**[Ex 2-3c] 2006-10-11 791068b October 11 2006 Texas Senate Hearing on Jurisprudence**

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Thank you, Mr. Chairman and the Senators for allowing us to be here today, and I only have one thing. I'm Glenda Fuller, and I am the current Legislative Chair for the Texas Court Reporters Association. We've covered the waterfront on this, so I really only have one thing, and that's to the accountability.

Currently, court reporters in Texas have to be certified, and they are accountable for their records to the public. If we make a major mistake, or we do have a reporter, as in all professions, that might not live up to the standards that they should, just like sometimes lawyers don't and judges don't, and they're accountable to their different boards, court reporters are accountable also. And they can lose their license and have lost their license.

They can be sued and have been sued. They can be put in jail and have been put in jail. So court reporters are accountable.

And back to the question of who owns a record, if you wanted a typed record off of CourtSmart or another one, you would still pay for that record. It wouldn't be given to you free if you want it transcribed. Thank you, sir, for your time.

Thank you. Okay. Thank you both very much.

I appreciate you being here. Jody Hughes, I see you checked, do you wish to testify? You didn't check either yes or no. You checked if needed.

Do you feel like you're needed? I'd leave that question to the committee. We'd be pleased to have you say whatever you'd like to say. I'll say a few words if it's all right.

Okay. You bet. You're welcome to do that.

Hi, Mr. Chairman, members of the committee. I'm Jody Hughes. I'm the Rules Attorney for the Texas Supreme Court.

I don't really want to try to weigh in on this issue, so to speak, between traditional court reporters and electronic reporters other than . . . Well, that's the purpose of the meeting this morning. I understand. But as a resource witness, obviously, with the court, I think the court's position is to sort of be neutral on this and not be advocating one or the other.

But I would observe that, at least in my own observations, these are both tools, and any tool can be used well or used less well, and the results will depend on who's using it and the circumstances. And just my observation would be there are certainly occasions, probably the capital murder trial was one example, where it's . . . no matter what the technology advances are going to be, it's going to be difficult or impractical to ever replace having a live person there to be able to deal with Fort Dyer and things like that. There are other applications where an electronic recording can probably do a good job, particularly if there's not an expectation that an appeal will be taken and that the cost savings that would result from not having to prepare a transcript, if no appeal is going to be taken, might be a benefit.

One other thing I would just . . . Could you explain that to me? What would be the benefit of an electronic recording of a matter that's not expected to be appealed? Well, because you might not know until after the matter is wrapped up, and if you just have an electronic recording made, my understanding of the testimony is that the cost for that, if you're not paying someone, if it's just the cost of a CD or whatever it would be, audiotapes, there's a minimal cost expended there. You don't have to go ahead in advance and expend the cost of having a person attending and making a transcript if, in the end, no appeal is going to be taken, but in a lot of cases, as you know, you're not going to know that in advance. The other thing I would just point out, I guess these are still being called pilot projects, but the court revamped its sort of format rule for electronic recordings.

We had two counties, Hardin County and Jasper County, that were very interested in obtaining permission to go forward with electronic recording, and I think in both instances, as I understood it, it was in part due to resource constraints, and I don't know what their experience has been with these. I know they were very eager to get them approved. We did approve them back in February.

I'm happy to leave copies of our rules. Jasper and Hardin? Yes, sir, and I'll leave copies of these with the committee of our orders, but I would just suggest that at some point it might be worth the committee's time to check with them and see what their experience has been. I do not know what that's been.

Mr. Chairman? Senator Crowley. One quick question. I just was curious.

Have you ever practiced in a state that utilized electronic recording as the primary means? No, sir. I've practiced only in Texas as an appellate attorney, and I've done a number of appeals. I've never done an appeal that had an electronic recording, so I have no personal experience with it.

Okay. Thanks. All right.

Anything else? Thank you very much for being here, Mr. Hughes. Thank you, Mr. Chairman. We appreciate your contribution.

Judge Delaney, about whom we've heard a great deal this morning? I live. Do you want to identify yourself and who you represent? Good morning. My name is John Delaney.

You went to Princeton University. We already got that. I regret that.

Thank you so much for giving me the chance to be here today. I've been making notes as we went through, trying not to re-plow old ground, but to give you a capsule on my experience with the issue might be helpful. I was appointed to the 272nd District Court in Brazos County in January of 1984.

By October, well, the summer of 1989, I decided that I wanted to experiment with this thing called electronic recording because of some unsatisfactory history with employing and retaining shorthand reporters in our little then semi-rural county. So I applied for and got permission from the Supreme Court on the one hand for the civil cases and the Court of Criminal Appeals on the other for the criminal cases that summer. And in the fall of 1989, our Commissioner's Court voted five to nothing to expend $10,000 to outfit our courtroom with mics strategically placed, all appropriate desks, the recording equipment, a backup piece of recording equipment, et cetera, et cetera.

