

Making the Record

A Guide for Attorneys

The Association for Court Reporters and Captioners

REVISED MAY 2019

The first edition of *Making the Record* was published by the National Court Reporters Association in 1937. The booklet has undergone several revisions since it first appeared, and hundreds of thousands of copies have been distributed over the years to attorneys, law students, judges, educators, and others who have an interest in the orderly resolution of disputes and the cause of justice. Its purpose was and remains to help the bench and bar better understand the factors that help make a clear record.

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Foreword

The reporter's transcript is an important document before, during, and after a trial. The transcript and its electronic version are 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. *Making the Record* provides numerous 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 booklet will help you remember to take the greatest care in making the record.

National Court Reporters Association
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You as record-maker



You, as counsel, can have an excellent theory and a winning strategy, but you must match preparation with a careful regard for the record so that it can accurately and completely reflect the merit of your case (to a jury or the appellate judge).

Creating a good record during a deposition or other pretrial matter can be just as important as the record you make during trial. Often a witness becomes unavailable for a myriad of reasons. If this happens, counsel are forced to rely on the record they created during the deposition.

Awareness of the record

You are aware of the effect your courtroom methods have on the jury. But do you also remember that your words are being reported? The transcript may be read by opposing counsel, appellate judges, legal scholars, future generations of law students — maybe even by Supreme Court justices.

When you keep this fact in mind, you take a big step toward creating an effective, usable record. Remembering that your words are being reported for the record will help you choose them more carefully and state them more clearly. You will tend to eliminate duplication of statements and repetition of questions. Your number of false starts will drop dramatically. You will tend to present your arguments and evidence more logically.

In short, you will look good, not only in the transcript but in court.

Dr. Livingstone, I presume?

Whether it's a trial or a deposition, unverified presumptions can cause problems. The reporter needs to know who you are, whom you represent, and the caption of the case. This will prevent you from being referred to in the transcript as an unidentified speaker.

Matters of identification are especially important in multiple-counsel cases. Reporters usually are good at associating names with faces, but they can't do it if they don't get the name right in the first place. You can help ensure a clean record if you identify yourself to the reporter when you rise to speak in a multiple-counsel case.

In today's world of technology, telephonic hearings are commonplace. It is imperative to identify yourself each time you speak during a telephonic proceeding.

What's in a name?

Two things are 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. But many names sound alike: Terry/Perry, Egan/Regan, Morris/Norris, Hoffman/Coffman, Corcoran/Cochran. Such pairs sound similar and can be mistaken by the reporter and others as well, especially when they show up in the same case.

Proper names should be spelled out or enunciated slowly and clearly so there can be no doubt. 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 once. Imagine, for example, a heated cross-examination. Counsel asks a question. Before it is completed, the witness begins the answer. At the same time, opposing counsel objects and the court starts to rule. 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 and a need to hear and understand. What can't be heard and understood can't be reported. Moreover, if the reporter didn't hear it, most likely other participants and the jury didn't hear it either. The proceeding at this point might be stopped and everyone's train of thought derailed.

This sort of problem can affect a jury's ability to follow a line of questioning. An attorney who continually interrupts the witness's answers should try hard to overcome the habit. Also, if you have a witness who anticipates your questions and starts answering before you are through asking, 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.

The basics of courtroom speech etiquette are quite simple: one at a time. There are very few occasions when overlapping speech serves the interests of justice or a client.

Know your ABCs

You've been very kind and spelled the acronym for the reporter, but when you read the transcript, BART has become DARP. Even the spelling of names and other words must be done carefully. M and N, B and D and V, F and S, and P and T are likely to cause confusion. To eliminate doubt, use an identifying name to clarify, such as M as in Mary, N as in Nathan, P as in Paul, T as in Thomas, etc.

Know your 1-2-3s

Numbers are no less subject to confusion than names or letters. For example, when you say forty-one-oh-six, you might mean 41.06, 4,106 or 40,106 — all with or without a dollar sign.

Q. *When did the accident happen?*
A. *One twenty. (A.M.? P.M.? January 20?)*
Q. *What were the damages?*
A. *One twenty. ($1.20? $120? $120,000?)*

Likewise, two-twenty could refer to an amount, a street number, cubic centimeters, or 20 minutes past 2 o' clock. October-twenty-fourteen means October 2014 — except when someone intends it to mean October 20, '14.

Let everyone know what you mean by stating figures in full, followed by the subject they represent. For example, forty-one-dollars-six-cents; two-point-two percent; six-o-five p.m.; or October-twentieth-twenty-fourteen.

