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OPINION COMMITTEE



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Court Reporters Certification Board

Judge Ben Woodward, Chair

Michele L. Henricks, Director

August 31, 2011

RQ-0993-GA

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for Attorney General Opinion – Can an oral deposition meant for use in litigation in the courts of this state be recorded solely by non-stenographic means, or would such violate Texas Government Code §52.021(f), which requires that an oral deposition be recorded by a certified shorthand reporter?

Dear General Abbott:

I am Chairman of the Court Reporters Certification Board (herein referred to as CRCB). A majority of the Board has requested that I seek the Attorney General's opinion concerning the above-referenced legal question.

The CRCB's authority to regulate certified shorthand reporters (hereinafter CSR) is found in Texas Government Code Chapter 52. That chapter provides that a person may not engage in shorthand reporting in Texas unless the person is certified as a shorthand reporter by the Supreme Court.¹ "Shorthand reporting" means "the practice of shorthand reporting for use in litigation in the courts of this state by making a verbatim record of an oral court proceeding, deposition, or proceeding before a grand jury, referee, or court commissioner using written symbols in shorthand, machine shorthand, or oral stenography."²

Government Code §52.021(f) provides that with certain exceptions, "all depositions conducted in this state must be recorded by a certified shorthand reporter."³ Government Code §52.021(g) permits the Board to enforce this section.

¹ Tex. Gov't Code §52.021.

² Tex. Gov't Code §52.001(a)(5).

³ The exceptions include Texas Government Code §52.033, §52.031 and Civil Practices & Remedies Code §20.001, each quoted in part below.

Texas Gov't Code §52.033: "This chapter does not apply to: (1) a party to the litigation involved; (2) the attorney of the party; or (3) a full-time employee of a party or a party's attorney".

Gov't Code §52.031 provides "(a) A noncertified shorthand reporter may be employed until a certified shorthand reporter is available. (b) A noncertified shorthand reporter may report an oral deposition only if: (1) the

Texas Rules of Civil Procedure 199.1 permits a deposition to be taken by other than stenographic means, for example, by video recording. The rule is silent as to whether a stenographic recording of the deposition must be made either simultaneously or later to be used in trial. A predecessor rule, Rule 202(e)⁴ did require that a simultaneous stenographic record be made by a CSR unless a court ordered that it was not necessary. That rule has since been repealed and absorbed by more recent rules, although the requirement that a simultaneous stenographic record be made by a CSR was written out of Rule 199.1.

There have been several Attorney General Opinions addressing the question of whether or not an oral deposition can be recorded by non-stenographic means without the need for a CSR and without being in violation of §52.021(f). The most recent opinion seems to be No. DM-339 (1995), which asks the following question: "Whether a 'videographer' who is also a notary public may record a deposition upon oral examination." It concludes that, "Rule 202(e), to the extent that it authorizes a court to permit parties

noncertified shorthand reporter delivers an affidavit to the parties or to their counsel present at the deposition stating that a certified shorthand reporter is not available; or (2) the parties or their counsel stipulate on the record at the beginning of the deposition that a certified shorthand reporter is not available."

Texas Civil Practices & Remedies Code §20.001:

"(a) A deposition on written questions of a witness who is alleged to reside or to be in this state may be taken by: (1) a clerk of a district court; (2) a judge or clerk of a county court; or (3) a notary public of this state.

(b) A deposition of a witness who is alleged to reside or to be outside this state, but inside the United States, may be taken in another state by: (1) clerk of a court of record having a seal; (2) a commissioner of deeds appointed under the laws of this state; or (3) any notary public.

(c) A deposition of a witness who is alleged to reside or to be outside the United States may be taken by: (1) a minister, commissioner, or charge d'affaires of the United States who is a resident of and is accredited in the country where the deposition is taken; (2) a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country where the deposition is taken; or (3) any notary public.

(d) A deposition of a witness who is alleged to be a member of the United States Armed Forces or of a United States Armed Forces Auxiliary or who is alleged to be a civilian employed by or accompanying the armed forces or an auxiliary outside the United States may be taken by a commissioned officer in the United States Armed Forces or United States Armed Forces Auxiliary or by a commissioned officer in the United States Armed Forces Reserve or an auxiliary of it. If a deposition appears on its face to have been taken as provided by this subsection and the deposition or any part of it is offered in evidence, it is presumed, absent pleading and proof to the contrary, that the person taking the deposition as a commissioned officer was a commissioned officer on the date that the deposition was taken, and that the deponent was a member of the authorized group of military personnel or civilians."

