choose your words more carefully and state those words more clearly. You will tend to eliminate duplication of statements and repetition of questions. The incidence of false starts will drop dramatically, and you will tend to present your arguments and evidence more logically. In short, you will come across as a true professional, not only in the transcript but in court as well.

DR. LIVINGSTONE, I PRESUME?

Whether it's a trial or a deposition, unverified presumptions can cause problems. In a deposition, the reporter needs to know who you are, who you represent, and the caption of the case.

Matters of identification are especially important in telephonic depositions and in the courtroom. You can ensure a clean record and avoid being labeled an "unidentified speaker" by identifying yourself before you speak.

OVERLAPPING

Overlapping is what happens when two or more people talk or shout at the same time. Imagine, for example, counsel asks a question, and before it's completed, the witness starts to answer at the same time that opposing counsel states an objection. The court reporter -- well, what does the court reporter do when all that can be heard is a jumble of voices at a combined rate of probably 10 words per second?

The reporter has a duty to report, but also has a need to hear and understand. What can't be heard and understood can't be reported. Moreover, if the reporter didn't hear what was said, most other participants didn't hear what was said either. The proceedings at this point might have to be interrupted and, consequently, everyone's train of thought derailed.

This sort of problem can also affect a jury's ability to follow a line of questioning; so it behooves you, as much as is humanly possible, to avoid interrupting witnesses who are in the midst of responding to the question posed. Also, if you have a witness who is anticipating your question and starting to respond before you are through asking the question, remind the witness to wait until the question is finished before responding.

At times, you might have to interrupt a witness who you think is about to give inadmissible testimony; but these occasions will be relatively few, and they are not an excuse to interrupt to the point that broken statements appear in the transcript like bleached bones in the desert.

WHAT'S IN A NAME?

There are two things that are invariably true about names: Everyone has one, and no one likes it when his or her name is misspelled, mispronounced, or confused with someone else's. Names like Randy/Andy, Terry/Perry, Morris/Norris, Hoffman/Coffman, etc., sound very much alike and can be mistaken by the reporter and others as well, especially when they show up in the same case.

To remove all doubt, proper names should be spelled out or enunciated slowly and clearly. And even if you pronounce it slowly, chances are the reporter will ask you to spell it anyway. Consider, for example, the case of Mr. White – or was it Mr. Wight? No, it was Weit . . . or maybe it was Wyatt . . .

KNOW YOUR ABC'S AND 1,2,3'S

Another common problem is assuming everyone present is familiar with the acronyms and jargon that you are using. As one attorney put it, "Until I started working for the government, I thought "Acronym" was the capital of Ohio!"

To avoid serving up alphabet soup, it's important to use the full term the acronym stands for. If you spell out acronyms, be sure to clarify letters that sound alike, such as M and N, B and D, V and F, and use an identifying name to clarify, such as M as in Mary, N as in Nancy, etc.

Numbers are no less subject to confusion than names or letters. For example, "two twenty" can be 2 hyphen 20, two hundred twenty dollars, two dollars twenty cents, or two twenty o'clock. When you say "forty-one-oh-six," you might mean, 41.06, 4,106, or 40,106, all with, or without, a dollar sign. If you say "October-nineteen-eighty-six," is it October 1986, or October 19, '86?

To avoid this kind of confusion, state figures in full, followed by the subject they represent. For example, "forty-one dollars, six cents," "two point twenty percent," "six-oh-five p.m.," or "October nineteenth, nineteen-eighty-six." If the witness gives an ambiguous answer, you can follow up with a clarifying question like this:

Q. How much did it cost to have it repaired?

A. Eleven twenty.

Q. Is that \$1,120?

A. That's right.

SHOW AND TELL

There is no standard national procedure for marking exhibits. What is customary in one locale might be less so in another. The marking of exhibits is generally left to the reporter, unless, that is, counsel asks the reporter to follow a specific procedure.