Show and tell

There is no standard national procedure for marking exhibits. What is customary in one locale might be heresy in another. The marking of exhibits generally is left to the reporter unless the judge or counsel asks the reporter to follow a specific procedure. In some jurisdictions, the clerk or bailiff does the job.

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

- When offering an exhibit, briefly but adequately identify it by stating both the date and the identifying features. Two or more items often bear the same date, and reference to them by date alone may not be sufficient to clarify the record.
- When referring to an exhibit, identify the item specifically by exhibit number. You also should clarify a witness's vague reference to "that exhibit."
- When you withdraw an exhibit or substitute a verified copy, state for the record that you are doing so.
- When introducing a previously marked exhibit, indicate where, when, and by whom it was marked.
- If you have a large number of exhibits to be entered into the record, let the reporter know in advance.
- Finally, give the reporter enough time to mark the exhibit and to make a note in the record to that effect before proceeding with the examination.

Body language

The simple phrase "let the record show" or its equivalent should be used to clarify every important gesture that witnesses make. By doing so, you can convert otherwise meaningless testimony into a coherent account. Such answers with gestures as "over to about there," "about that long," "he had a bruise here about that big and another one here not quite as large," or "that man sitting there" become meaningless when read.

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

Q. *How far away from the defendant were you standing?*
A. *From where I'm sitting to about there.*
Mr. BROWN: *Let the record show that the witness is indicating to the edge of the jury box, a distance of about nine feet.*

◆

Q. *When you saw the plaintiff after the accident, did you see any bruises on his face?*
A. *Yes.*
Q. *Where were they?*
A. *He has a bruise here about that big and another one here not quite as large.*
MR. SMITH: *For the record, the witness is first indicating a bruise on the right cheek about two inches long and one on the right side of the neck.*
Q. *You said the bruise on the neck was not quite as large. How large was it, would you say?*
A. *About that large.*
MR. SMITH: *Indicating about one inch.*

◆

Q. *Do you see the man you saw running from the store in this courtroom?*
A. *Yes.*
Q. *Can you point him out?*
A. *Yes. That man sitting there.*
MR. JOHNSON: *Let the record show that the witness has identified the defendant.*

If the witness nods in answer to a question, the notation "(witness nods)" might appear in the record if a spoken answer is not forthcoming. Here again, remember that you make the record. It would be improper for the reporter to interpret the gesture.

Electronic presentation of evidence makes it easy to slip into poor record-making habits. Everyone can see the document or photo, and you can point to or highlight a portion. Unless these areas are preserved electronically or identified for the record, the exchange can become meaningless.

Wrong

Q. *Do you see this document?*
A. *Yes.*
Q. *Does it bear any of your markings?*
A. *Yes, right there.*

Right

Q. *Do you see this document that has been marked as Exhibit 12?*
A. *Yes.*

Q. *Does it bear any of your markings?*
A. *Yes, right there.*
Q. *Are you pointing to initials on the left margin of the first page?*

The out-of-towners

The reporter's ear becomes attuned through experience to the speech patterns and accents of many nationalities, but the reporter often needs help from the court and counsel to decipher testimony of foreign witnesses. It generally is sufficient for you and the court to gather the gist of the answers — the thought the witness is trying to convey — but the reporter must, for the record, identify and capture all the words. This process takes a fraction of a second longer than understanding the thought. Especially with a foreign witness, you should avoid crowding the answer with your next question.

Using an interpreter can cause special problems. 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:

MS. JENSEN: *Ask the witness to tell us what happened then.*
THE INTERPRETER: *He says he hit him and then he hit back and finally he hit and knocked him down.*

This is colloquy between counsel and the interpreter and 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, as follows:

Q. *Tell us what happened then.*
A. *He hit me, and then I hit him back, and finally he hit me and knocked me down.*

When you have a witness who speaks some English, you can still request the use of a competent official interpreter. However, the judge may prefer to have the witness testify in English. The decision to use an interpreter is up to the court. Using a computerized realtime reporter in such situations often clarifies for everyone what is being said.

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, 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.

Quote, unquote

During the course of trial, you might find occasion to quote from citations, depositions, or other written materials. Almost everyone has a tough time reading aloud with accuracy. Keep in mind that if it is important enough to quote, it is worth doing so in a fashion that can be heard and understood by everyone. The ability to speed-read is an asset, but not in court.

When quoting, give the proper reference, and indicate where the quote begins and ends by saying "quote" and "unquote." When you read testimony into the record, include the words "question" and "answer."

Reporters spend a lot of time verifying excerpts from cases cited during the course of a trial or argument. You can greatly expedite the transcription process by providing the reporter and the court a copy of the quoted materials.