We commenced operating then in October of 1989 and did so continuously through the end of 2000 when I left office. So that's 11 years of continuous experience with electronic recording as the medium. I think one case was recorded or taken down with the use of a stenographic reporter during that period because criminal defendants had the option and still have the option under the Court of Criminal Appeals rules to veto electronic in favor of shorthand.

Okay, that's my experience. Was I satisfied with it? 100%. I would say 98%.

Would I do it again if I had the chance? 100%. I definitely would. Does the Texas legislature, in my view, need to give all the judges of the courts of record in this state the freedom, the choice, 100%, I say.

Turn that on its head. What prevails in the state of Texas right now, and you're not going to like this word, is a legal monopoly that favors one court reporter-assisted technology. It's always wedded to the human being using shorthand strokes as opposed to a human being using a device like this.

We should not be in the business of perpetuating legal monopolies that favor one form of technology over another. The world's come too far too fast. The statute, section 52.041 of the Texas government code, was enacted in 1911, according to my research, which for the first time gave trial court judges in the state of Texas not only the authority but the obligation to appoint a shorthand reporter.

In those days, they wrote with pens. They didn't have steno-writing machines, much less real-time computer-assisted transcription. Well, I say, bully for them that they have come so far.

They deserve enormous credit for having kept up technologically in advance their method as far as they have. But I depart from them when they say that electronic is inherently undesirable, subject to failed events, and so forth, while admitting, candidly, that every system has its records of failure. I don't want to sit here and condemn the court reporter methodology, the stenographic court reporter methodology, by reciting a litany of failures.

It's unproductive to go down that track in pointing fingers of failures. Every technology has had its failures. At one time, people stood on a hillside in Kitty Hawk, North Carolina, and said, that thing's never going to work.

And then it did. And somebody else said, it ain't going to work if they make them out of metal. And they did.

And all that I ask is to relax the monopoly, like the federal government has done. You ask about studies. I wish that— Senator Harris has a question for you.

Yes, Senator Harris. I'm all yours. Well, Judge, apparently, if I'm understanding you correctly, the Supreme Court granted permission for the system to be used in your courtroom as to civil cases.

And the Criminal Court of Appeals also gave permission, save and except in the situation where the defendant objected to the use of the electronics. Or the prosecutor. Both sides had the right to object, exactly so.

Okay. So, in turn, what you're telling us, if I'm understanding correctly, is that under current Texas law, any judge can make an application to the Supreme Court and to the Criminal Court of Appeals, as far as district courts, and I would think also as to county courts, as to using this technology in a court can grant it. I mean, the appellate courts apparently have granted to you, I presume to some other judges.

The Court of Criminal Appeals stopped granting this permission in early 90s, after they had granted it in Dallas County, Brazos County, and Montgomery County. Now, that's the latest knowledge I have. I don't think it's extended beyond those three counties.

I talked to a former chief justice of the court, and he told me they felt like it was a legislative responsibility, and they had stretched the envelope as far as they could in writing out on this pilot project tree. Now, Judge Laney, when I look at our district courts nowadays, particularly in the urban areas, those courts now have become specialized. You have your criminal district courts, your civil district courts, and in turn, you have your domestic relation district courts.

And so, let's say, civil district judge, or probate court is a good example, probate, even though it's a county court, but so any one of them, save and except the criminal district courts, right now could apply to the Supreme Court, and in turn, be able to use electronic recording. I think in theory, you're exactly right. There is an issue, however.

While the Supreme Court constitutionally has the general supervisory authority over the courts of the state of Texas, there's also language about subject to the legislature and our legislative enactments. And this legislature spoke some time ago and has continued to speak through section 52.041 that makes it mandatory that every court of record in the state, both state-supported and county-supported, shall appoint a court reporter, which is a defined term meaning a person who uses shorthand keystrokes to keep the record, thereby excluding by statute anyone in a court of record who would utilize some other form of technology. So... Judge used a different kind of technology.

Yes, sir. Did I answer your question, though? You said, couldn't the Supreme Court do this if they wanted to badly enough? And the point I was trying to make to you is that I know the individuals who wrote those orders and I've talked to them more than once about it. Is there any prohibition on the Supreme Court granting this to other courts right now today by statute? Maybe.

It depends on who decides that lawsuit, Senator. Help me out. The statute... Has there been some kind of resolution offered up on this to the Judicial Council? The presentation from Ms. Miller alluded to what you may be referring to, that for ten years in a row, I presented a resolution to an organization called the Judicial Section of the State Bar of Texas, which translates into the Annual Judge Convention, takes place every September.

