

DID I SAY THAT?

**The court reporter
preserves the record but ...
you create the record.**

TIPS FOR
MAKING THE
RECORD



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 counsel 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 – all the way to the appellate judge.

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 questioning. We hope this will be helpful to you in creating the record and perhaps even when describing the process to your witnesses.



.....

Q. ARE YOU MARRIED?

A. NO, I'M DIVORCED.

Q. AND WHAT DID YOUR HUSBAND DO
BEFORE YOU DIVORCED HIM?

A. A LOT OF THINGS I DIDN'T KNOW ABOUT.

.....

Awareness of the Record

You are aware of the effect of your courtroom methods during a proceeding, 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.

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.

Dr. Livingstone, I Presume?

Whether it’s a trial or a questioning, unverified presumptions can cause problems. In a questioning, the reporter needs to know who you are, who you represent, and the style of cause.

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



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 ...

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 the ability of participants, including a judge or arbitrator, to follow a line of questioning; so, as much as is humanly possible, it is best 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.

Show and Tell

The marking of exhibits is generally left to the reporter, unless, that is, counsel asks the reporter to follow a specific procedure.

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 questioning: 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.

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.

Know your ABCs and 123s

Another common problem is assuming everyone present is familiar with the acronyms and jargon that you are using. To avoid serving up alphabet soup, it’s important to use the full term the acronym stands for, at least the first time it’s referenced. 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-nine-teen-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.*

Off the Record / On the Record

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

LAWYER 1: *Off the record.*

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

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

The “this” the lawyer 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 transcript the parenthetical (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 counsel’s 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 counsel.”

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. It is up to you to clarify the record. For instance:

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

A. *(no verbal response)*

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.*
- 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.** *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 questioning. 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.

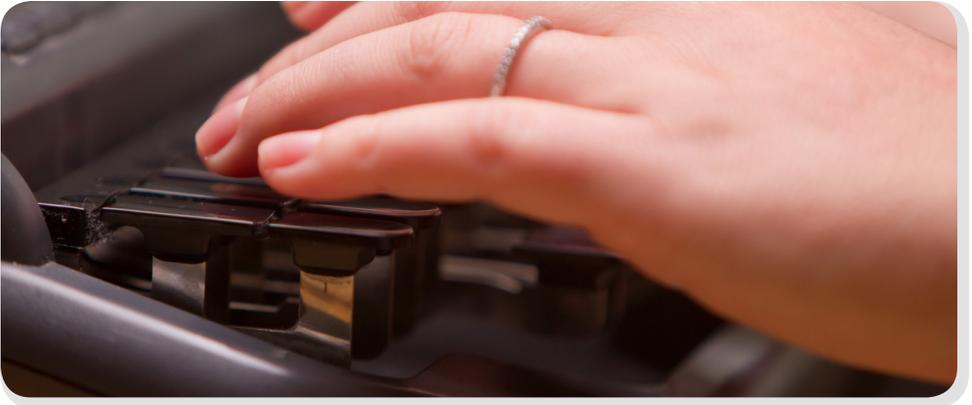
REMEMBER: SPEED KILLS

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 questioning, 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 misspoken or 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.



Quote, Unquote

During the course of a questioning, you may have occasion to quote from previous questionings, 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 - don't speed up to race through the quote - and clearly delineate, by saying "Quote" and "Unquote," where the quotation begins and where it ends.

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 questionings to ensure consistency of name and term spellings.

.....

**Q. DOCTOR, HOW MANY AUTOPSIES HAVE
YOU PEFORMED ON DEAD PEOPLE?**

.....

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 or 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 questioned, 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.*

.....

A. ALL MY AUTOPSIES HAVE BEEN PERFORMED ON DEAD PEOPLE.

.....

To Undertake or Not to Undertake – Is That the Question?

“Will you please undertake to produce” is a key phrase court reporters are attuned to hearing during questionings. This alerts them to the potential need for an undertaking notation in the transcript.

In order to capture the request accurately, the reporter needs to understand not only what is being requested but also whether the undertaking has been granted, given under advisement, or refused. When counsel are clear in summarizing their undertaking request and opposing counsel provide clear responses to that request, the parties will receive a functional transcript record which lists the information requested to aid parties in completing the task requested. It will also be of assistance for any future applications to be made or if further steps need to be taken in order to have the undertaking answered.

Not so Clear:

Q. Would you provide me a copy of that document?

Clearer:

Q. Would you undertake to provide me a copy of that document you received from the Bank of Montreal in April of 2006?

.....

Q. NOW, MRS. JOHNSON, HOW WAS YOUR FIRST MARRIAGE TERMINATED?

A. BY DEATH.

Q. AND BY WHOSE DEATH WAS IT TERMINATED?



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 questioning, 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 counsel 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 counsel's laptop, and the capturing software allows counsel to not only view the transcript as it is being spoken, but to scroll through previous testimony, search for key words, add notations, or issue codes to mark testimony according to specific subjects that you choose.

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, lawyers, jurors, and judges.

New technologies that benefit the legal and court reporting professions are constantly being developed. Working in tandem with your court reporter will enable you to stay at the forefront of new and evolving technology to support and enhance your work process.

Keeping these tips and reminders in mind

for your next proceeding will ensure your record is worthy of the hours, days, or even possibly decades of study ahead of it. Your court reporter is your partner in record preservation. If they do speak up, remember it is in the interest of capturing an accurate and effective record for the days, months or even years to come.

**Vox audita perit,
littera scripta manet**





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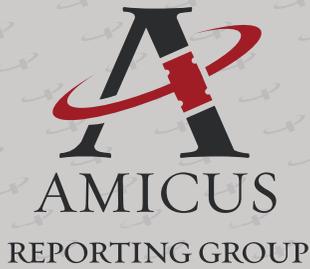


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