Off the record

MR. BRAUN: *Off the record.*

MR. JONES: *No, I don't want to go off the record.*

MR. BRAUN: *Well, this is my reporter…*

The "this" Mr. Braun refers to is in fact an officer of the court, impartial, and the property of no one. The reporter's duty is to prepare a full and accurate record of proceedings. In most jurisdictions, only when all counsel agree will the reporter stop writing. At this point, the reporter will indicate in the transcript, "(discussion held off the record.)." The reporter will not start writing again until directed to do so by all counsel.

In the courtroom, of course, the judge has the final say. Sometimes a discussion remains off the record beyond the court or counsel's intent. This can be avoided by remembering to tell the reporter to go back on the record.

Objection as to form

When objecting, don't be at a loss for words and resort to hand signals or head nods in the general direction of the reporter. Instead, simply state the fact that you object, the grounds for your objection, and, where permitted, your argument. Doing so concisely makes it possible for the judge to rule promptly and for everyone to understand what is happening.

Methyl-ethyl-what?

Through training and continuous education, court reporters, like lawyers and judges, acquire broad general knowledge. However, in this world of advanced technologies, it is difficult to be familiar with every possible subject matter.

You have the advantage of having prepared your case and thus become familiar with its specialized terminologies. A reporter who just ended an asbestosis case will not be as prepared for the metallurgical terms that have become like old friends to you during your preparation.

You can help ensure an accurate transcript — and even more so with a realtime display — by providing the reporter with a glossary of technical terms and names. This will acquaint the reporter with the terminology of the case and minimize interruptions for clarification during the proceedings.

Remember, speed kills

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

As with other aspects of life, the pace of legal proceeding has increased over the years. People simply talk faster than they used to. The average rate of speech now is estimated to be 150 to 160 words per minute, or about two and one-half words per second. In the heat of trial or deposition, it's not unusual for speech to approach double that rate. At around 200 words and above per minute, speech tends to become slurred and indistinct, making it more likely that words will be misheard.

This isn't to apologize for the skills of the court reporter. For example, NCRA's Registered Professional Reporter exam includes three dictations of five minutes each at 180, 200, and 225 words per minute. That's a rate of three to almost four words per second every second for five solid minutes. The Registered Merit Reporter exam has portions at 200, 240, and 260 words per minute.

But this skill, like the engine in your car, isn't there to be run at top speed every time. The points you make with your questions and your arguments look and

sound better when you speak clearly rather than when you are racing out of control near the upper range of comprehension.

Speed can greatly affect the accuracy of a realtime transcript. While the court reporter may be able to hang on and read through any missed fingering at 250 words per minute, all it takes is one wrong key and the computer cannot translate accurately. If you notice a degradation in the realtime quality, it may be due to talking too rapidly.

Choosing a reporter

In most jurisdictions, you have the right to select your freelance reporters for depositions or other private reporting functions. NCRA conducts several competency examinations for its members. To help determine whether reporters are qualified, ask if they are tested Registered Professional Reporters, Registered Merit Reporters, or Registered Diplomate Reporters. For realtime translation, ask for Certified Realtime Reporters. In addition, some state associations and the United States Court Reporters Association conduct their own competency examinations.

Several states require licensing, often referred to as Certified Shorthand Reporter tests. Standards for passing such exams vary from state to state, but possession of a CSR license is another clue to a reporter's abilities.

Finding a reporter locally should not be difficult. Ask your colleagues for recommendations, and remember to satisfy yourself about the reporter's qualifications.

When you need a reporter away from home, ask your local reporter for a referral, or contact an attorney or bar group in the area where you need a reporter. If you have frequent need for out-of-town reporting services, you can find reporter listings and credentials in the online *NCRA Sourcebook*, at *NCRASourcebook.com*. The online version of the *NCRA Sourcebook* helps you schedule a deposition in a matter of minutes with a reporter who offers the services you require.

NCRA's certifications

NCRA certifications have set the standard for excellence since 1935, when NCRA first established a certification program to individually recognize the competence of court reporters.

RPR (Registered Professional Reporter): NCRA considers the RPR its entry-level designation, suitable for reporters who possess the knowledge and skill to produce a verbatim record of proceedings, in addition to having a grasp of reporter-related terms and technology. The RPR comprises both a written and skills test.

RMR (Registered Merit Reporter): NCRA considers the RMR to be the next step to advancing a court reporter's skills. Consisting of a skills test only, the RMR is designed to test speeds of 200 wpm of literary dictation, 240 wpm of jury charge, and 260 wpm of testimony, also known as Q&A. Candidates must attain 95 percent accuracy on each leg to pass.