And what has transpired over those ten years as far as the judges? The resolution reached... I introduced it three times. It... I'm sorry. I misunderstood you then.

I thought you said you did it for ten years. No. She said I did it ten years.

Oh, I'm sorry. I didn't... Yeah. I'm telling you I did it three years.

It was an honest mistake on her part. She knows I've been around this for a long time. Okay.

But I introduced it in the Resolutions Committee three times. It was not brought to the floor on one occasion because for reasons not my doing, it wasn't posted for... Has Judicial Council approved your resolution in any of these three times? I don't... Are you referring to the same convention that I'm referring to? I'm referring to any convention. Okay.

Have they... It was voted on twice. A motion to table was sustained on one occasion, so it wasn't voted on on its merits. I'm sure it would have been defeated on a voice vote on that occasion had it come to the floor to be voted on on its merits.

Was it ever voted upon by the floor? The second time it was introduced, it was voted on on its merits by a voice vote. It did receive a second. It got a loud voice vote that appeared to many of us to be too close to discern.

Judge, are you telling me you couldn't even get a second? Sir? Are you telling me you couldn't even get a second to your motion? I thought I told you just the opposite. He said he got a second and he had a voice vote. Right.

Got a second and a voice vote was indistinguishable to me whether the ayes or the nays had it. The chair ruled that the nays had it, so that was the end of business. I didn't try to pull some parliamentary maneuver about dividing the House to break it down.

Same thing happened on the third time? No, sir. On the other occasion, it did not come to the floor because somebody on the resolutions committee didn't have it posted long enough, so it violated a rule that we had in place that these proposed resolutions have to be posted outside the committee meeting room extra number of days. No failure on my part.

It's just a glitch on the committee. Now, I'm not here to tell anybody, Senator Harris, that if we voted today, the judges of Texas would be 51% in favor of this. I don't know what they would say.

I am here to say that the 10% or 20% or 5%, whatever it is, should not be excluded by legislated monopoly. That's all I'm saying. But wait a minute.

You were granted permission by the Supreme Court to use it. In turn, let's say that it's only asked to civil cases. Commissioner, I hope you're hearing this because apparently you have an avenue that's currently in the law.

May I address you? Well, there are a couple of things that they've already pointed out. The law says currently that they shall appoint court reporters, and they need that change to May. When did we make it, Shell? I don't think we did.

I think somebody prior to us, long ago, changed it to May. But that's my point. He was able to get that way by the Supreme Court.

Yeah, the Supreme Court sometimes. And they shinnied out on a limb sticking out of the edge of a cliff to do that. Where's Mr. Hughes when we need him? How did the Supreme Court do that? If I may answer that question.

We'd love to hear it. On the mic so we can get it recorded, in case we need to play it back later. You know, when we had this debate in the United States Congress, there was a committee hearing in 1983, and the representatives of the shorthand industry were there to say, it'll never get off the ground.

It's not going to fly. It's not going to work. You're making a terrible mistake to let our federal district judges tamper with a record by using electronic.

Would you let him answer the question? Yes, I will, Senator. I didn't think he was ready. Mr. Chairman, for the record, this is Jody Hughes again for the Supreme Court.

And I think the answer to your question can be found in section 52021 of the government code. And that provision, it says that a person may not be appointed an official court reporter unless the person is certified as a shorthand reporter by the Supreme Court. So that's subsection A. Subsection C of the same provision, it says a certification issued under this chapter must be for one of or more of the following methods, one, written shorthand, two, machine shorthand, three, oral stenography, or four, any other method of shorthand reporting authorized by the Supreme Court.

And my understanding is that the audio recording that's been approved by the Supreme Court falls under this category. Number four. Number four is authorized by the legislature.

Authorized by the Supreme Court, you mean? Yes, sir. But authorized by the legislature statutorily for us to do that. I see.

Okay, but the point is then there could be a court reporter could be monitoring four screens, say on this procedure he's talking about, or do you have to have the court reporter? It has to be a court reporter then that would be monitoring the screens? No. Help me. Senator, I'm not, I don't know that that would be.

The answer to that clear is, the answer is clear under these rules. Has there been any change take place in the law? When did that become the law? As best you know. Probably when you were chairman of the jurisprudence committee.

Senator, I don't know. It says Acts 1985, but then there was a series of amendments through 2003, and I don't know when this particular provision came to be. We'll do some research and find out.

That was when I was in the House. I bet you. All right.

Thank you, Mr. Hughes. The point is there's been no changes since he, since this judge used it in his court. We don't know that there has been.

I don't know the answer to that. We don't think there has been. Judge Laney, we appreciate you being here and your testimony.

Do you have anything as a summation? If you permit me, please, yes. Yes, sir. You bet.

