

RQ-695



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Opinion Committee

March 21, 1994

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Attorney General Dan Morales
Office of the Attorney General
Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Request for clarification of Attorney General Letter Opinion Number 93-110.

Dear General Morales:

The Court Reporters Certification Board previously requested an Attorney General Opinion regarding the newly added subsections (e) and (f) of Section 52.021 of the Government Code as recently amended by House Bill 2073. Attorney General Letter Opinion Number 93-110 was issued on December 7, 1993, addressing those issues.

This request seeks clarification of Sections 52.021(e) & (f) of the Government Code and how they relate to Texas Rules of Civil Procedure 166(c).

Section 52.021(e) of the Government Code states:

A person may not assume or use the title or designation "court recorder," "court reporter," or "shorthand reporter," or any abbreviations, title, designation, words, letters, sign, card or device tending to indicate that the person is a court reporter or shorthand reporter, unless the person is certified as a shorthand reporter by the supreme court. Nothing in this subsection shall be construed to either sanction or prohibit the use of electronic court recording equipment operated by a noncertified court reporter pursuant and according to rules adopted or approved by the supreme court.

Section 52.021(f) of the Government Code states:

Except as provided by Section 52.031¹ and by Section 20.001, Civil Practice and Remedies Code², all depositions conducted in this state must be recorded by a certified shorthand reporter. (emphasis added)

Texas Rules of Civil Procedure rule 166(c) states:

Unless the court order otherwise, the parties may by written agreement (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery. An agreement affecting a deposition upon oral examination is enforceable if the agreement is recorded in the deposition transcript. (emphasis added)

Historical research of Rule 166c, indicates that the intent of the rule was to give more flexibility to accommodate proposed agreements among parties to litigation during discovery, especially in the manner of taking depositions upon oral examination. The rule appears to have been proposed because concerns were expressed regarding the reservation of objections to the form of questions and/or unresponsiveness of answers until the time of trial.

¹Section 52.031 of the Government Code states that:

(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 noncertified shorthand reporter delivers an affidavit to the parties or to their counsel 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.

(c) This section does not apply to a deposition taken outside the state for use in this state.

²Section 20.001, Civil Practice and Remedies Code provides:

(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.

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Comments submitted to the State Board of Texas Committee on Administration of Justice shows that the rule was proposed to allow for the reservation of objections until the time of trial. (See Exhibit A, Comments of Charles R. Haworth, attached hereto and as the 3rd page document on the "Johnson & Swanson" letterhead). Additionally, please see the transcript of Rules Advisory Committee Hearing held in 1985, wherein the Committee describes the comments of Mr. Haworth as simply permitting "attorneys to stipulate that a deposition can be taken without waiving the form of the question and nonresponsiveness of the answer³". (See Exhibit B, Testimony before the Rules Advisory Committee at 423.) It is not clear whether the intent of the commenters or the drafters of Rule 166c was to permit parties to dispense with the statutory requirements regarding the use of a court reporter.

In Letter Opinion No. 93-110, the question was asked whether newly enacted subsection (e) and (f) of Section 52.021 of the Government Code conflict. Subsection (f) provides that subject to certain exceptions, "all depositions ... must be recorded by a certified shorthand reporter." Subsection (e) provides that a person may not use the title of "court reporter or shorthand reporter" unless the person is certified as a shorthand reporter, however, that subsection also provides "Nothing in this subsection shall be construed to either sanction or prohibit the use of electronic court recording equipment operated by a noncertified court reporter pursuant and according to rules adopted or approved by the supreme court".

³ Apparently, the Committee was considering two proposals, one to leave the rule in its then form or to change it to the form advocated by Mr. Haworth. The discussion at the Committee hearing distilled the commenters responses as follows:

They want depositions to be taken before any person, at any time or place, upon any notice, and in any manner. And what really the recommendation is is to go back to allow the attorneys to stipulate that a deposition can be taken without waiving the form of the question and nonresponsiveness of the answer. There are two proposals. One would go back to the old practice and two would continue, unless there is an agreement of the parties, the form of the question and the nonresponsiveness of the answer to still be as they are today. And so, I think we need to -- Luke, we need to decide, one, do we want to allow the lawyers to make agreements and change the rule, and if so, then do we want to continue the existing rule as to objections to the form of the question and nonresponsiveness of the answer if there is no agreement. I think those are the two factors we need to decide, and then we can draft the rule pretty easily...

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The Opinion determined that the subsections did not conflict because:

[T]he intent of subsection (e) appears to be to ensure that the prohibition in the first sentence of the subsection has no effect on those local rules, and subsection (f), on the other hand, requires that all depositions conducted in the state must be recorded by a certified shorthand reporter, with certain exceptions not relevant here. It is clear . . . that subsection (f) refers to depositions upon oral examination as opposed to deposition upon written questions. Given that the two provisions deal with entirely different contexts, court proceedings in the case of the last sentence of subsection (e) and depositions upon oral examination in the case of subsection (f), we do not believe that they conflict.

Footnote 2 in the Letter Opinion 93-110 states:

To the extent a local rule approved by the supreme court permits the taking of a deposition by anyone other than a certified shorthand reporter, we believe the prohibition set forth in subsection (f) would prevail.

The question presented in this request for clarification of Letter Opinion No 93-110 is whether, notwithstanding Rule 166(c) of the Supreme Court Rules of Court, Section 52.021(f) of the Government Code requires parties to use a certified shorthand reporter⁴, when taking a deposition upon oral examination? In other words, a clarification of footnote 2 in Letter Opinion DM-93-110 is requested to add the italicized language:

To the extent *any rule of court adopted by the supreme court or any local rule approved by the supreme court permits the taking of a deposition by anyone other than a certified shorthand reporter*, we believe the prohibition set forth in subsection (f) would prevail.

The Board believes the additional language is necessary because of the ambiguity of the seemingly broad language of Rule 166(c). The additional language reconciles the various statutory provisions.

⁴Subject to the permitted exceptions as stated in section 52.031 of the Government Code and Section 20.001 of the Civil Practice and Remedies Code.

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In addition, the additional language comports with general law of statutory construction that when rules of court conflict with a statute, the rule must yield. Tex. Const. art. 5, section 25; Tex. Rev. Civ. Stat. art. 1731a, section 2 (Vernon). Specifically, the Texas Supreme Court has held that when rules adopted by the Supreme Court conflict with legislation, the rules of the Supreme Court must yield. Purolator Armored, Inc. v. Railroad Comm'n, 662 S.W.2d 700 (1983) and Mary Frances Few. v. The Charter Oak Fire Ins. Co. 463 S.W.2d 424 (1971).

Thank you for your consideration of this request for clarification of Letter Opinion 93-110. Please contact the Board if you would like any additional legal briefing on the issues.

Sincerely,

A handwritten signature in cursive script, reading "Merrill L. Hartman". The signature is written in black ink and is positioned centrally below the word "Sincerely,".

Merrill L. Hartman, Chairman
Court Reporters Certification Board

cc: Ms. Sarah Shirley, Chief, Opinions Committee
- Ms. Mary R. Crouter, Assistant Attorney General, Opinions Committee