RDR (Registered Diplomate Reporter): NCRA considers the RDR to be the epitome of achievement for court reporting test candidates. The RDR tests the court reporter's organizational and practical skills through a written test.

CRR (Certified Realtime Reporter): The CRR test can be taken by a Registered Professional Reporter. Candidates must be able to produce a realtime translation, that is, an accurate, simultaneous translation and display of live proceedings using computer-aided translation. Test candidates must realtime a recorded five-minute, two-voice Q&A segment at 96 percent accuracy to earn this certification.

CRC (Certified Realtime Captioner): The CRC is an entry-level exam that certifies a captioner's ability to produce accurate, simultaneous translation and display of live proceedings. The test requires that candidates be able to use the appropriate software to create captions. The three steps for earning the CRC include taking the CRC Workshop, taking and passing a skills test, and taking and passing a written knowledge test.

CLVS (Certified Legal Video Specialist): The CLVS certification recognizes the role of the legal videographer in the deposition by providing them with best practices in producing videos as supplemental evidence for court. Through the CLVS program, legal videographers learn to work with court reporters during depositions.

For a realtime, call...

Reporters apply modern technology through computer-aided transcription, commonly referred to as CAT. Using a computerized steno machine, reporters make a digital record of the keystrokes on a computer disk or an internal memory unit. After the proceeding ends, these digitized notes are loaded into a computer, which translates them into text.

The text is checked for untranslates (which appear as stenotype notes on the computer screen), corrected, and printed out. Proofreading, checking of citations, and other verification procedures continue to be part of the reporter's responsibility.

Most CAT systems can produce a translation from stenotype notes almost instantaneously. This is called realtime translation. Realtime is provided by specialized reporters in a variety of environments.

Captioners have provided this service for many years to assist people who are deaf or hard of hearing in the form of closed captions on television broadcasts. Communication Access Realtime Translation (CART) is provided in settings such as schools, offices, churches, and theaters to assist in communication for people who are deaf or hard of hearing.

Many court reporters or Certified Realtime Reporters provide realtime services to the bench and bar in courtroom or deposition proceedings to allow for instant access to the record to assist in rulings, cross-examination of a witness by counsel, and record clarification.

Besides providing greater access to the justice system, the computerized transcript affords the court and attorneys the ability to search the transcript automatically for keywords and phrases, thus greatly enhancing the ability to cross-check witnesses' testimony for inconsistencies. The computer-aided transcript can be telecommunicated from one site to another, it can be entered into a database for use in litigation support, and it can be synchronized with contemporaneous videotape or digital audiotape.

Finally, the data collected by the reporter in the course of reporting a proceeding can be fed into a courtwide computer system to aid in the management of courthouse records.

Lights, camera…



Videotaped depositions along with a reporter's transcript are being used more frequently and effectively in court. Proper use of this visual medium requires special care and knowledge.

A carelessly made videotape might be disallowed as evidence or, if allowed, may damage rather than help a case. Recognizing the importance of this medium and the need for high standard in its use, in 1977, NCRA began conducting videotape workshops. In 1984, the program evolved to include a certification exam as a mark of competence in the field. Certified Legal Video Specialists are trained in equipment selection and use, camera techniques, and rules of evidence.

The more experience you have with videotape, the more readily you will see the value of having a contemporaneous written record made with the videotape

deposition. Searching a videotape for a specific reference is far more time-consuming and troublesome than searching a printed transcript. Having a transcript typed from the tape's soundtrack likewise takes an inordinate amount of time and allows for the introduction of time-wasting and misleading errors. Some court reporting firms even offer videotaped depositions with embedded transcript captions for ease of use by attorneys.

For more information about this program, visit *NCRA.org/CLVS*.

To find Certified Legal Video Specialists in your area, visit *NCRASourcebook.com*.

The National Court Reporters Association

NCRA was founded in 1899. It is committed to serving its members, the public, the bench, and the bar through programs that promote excellence in court reporting.