Here are some tips to keep in mind for the efficient handling of these important items of evidence:

Try to have enough copies made prior to the deposition: one for the reporter to mark as the original, and a copy for each counsel. Have the pages numbered ahead of time so page references are clear. "Can you please turn to page 16 of Exhibit 1" is much more precise than "Can you please turn to -- well, I think it's about the fourth page from the back -- yes, that's the page." If the document has been Bates-stamped, make sure the Bates numbers on the pages can be clearly seen.

If you have a large number of exhibits to be entered into the record, ask the reporter to mark as many as possible before the deposition begins. When taking a videotape deposition, it is always preferable to mark exhibits in advance rather than handing things back and forth on camera.

When offering an exhibit, briefly but adequately identify it. State both the date and the identifying features. Two or more items often bear the same date, and referencing them by date alone may not sufficiently clarify the record. You can also have the witness identify the exhibit.

BODY LANGUAGE

The simple phrase "Let the record show" should be used to clarify gestures that witnesses use in answering questions put to them. Answers such as "over to about there," "about that long," while perhaps being clear to the participants present at the proceeding, can be rendered utterly meaningless when read at a later time.

Reporters may parenthetically be able to describe some gestures, but they cannot draw conclusions from them. It is up to you to clarify the record. For instance:

Q. Did you see the driver of the other car?

A. (Nods head)

Q. Can we have an audible answer, please? The reporter can't take down a nod or shake of the head.

A. Yes.

Q. How tall would you say the other driver was?

A. About this tall.

Q. That's about five-foot-eight?

A. No. More like six feet.

Q. How far away was he from you when you first saw him?

A. About the length of this room.

Q. I'd say this room is about 12 feet long. Is that about right?

A. Yes.

Q. Did you know the other driver at the time?

A. I'm sure (enunciating).

Q. Indicating that you did not?

A. Of course I didn't.

Q. What was the first thing you said when you got out of your car?

A. (Reading.) I said, "What do you think you are doing?"

Q. Let the record reflect that, before answering, the witness looked at something handed to her by opposing counsel.

Body language often plays an important part in a deposition. Unless they are verbalized, shrugs, sighs, long pauses, weeping, gestures, and/or pointing to locations on a diagram don't make it into the record. Also be careful of slang terms, colloquialisms, or sarcasm that may read in black and white much differently than what was actually spoken and understood at the time.

THE OUT-OF-TOWNERS

Through experience, the reporter's ear becomes attuned to the speech patterns and accents of many nationalities, but the reporter often needs help from counsel to decipher testimony of foreign witnesses. While listeners can gather the gist of the answers, the thought the witness is trying to convey, the reporter must identify and capture for the record each and every word. This process takes a fraction of a second longer than understanding the thought. Especially with the heavily accented witness, avoid crowding the answer with your next question. It is highly

recommended that you repeat part of the answer back in your next question in order to ensure that you and everyone else heard and understood the same thing.

Using an interpreter requires extra effort to ensure a clear record. For example, a witness sometimes will understand the question and begin answering in English without waiting for the interpreter to translate the question. It is then your responsibility to instruct the witness to answer only through the interpreter.

When questioning a witness through an interpreter, remember that the witness is being examined, not the interpreter. Address your questions directly to the witness. Don't let your questioning of a witness take on this pattern:

Q. Ask the witness to tell us what happened then.

(Interpreter and witness speak in foreign language)

A. She says she hit her, and then she hit her back, and then she hit her and knocked her down.

This is colloquy between counsel and the interpreter. It leaves a great deal of doubt about what actually happened and what is sworn testimony. But the record is clear when counsel speaks directly to the witness and the interpreter translates the response, like this:

Q. Tell us what happened then.

(Interpreter and witness speak in foreign language)

A. She hit me, and then I hit her back, and finally she hit me and knocked me down.

In the case of hard-of-hearing or deaf witnesses who can read and speak English, realtime translation is very effective. The witness has the opportunity to read the question and know specifically what is being asked before responding. Realtime court reporters are equipped to provide this service for witnesses, parties, attorneys, jurors, and judges. Realtime reporting is also very effective for meetings or events where it's possible some of the participants may be hard-of-hearing or deaf. The realtime transcript can be projected on a screen for the entire room to view.