A question, a very good question was asked about what is the position of the State Bar of Texas on this? In 1990, a committee called the State Bar Committee on Court Cost, Efficiency, and Delay was charged with investigating a number of things relative to those general parameters, and the committee reported that they thought that both forms of technology had merit, that the monopoly should be removed, but that they were not advocating one form of technology over another, which I thought was a responsible position to take. So that addresses the question, where has the State Bar been on this? The State Bar has spoken. Another state committee appointed by the immediate past Chief Justice of the Texas Supreme Court called the Citizens Commission on the Texas Judicial System.

Passed a resolution in 1992, a vote of 31 to 7. I was there saying the same thing. Now on the federal side, which has gone through this debate since the 1950s, decided in the early 80s to conduct an experiment. They charged the Administrative Office of the United States Courts to run trials where Steno reporters took down the record in their methodology and that audio recording systems with a monitor there in court recorded it using theirs.

And then transcripts were made thereafter, separately. The conclusion in the report, which is about a half an inch thick, but there's an executive summary I can provide if the committee ever wants it. The conclusion of that committee was that with respect to accuracy, the records produced by the audio recordings were more accurate than the Steno records.

The speed of return on the records was greater by the audio, the cost was less, and the fourth category of examination was ease of use by the court. And by anecdotal discussion with the courts, judges, and so forth, they concluded that was a tie. So for years I've been going around saying that if you want to have some documentation that electronic recording is adequate, and that's all we're saying is that it's adequate.

Not that it's necessarily the very best that it ever will be, but that it gets the job done, you simply look to the federal experiment. You don't have to rewrite it. They concluded that it was more accurate, it was faster, and it was cheaper.

Or better, faster, cheaper. Now that was then, now is now. Has court reporting profession moved on? Absolutely.

Has electronic recording moved on? Absolutely. Who's ahead in the race for supremacy at any given time? Well, I suppose it depends on whether you're in the 20-something story criminal justice center in Harris County, where I serve as a visiting judge from time to time, or you're in a little courtroom in Ozona, or like Anderson, Texas, where I sit, where the acoustics are horrible. But I don't know that lapel mics or well-positioned boundary mics that pick up with high sensitivity wouldn't do a perfectly good job, or whether the recording system there would be more in keeping with the resources of that county.

That's what we've got to get through our minds. There are courts and counties, and then there are courts and there are counties. One size does not fit all.

Never has, never will. We haven't asked the shorthand reporter representatives here how many of the 500-plus, 550-plus courts of records in this state are utilizing shorthand reporter, I'm sorry, a real-time shorthand reporter, the type of state-of-the-art technology you saw demonstrated here. And the answer is, they darn sure are not all using it.

Why? Because these people come at a premium. They're not going to go to a small rural county where the county simply can't pay for that. So those counties should have the option.

Judges should have the option of using what fits. And as you can see, I'm getting passionate about it, but let me tell you, for the record, I own no stock in any company that sells any of this equipment. I don't have a relative that's a court reporter.

We didn't suspect you did, Judge. None of my relatives are involved in the industry in any way, shape, or form, except one practices medicine and the other one is an assistant DA in El Paso County. But I have no financial interest whatsoever in this issue.

But it's bad law to perpetuate a legal monopoly. Appreciate your testimony. Yes, sir.

Thank you for being here. Chair calls Carl Reynolds. I don't want to cut anybody short, but I would just observe that it is now 12.02 p.m., which is the traditional lunch hour.

So Senator Wentworth, thank you for calling me up. And I'll be very brief. I really didn't intend to testify today.

I just wanted to tell you. Your card says yes. Well, coming into the meeting, I didn't intend to testify.

I just thought I'd turn in the card. I'm Carl Reynolds. I'm the administrative director of the Office of Court Administration and the director of the Texas Judicial Council.

I really just wanted to compliment you for taking on this issue. This has been an extremely educational session for me and my staff. We support the Court Reporter Certification Board, as Judy Miller mentioned to you earlier.

We also support the Judicial Committee on Information Technology, which is charged with trying to help the Supreme Court guide the evolution of Texas courts towards the 21st century. And this issue that you're grappling with is at the heart of that mission as well. So we kind of view this from two different standpoints, from the JCIT standpoint as well as the court reporter standpoint.

And I just wanted to compliment you for taking this on. It's a touchy subject, obviously. It's a difficult subject.

And as someone who just enjoys public policy discussions, I have found this fascinating. Well, the way the system works, as you know, Mr. Reynolds, this committee does in the interim whatever the lieutenant governor assigns us. So we deserve no credit for taking this on ourselves.

The lieutenant governor needs the credit for assigning this responsibility to our committee.

**This file is longer than 30 minutes.**

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