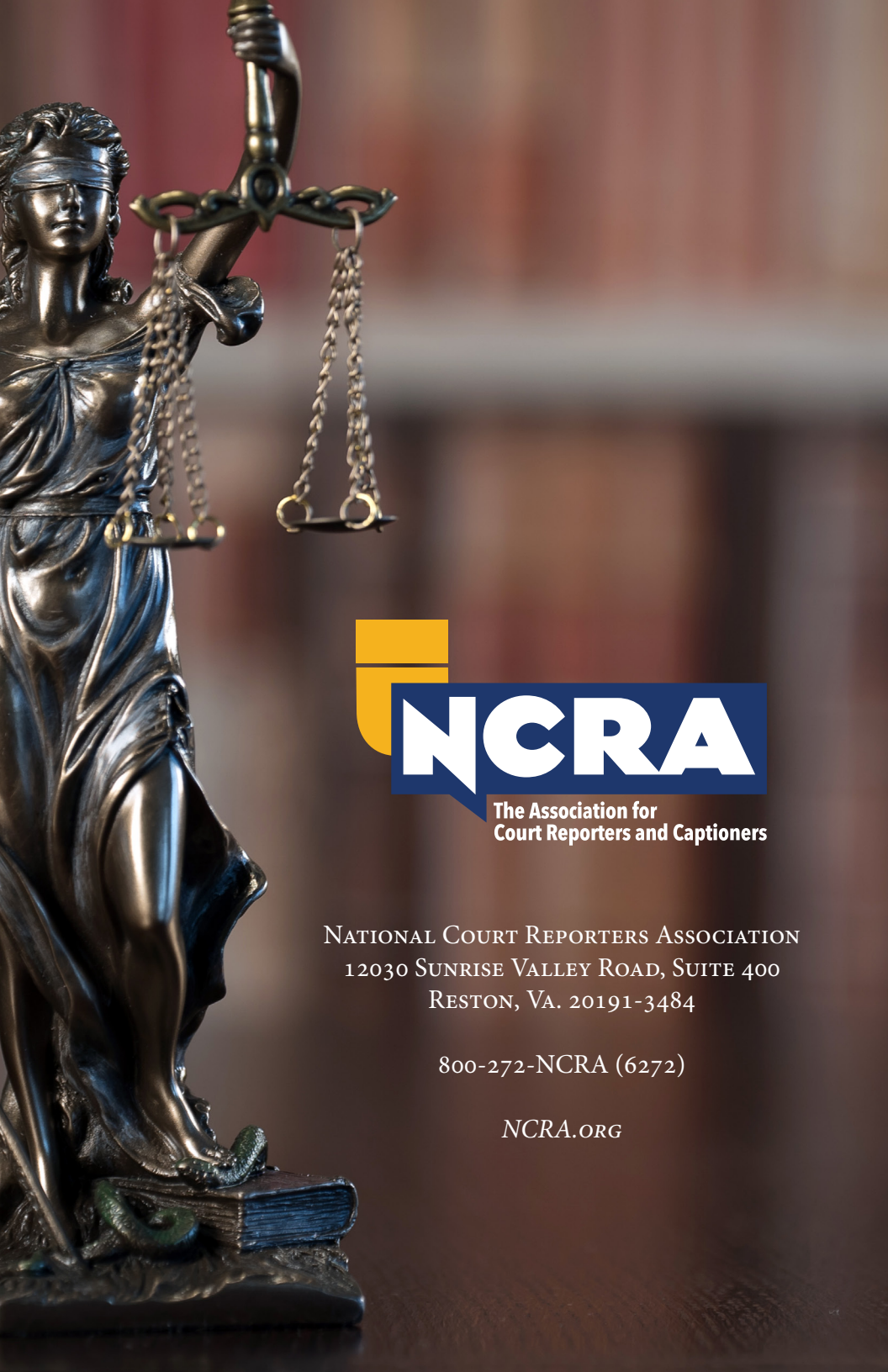
Many of NCRA's reporter members have received certification as Registered Professional Reporters. To earn RPR status, reporters must pass both skills and written knowledge tests. Skills tests are taken online with several testing opportunities throughout the year. The written knowledge tests are offered up to four times per year at Pearson VUE Professional Centers across the nation. To remain RPRs, reporters must participate in NCRA-approved continuing education programs.

NCRA's continuing education program is accredited by the Accrediting Council for Continuing Education and Training, an organization designated by the U.S. Department of Education as a nationally recognized accrediting agency.

NCRA also offers a Registered Merit Reporter designation. This exam is structured similarly to the RPR skills test but is given at higher speeds. There is also the Registered Diplomate Reporter, which is the ultimate achievement by examination for a reporter.

NCRA's other educational tracks for reporters include the Certified Realtime Captioner, the Certified Realtime Reporter, the Certified Legal Video Specialist, and the Trial Presentation Professional certificate.

NCRA is a clearinghouse of information about reporters and reporting technology. If you have questions about the reporting profession, reporter technology, or court reporting as a career, contact NCRA at 12030 Sunrise Valley Drive, Suite 400, Reston, Va. 20191-3484; call 800-272-6272; fax 703-391-0629; email *msic@ncra.org*; or visit *NCRA.org*.



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