DID I SAY THAT?

A casual listener at a legal proceeding may be impressed with the clarity of what was said, but the reporter is not a casual listener. The reporter hears and must record the false starts, the mistaken references to plaintiff instead of defendant, inaccurate exhibit numbers and dates, and all too often, the unfortunate grammatical errors. Before approaching the reporter with the all-too-familiar "Did I say that?" remember that the reporter is only the mirror that reflects what was actually said, not what was intended to be said.

QUOTE, UNQUOTE

During the course of a deposition, you may have occasion to quote from previous depositions, exhibits, or other written materials. If possible, supply the court reporter with a copy of the document from which you are quoting. When quoting from documents, remember that if it is important enough to quote, it is worth doing so in a fashion that can be heard and understood by everyone, especially the reporter. That being the case, make every attempt to read quotations

at a reasonable pace and clearly delineate, by saying "Quote" and "Unquote," where the quotation begins and where it ends.

OFF THE RECORD/ON THE RECORD

When, and how, to go on the record and off the record can sometimes be confusing.

ATTORNEY 1: *Off the record.*

ATTORNEY 2: *No. I don't want to go off the record.*

ATTORNEY 1: *Well, this is my reporter (indicating reporter).*

The "this" the attorney is referring to is, in fact, an officer of the court, impartial, and no one's property. The reporter's duty is to prepare a full and accurate record of proceedings. Only when ALL counsel agree will the reporter stop reporting the proceedings. At this point, the reporter will indicate in the transcription a parenthetical such as (Off the record.) The reporter will not start writing again until directed to do so by all counsel.

Sometimes, though, a discussion remains off the record beyond counsels' intent. This can be avoided by remembering to tell the reporter to go back on the record. If an important event occurred while off the record, you should verbalize that when you go back on the record; for example: "While we were off record, the witness had an opportunity to confer with her attorney."

METHYL-ETHYL-WHAT?

Through training and continuing education, shorthand reporters, like lawyers and judges, acquire a broad general knowledge; however, in this world of advanced technology, it is difficult to be familiar with every possible subject matter. You have the advantage of having prepared your case and thus have become familiar with its specialized terminologies.

You can help to ensure an accurate transcript by providing the reporter with a glossary of technical terms, if your office has compiled one in preparation of this case. Often, court reporting offices compile case-specific glossaries and can provide a copy for you to furnish reporters at out-of-town depositions to ensure consistency of name and term spellings.

REMEMBER: SPEED KILLS

In an average day, a court reporter will write anywhere from 30,000 to 50,000 words. It is best for everyone that this not occur in the first two hours of a proceeding.

As with other aspects of life, the pace of legal proceedings has picked up over the years. People simply talk faster than they used to. The average rate of speech now is estimated to be 180 to 200 words per minute, or about two and a half words per second. In the course of a deposition, it's not unusual for speech to approach double that rate. Above 225 words per minute, speech tends to become slurred and indistinct, making it more likely that words will be misheard.

Reporters are skilled professionals trained to write at high rates of speed, but this skill, like the engine in your car, isn't there to be utilized at top speed every time out. The points you make with your questions look and sound better when you speak clearly than when you are racing out of control, near the upper range of comprehension.

And while I'm on the subject of the reporter's comfort level, let me remind you that reporters need regular breaks. It's usually better if you pick a good time in your questioning to break rather than pushing the reporter, witness, or other counsel to the point of desperately calling for a break right in the middle of an important point you are trying to make.

