considered for this opinion is similar to the situation involved in Public Advisory Opinion No. 10. However, in this case, the client asked the freelance agency owner for an expedited transcript of a deposition. The independent contractor who reported the proceeding was in the hospital recuperating from surgery and, therefore, was unable to prepare the transcript. The agency owner requested a copy of the notes, a computer disk, or both so the agency could prepare an uncertified copy for the client, but the reporter refused.

In accordance with Provision No. 9 of the Code of Professional Ethics, the agency and the reporter should put the needs of the parties in the proceeding above any other concerns. Because the best practice is for the reporter taking the proceeding to prepare the transcript, the firm must give the reporter the opportunity to do so. The reporter must then make every effort to transcribe the proceeding in a timely fashion. When a reporter is unable, is unavailable, or refuses to do the work in a timely fashion, the firm may do what is necessary to ensure that the needs of the parties in the proceeding are met. In the situation described earlier, if the reporter refuses to give a copy of the notes to the agency while knowing that the parties will be harmed by the delay in the transcription, then the refusal would be considered a violation of the Code.

If someone other than the person who reported the proceeding prepares the transcript for the firm, Provision No. 5 requires the firm to prepare an appropriately worded certificate disclosing those circumstances.

For this advisory opinion and others, please visit the NCRA Web site at www.NCRAonline.org. This public advisory opinion reflects the status of the law in most jurisdictions. Members are required to conform to the accepted practices set forth in this public advisory opinion to the extent that such practices are consistent with their own applicable state and local laws, rules, and regulations.

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**On Making the Record:**

**A Plea for Mercy**

**BY DAVID HOLT**

One of our local judges was to speak at a meeting of the Kansas defense bar association, consisting of approximately 250 members; his subject was the record. This judge solicited suggestions from the official reporters here in Wichita. Additional suggestions were sought by e-mail from all reporters across the state by the executive director of the Kansas Court Reporters Association. The suggestions were compiled, and the article below (in a very slightly different form) was prepared and given to the judge.

In addition, the Wichita officials pooled their funds and purchased 200 copies of NCRA’s *Making the Record, A Guide for Attorneys*. We gave the judge 125 copies to distribute to attendees at the meeting; the rest of the copies were retained by the Wichita officials to be offered, as needed, to any attorneys.

This procedure and this article are offered for use by other officials across the country. Sure, an attorney receiving a copy of the pamphlet may never read it or may pitch it into the first wastebasket, but at least no one individual is out a lot of money, and at least all officials can truly say we continue to try — for the litigants, for ourselves, and for all future officials — to improve the taking and making of the record.

Charles Motter, RDR, previously a freelance reporter and now a realtime captioner and CART provider, has also offered a few suggestions with more of a slant toward the freelance market.

TO: COUNSEL
FROM: OFFICIAL COURT REPORTERS
RE: ON MAKING THE RECORD (A Plea for Mercy)

Counsel, if you will be speaking on the record and do not know the reporter,
the chances are he or she also does not know you — most particularly, of course, if you are not local. Before the proceedings commence, please introduce yourself to the reporter, and offer him or her one of your business cards. That beginning gesture is very much appreciated!

Virtually everything in today’s world moves at a much faster pace than 20 years ago — shoot, even 20 minutes ago. Studies have proven speech is no exception. Counsel, please, slow down if you know you speak rapidly. Your ability to modulate the speed at which you speak is certainly more quickly accomplished than any reporter’s ability to spontaneously write 100 words or more per minute faster. If one reporter has previously asked you to speak more slowly, honestly, you are, perhaps unknowingly, speaking too rapidly, and you should heed the request and make the effort to slow down!

A reporter has shared that once, when the reporter requested an attorney during a recess to please try to slow down, the attorney advised the reporter that the attorney was only concerned with what the jury was getting and that the attorney frankly did not care about the record. You may know your case inside and out; counsel as significant to his or her case must surely be considered by the reporter from your examination.

Please do not look straight down at notes and continue speaking to the table. Reporters frequently like to look at your notes and continue speaking to the table.

When examining a non-English-speaking witness, do not go through the interpreter with questions such as, “Ask him to tell you where he was at that time,” instead of “Where were you at that time?” The interpreter is not the witness.

If prospective jurors or witnesses are not letting you complete your question before responding, please caution them to stop — and, please, do not speak over the responses. Habitually interrupting a witness’s lengthy answer with “uh-huh,” “mm-hmm,” “all right,” and “okay” is problematic for the reporter and should be avoided. Also, counsel should always clarify whether a witness’s or juror’s “Uh-huh,” “Huh-uh,” “Mm-hmm,” “Hmm-mm,” or “Nuh-uh” grunt means “Yes” or “No,” and counsel should continue to remind those persons to give an intelligible response using actual words!

Please request all soft-spoken persons — be they witnesses or prospective jurors — to speak up. On voir dire, a prospective juror can frequently be in the back of the courtroom and may not be visible to the reporter. Any juror may answer in a low voice, which some- times can be difficult to track, and you just can’t remember to make the effort to raise your voice, please use any microphones that are available. The better practice, however, is to remember to keep the same audible-to-all volume in your voice from the beginning to the end of all your questions or statements as microphones certainly are not always available and acoustics are not always the best.

Please do not look straight down at notes and continue speaking to the table. Reporters frequently like to look at your mouths as you are speaking, so also avoid turning your back on the reporter while you are speaking. (Full beards covering the lips can definitely be a problem.) Also, pay attention to your witnesses. Do not let them put their hands up by or over their mouth, for example. Counsel, you should also remember not to do this. Simply put, please be conscious of the record at all times.

