The Care and Feeding of Court Reporters

By Judge Barbara Hanson Nellermoe

Much of our work depends upon creating a clear, clean record for posterity. We depend upon such records to support the evidence establishing a claim or defense, a right or responsibility, an agreement between the parties, or a moment of clarity when lucidity is fleeting. And we strive to preserve such records in a pressure cooker – the courtroom, the conference room, the board room, on the telephone, before a video camera – environments that do not necessarily lend themselves to accurate recall.

Have you ever relived your latest devastating cross-examination in your mind and then choked as you re-read key responses as [unintelligible] in the deposition transcript? Have you seen transcripts that have so many dashes you wonder what the witness's next word would have been?

When your "killer" evidence is on an answering machine tape or a cell phone voice mail, and all you were prepared to do was play it from a portable recorder or cell phone in open court, all I can tell you is pray you do not need to appeal the judgment.

When visiting with court reporters, two anxieties emerge: speakers talk too fast (and at the same time) and the notice of appeal did not reach them timely. Unless you notify the court reporter directly, assume the notice of appeal did not reach the preparer of the record.

A cardinal rule of a clear record gives attention to only one speaker at a time. So ditch your secret Tom Cruise desire to brow-beat Jack Nicholson into submission. Concentrate, instead, on stating a complete and coherent question. Prepare your witness to listen carefully to questions and to wait until the questioner has finished before speaking. Caution the witness to resist anticipation of the question, pause to review the question mentally, and then provide a precise answer to the question. Do not interrupt the witness in mid-sentence. If you need to object or interrupt, the correct procedure is to stand and state "Objection." You have everyone's attention now and, *voila*, the witness stops talking. The court reporter is now focused on you and what you say! Remember, the court reporter cannot record two or more people at once. Nor can the judge listen to two or more people at once. The risk: your point may not be preserved in the record.

If you want to read something verbatim into the record, such as part of an opinion, or a provision of a contract, or testimony from a deposition, force yourself to speak slowly. I suspect lawyers fear that, although this is important to the record, they are boring listeners while they read. In actuality, the person you seek to impress with this reading may be a judge who listens more slowly that you read. Reading authority or evidence into the record slowly has at least two benefits: the judge may actually contemplate and absorb what you think is important here, and the court reporter may not have to interrupt your tempo and ask you to repeat yourself.

During a hearing, do you make a practice of providing a copy of case law to the court to support your argument? If you decide to order a record of this hearing, it is extremely helpful to pass on copies of those cases or statutes to the court reporter. It saves him or her hours of work in proofing the transcript and increases accuracy.

Always get a business card and note in your file the name of the court reporter who took the record of the hearing you attended. Then legal assistants can more efficiently obtain the record directly and avoid unproductive calls that chase down rabbit trails for the elusive but critical pre-trial hearing.

As video deposition production becomes more sophisticated, there are still a couple of things to monitor. Some videos display the written transcript as a subscript. This is very helpful if the witness doesn't speak clearly or the video is of poor quality. The subscripts can help the jury see what the witness is saying while observing his or her demeanor at the same time. But the words are often not exactly what the jury is hearing the witness say. In other words, no one has proofed and compared the two before trial and asked the original reporter to correct the written record to correspond to the spoken record. The jury may not be too bothered by the discrepancies when the differences are minor.

But what about the record on appeal? You really have two choices to remedy this situation. You can insist that the court reporter take the video-oral testimony as it is presented in court – and this really should be your first choice. You may think the court reporter deserves a break; but if you order a record later, the reporter will pay dearly in sweat and tears when trying to piece together a complete record that includes video deposition testimony that may be of poor quality. Alternatively, you can, with the agreement of opposing counsel, hand the court reporter a copy of the testimony on disk in ASCII format to incorporate into the record. Never rely on the video itself for an appellate record. It is extremely awkward to cite it in your brief on appeal and, therefore, is not accepted as part of the appellate record.

When you order a record, you should do so in writing to the court reporter. If you simply rely on filing a request for a record, you run the risk of putting this critical request solely in the hands of a deputy district clerk whose focus is primarily to ministerially file documents. Meanwhile, the reporter's deadline marches on. Always go the second mile and contact the official court reporter directly by email, telephone, or letter to place your order. Then follow-up with a check that meets the terms of the order. Court reporters have so many requests for records that actual preparation of the record does not begin until a deposit is made.

Creating a clear, clean record for posterity is critical. Take care and feed the court reporter accordingly.

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