⁴ Tex. R. Civ.P. 202 read, in pertinent part, as follows: 1. Non-Stenographic Recording. Any party may cause the testimony and other available evidence at a deposition upon oral examination to be recorded by other than stenographic means, including videotape recordings, without leave of court, and the non-stenographic recording may be presented at trial in lieu of reading from a stenographic transcription of the deposition, ...

e. The non-stenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition unless the court shall so order on motion and notice before the deposition is taken, and such order shall also make such provision concerning the manner of taking, preserving and filing the non-stenographic recording as may be necessary to assure that the recorded testimony will be intelligible, accurate and trustworthy. Such order shall not prevent any party from having a stenographic transcription made at his own expense. In the event of an appeal, the non-stenographic recording shall be reduced to writing. (emphasis added)

to dispense with a stenographic transcription, conflicts irreconcilably with section 52.021(f) of the Government Code. Rule 202(e) is void to the extent it conflicts with the statute.” Opinion DM-339 at 3.

Opinion No. DM-308 (1994) asks “whether rule 166c of the Texas Rules of Civil Procedure and section 52.021(f) of the Government Code conflict.” Rule 166c became effective in 1988 and was repealed in 1999. Parties could, under Rule 166c, stipulate that depositions need not be taken by a CSR. The Opinion concluded that, to the extent that the provision was in conflict with §52.021(f), the statute must control.

Relevant to this issue is Tex. Gov’t Code §22.004⁵, effective September 1, 1985. The previous Attorney General Opinions do not analyze my question in light of §22.004, although Opinion No. DM-308 mentions, in footnote 3, the following: “You do not ask and we do not consider here whether subsection (f) of section 52.021 of the Government Code is merely a procedural law which the supreme court could repeal by rule.”

It is clear that, if there is a conflict between a statute and a rule, the statute will generally control, and prior Attorney General Opinions support that conclusion. Here, we have three relevant statutes and rules: Tex. Gov’t Code §22.004, effective September 1, 1985, Tex. Gov’t Code §52.021(f), effective 1993, and a later rule, Tex. R. Civ. P. 199.1, effective 1999. The cited opinions dealt with earlier discovery rules than 199.1 that generally required that a CSR take an oral deposition in addition to any non-stenographic recording, thus comporting with Tex. Gov’t Code §52.021(f).

Additionally, court reporters must conform their work to the Uniform Format Manual, which contains all formatting requirements that official and, unless otherwise stated, freelance reporters must use. The Manual is submitted to and approved by the Supreme Court of Texas. Section 3.7 of the Manual addresses certification of the non-stenographic record. Beneath that section is a Comment which states the following:

Whether and when an oral deposition may be recorded non-stenographically is governed primarily by statute. Section 52.021(f) of the Government Code generally requires that all depositions taken in this state must be recorded stenographically by a CSR.

The exceptions noted elsewhere in that Comment refer back to the Tex. Civ. Prac. & Rem. Code §20.001, and the Tex. Gov’t Code §52.033, both referenced earlier in this Request. While this Comment is neither

⁵ Tex. Gov’t Code §22.004: (b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

a statute nor a rule, it is in the Manual and has been for some time. On May 25, 2010, the Supreme Court of Texas approved the Comment to remain in the newest version of the Manual.

Case law and the cited Attorney General opinions deal with situations in which a statute is enacted subsequent to an earlier rule, serving to repeal the rule. Here we have a situation where a later rule (199.1) would appear to have repealed, pursuant to Tex. Gov't Code §22.004, the earlier statute regarding the necessity of having a CSR take an oral deposition. A summary of the chronology of rules and statutes is the following:

1984 Rule 202(e) effective (stenographic recording also necessary if deposition taken by non-stenographic means);

1985 §22.004 effective (Texas Supreme Court can promulgate rules of civil procedure that effectively repeal procedural statutes and process for doing so given);

1988 Rule 166c effective (allowed parties to agree that a CSR need not record a Deposition);

1993 §52.021(f) effective (all oral depositions to be recorded by a CSR);

1999 Rule 199.1 effective (allows non-stenographic oral depositions and no requirement for a CSR); Rules 166c and 202 repealed.

There are two issues to be addressed, however. First, in promulgating rule 199.1, the Supreme Court apparently did not follow the procedure outlined in Tex. Gov't Code §22.004 in that the Court did not file a notice with the Secretary of State indicating what statutes (Tex. Gov't Code §52.021(f)) have been repealed by the new rule. Second is the question of whether or not §52.021(f) is procedural or substantive. If procedural, it is subject to being repealed by a Supreme Court rule of procedure but if it is substantive in nature, it is not.

The Board's inclination is to enforce the statute – Tex. Gov't Code §52.021(f) – because they are unsure that rule 199.1 actually can and did act to repeal §52.021(f). The Board looks to the Attorney General's Opinion for guidance.

I appreciate your assistance in this matter. If further information is needed, please contact me at the Court Reporters Certification Board, 205 W. 14th Street, Suite 101, Austin, TX, 78701 or by phone via the Director, Michele Henricks, at (512)463-1747.

Sincerely,



Judge Ben Woodward
Chair

CC: Justice Nathan L. Hecht
Supreme Court of Texas

Justice Debra Lehrmann
Supreme Court of Texas