If the reporter in your district administers oaths, upon completion of the oath, please give him or her time to be seated and at the machine before you start your first question.

Regarding the entry of exhibits, counsel should always prepare a log of all exhibits (which they should have pre-marked) and provide a copy of that log to the judge or a clerk and the reporter. The best procedure for noting the offering and admission of exhibits on this log is for the court to keep track of this. A court reporter’s hands are busy — and if counsel, for example, offers Exhibits 2, 7, 9, 15, 23, 38, 41, 56, 73, opposing counsel has no objection, the court says the exhibits will be admitted, and, boom, offering counsel starts his or her next question, it is impossible to get those exhibits contemporaneously noted as admitted by the reporter on the log. The reporter may attempt to make some type of mark on or shorthand stroke within their notes that they will have to search for at the next recess and then make the notation of the numbers which were admitted. If the reporter is expected to keep the exhibit log accurate, time should be given to the reporter in the courtroom to make the correct notations on the log before his or her hands are needed back on the shorthand machine.

When reading from a case citation, please provide, completely and distinctly, the full case citation. (State vs. Henry Jones, 231 Kansas 792, as an example.) If there is an unusual spelling for any name in the caption of the case, providing that spelling, again at a reasonable speed, is also greatly appreciated. Also, providing the spelling of the names of authors of textbooks, learned treatises, etc., to which you may refer is definitely appreciated. Frequently in lengthy cases — for example, medical malpractice — counsel will have copies for the court of cases or excerpts from treatises they will be citing. Every reporter would be most grateful if he or she is given a courtesy copy as well, perhaps by a paralegal at the first recess after the reading has occurred. Also, anything read into the record must surely be considered by counsel as significant to his or her case.
and something which he or she wishes the jury or the court to grasp, so this is not the time to show everyone how fast you can read.

Counsel, please do not chew gum or allow others to do so. Most courtrooms will have a tissue box at a desk somewhere. Please grab a tissue and offer it to a witness who might be speaking with gum in his or her mouth — if the reporter has not already accomplished this before the oath is administered!

Extraneous noises, such as crying babies, jiggling of change in a pocket, clicking of pens, trimming of fingernails, loud flipping of pages, and so forth, are annoying and can break a reporter’s concentration almost instantly.

Counsel, please consult with your criminal-defendant client if he or she has prepared something in writing which he or she will be reading to the court at allocution. If such has been prepared, make a copy to give to the court reporter before going into the courtroom. Frequently this is a very emotion-al time. Interrupting a nervous, speed-reading, or unintelligible, sobbing defendant at allocution is not exactly comfortable for the reporter.

In closing, everyone present, at every proceeding, in every courtroom in this country, is trying to do the best job possible, either for the individual client(s) or for all concerned. Sincerely, court reporters have the right of everyone to the best record possible as their paramount concern. If they did not, they would not be harping on you about some of their pet peeves mentioned here. The court reporter is ultimately, however, only responsible for taking the record; you and all other speaking persons will be making the record. The National Court Reporters Association has produced a pamphlet under that very title, “Making the Record,” which offers other very helpful information. If a reporter ever offers you a copy, he or she is attempting to politely tell you something. For the benefit of all your clients — and, yes, for the benefit of official court reporters nationwide — accept it and read it.

Please.

TO: Counsel
FROM: Freelance Reporters

Please extend professional courtesy to the reporter. In a deposition, please ask the reporter for his or her input on mid-course schedule changes. For example, don’t just “order in lunch and continue” without consulting with the reporter. We are human, and there very well may be health issues we don’t want to discuss that make it necessary for us to have lunch, leaving aside the fact that to take a record when someone is attempting to speak with a mouthful of food is, at best, difficult. Ten or 15 minutes taken to eat a quick bite will make for a much happier reporter than one who is treated as if he or she has no voice.

Additionally, for a reporter not to be asked for input on extending the day past normal work hours is something that
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will not win you a lot of points. We have families and outside lives with obligations, just as you do, and we will long remember those of you who do not extend us the common courtesy of being asked if we can accommodate such a change.

If you have any idea that you might need a transcript more quickly than the normal delivery, please advise the person with whom you speak when booking the job of that request. There is nothing more frustrating than to arrive at a deposition and be told, "I need this as soon as possible," without any prior notification. The nature of our business is that we work with many clients, and it very well may be that such a request is the second or third in a row within as many days. The old adage, "Lack of prior planning on your part does not create an emergency on my part" holds true.

Though reporting has changed, and with technology transcripts can be delivered more quickly, we cannot simply "press a button and print the transcript." Any reporter worth hiring is going to insist that the transcript they affix their signature to be carefully edited and proofread. A good rule of thumb to use is that there is at least a one-to-one ratio in terms of the amount of time spent in taking the record to the amount of time needed to prepare the transcript. In other words, if you have a daylong deposition, it will take at least a day to prepare the transcript. That rule of thumb is based upon ordinary testimony on a common subject matter. If, on the other hand, the subject matter is highly technical, with lots of research required by the reporter, the time could easily be extended.

Last, please pay the reporter. We were hired by you, the attorney, not by your client. To be told, when attempting to collect a past-due account, "My client didn’t pay me" or "I lost the case" does not impact the fact that we performed the services and delivered a product for which we are entitled to be paid. Likewise, do not ask us to contact your client directly for payment; our agreement (and very likely only contact) is with you.

David Holt, RMR, CRR, has been an official for 33 years. He can be reached at dgholt@dc18.org.