TELEPHONIC DEPOSITIONS

Telephonic depositions occur where either the witness, attorneys, and/or the court reporter are participating telephonically. Telephonic depositions can provide significant cost savings and convenience but can pose some special problems as well. Advance planning, a conference operator, and an awareness of time zone differences should result in a timely connection. While Alaska court rules permit oaths to be administered telephonically, this is not necessarily so in all states. When you schedule a telephonic deposition, try to either use an Alaskan court reporter or arrange to have a reporter at the witness's location. If in doubt, verify ahead of time with your court reporter that the oath is going to meet all statutory requirements.

If possible, deliver or fax proposed exhibits to the witness and opposing counsel who are not at your location.

Speaker identification is often confusing over the telephone. Clearly identify yourself at the beginning of the deposition. Be aware that similar sounding voices are difficult to differentiate over the phone.

The rule of speaking one at a time is crucial in telephone depositions. Objections, questions, or answers can vanish if someone else overspeaks them. Unless you have high-end duplexing capabilities, only one voice can be heard at any one time. And try to pick a quiet location – background noises can override all voices.

TECHNOLOGY IS YOUR FRIEND

To put it mildly, technology has revolutionized our lives. Although technology can sometimes be frustrating and intimidating, it provides many efficiencies and capabilities that our legal and court reporting professions simply did not have access to before.

A prime example of that revolution is court reporting realtime technology. As the reporter writes on a shorthand (steno) machine the words being spoken, the words spoken are instantly translated into English and appear on the reporter's realtime screen. If the computer encounters a shorthand stroke it doesn't recognize, it will produce an untranslate or a mistranslate on the screen. Thus, the realtime transcript is a rough draft, not a final product, and the reporter still needs to correct untranslates or mistranslates, punctuation, etc., and proofread before the transcript is in final form.

The rough draft, however, can be furnished quickly after the termination of a deposition, with the final transcript to be provided at a later time. Rough drafts and final transcripts can be furnished in hard copy or electronically over the Internet.

Realtime technology also allows attorneys to connect their laptops with the reporter's laptop. Of course, you need to arrange this with the reporter ahead of time and make sure that you have the appropriate receiving software installed, about which your reporter can advise and assist

you. The realtime transcript can also be streamed to the Internet and viewed by co-counsel, expert witnesses, etc., anywhere in the world.

Once connected, the realtime transcript is then sent to the attorney's laptop, and the capturing software allows the attorney to not only view the transcript as it is being spoken, but to scroll through previous testimony, search for key words, add notations, add electronic paperclips or issue codes. Issue coding is a way of marking testimony according to specific subjects, such as "D" for "damages," "N" for "negligence," "G" for "good testimony," or "L" for "lying."

Realtime technology can be used to synchronize video with the reporter's transcript. One benefit is the ability to print time stamps in transcripts that match the time shown on the videotape. This allows the attorney to quickly find the spot on the videotape that matches the transcript, or vice versa.

Another utilization of this technology is to ask the court reporting office to furnish you with a synchronized video, where the scrolling transcript is displayed on the side of the video screen. With this technology, you can click anywhere in the transcript, and the video immediately begins playing at that spot. When the transcript refers to an exhibit, you can click on the exhibit hyperlink and the full exhibit will be displayed on the screen.

Just think – a synchronized video is a much more effective way of presenting witness testimony at trial than reading from a transcript!

New technologies that benefit the legal and court reporting professions are constantly being developed, but there are some things technology can't do for you, or at least not yet. It can't do your thinking for you, it won't allow you to scroll ahead and see what the next answer will be, and it won't replace careful attention to making the record.

Reporters are the silent performers in the deposition room or courtroom, as they should be. When a reporter does speak up, it is in the best interest of the record to recognize and acknowledge the problem at hand and to make every effort to resolve it. Remember:

VOX AUDITA PERIT, LITERA SCRIPTA MANET*

*THE SPOKEN WORD VANISHES; THE WRITTEN WORD REMAINS