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

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that are in probably almost all of the other federal courts. As you may or may not know, the bankruptcy courts almost exclusively are electronically recorded. Now, you say in 05 more than 50% of the courts use electronic recordings.

What's that based on? Well, it's based on statistics given to us by the National Center and also by inquiring with the administrative office of many of the states that we're in and that we're trying to be in. And those are the numbers that have been given to us and also not just using Quartzmark technology but other electronic technologies. Well, if you look at the state of Texas, there's a multitude of the courts that do use electronic tape recording, and that's the municipal courts.

In case somebody appeals, they use a municipal record, and you have to get that transcribed and you have to stay within that record on appeal unless we change something else I don't know about. So courts like that would be being counted too. Is that not correct? That is correct, Senator.

So that right there can skew these figures in comparison to a county court or a district court actually using these? Yes, sir. They certainly could. So that percentage can be substantially or probably, well, it would be substantially lower, would it not? Well, that depends.

I mean, if you look at state, well, okay, I'll answer it. Sure. Thank you.

Any other questions? Thank you very much. Appreciate your testimony. Thank you, gentlemen, ladies.

You bet. Chair calls Judge Rick Davis. Howdy.

Welcome to the committee. Thank you. Senator, my name is Rick Davis.

I'm presiding judge of the 272nd District Court. You can sit down. He was standing up because of the obstruction, but you can sit down and turn off that little mic if you would.

I appreciate the opportunity to be here. You bet. It's a handsome ring you're wearing.

I beg your pardon? It's a handsome ring you're wearing. Oh, thank you. I'm kind of partial to it myself.

So is my wife. And I've got a sophomore in the Corps of Cadets right now. Coincidentally, my predecessor, Judge John Delaney, is also present in the hearing room.

About seven years or so, he and I, for a very brief period of time, were political opponents or adversaries, if you will, but that's long in the past. Our relationship now I view as friendly, cordial, and professional. I still refer him cases for mediation.

He does good work in that regard. But there's still one. Is he an Aggie too? Pardon? Is he an Aggie too? No, sir.

Princeton graduate. Okay. Wanted to be.

Anyway, we still have one very substantial ideological difference, and that is this business of court reporting versus or certified shorthand reporters as contrasted with electronic recording. He had been on the bench, I think, for about 17 years prior to my taking the bench. I took the bench and I took office in this particular court January 1st of 2001.

So I've been serving there for a little over five and a half years. Prior to that, I had some judicial experience in Brazos County Court at Law No. 2. I took that office January 1st of 1999, served there for 13 months, and, of course, you all know there's a resign to run provision under the Texas Constitution.

The announcement of my candidacy for the district bench constituted an automatic resignation of that first office that I held. I think I presided over, I don't have an exact count, but I presided over probably between 120 and over 120 to 150 jury trials. Both courts were courts of general jurisdiction.

I do think I'm very familiar with the subject of court records. I also had significant experience as a lawyer trying cases. I was a solo practitioner.

I did a lot of criminal defense. I was a general practitioner, but the emphasis was on criminal defense. I don't have an exact count, but my estimate is I probably tried 30 to 40 cases to a jury as a lawyer prior to taking the bench.

Before I get into some of the remarks that I anticipated making, I wanted to address something that Senator Duncan said. You talked about who could require what, who could order what, commissioners' court would make the decision, and so forth and so on. Coincidentally, and I don't have 13 copies because I didn't anticipate addressing this, coincidentally, I have a copy, though, of Mays v. the Fifth Court of Appeals, which is a 1988 Texas Supreme Court case.

This case involved a dispute between the district judges in Dallas County, and they're trying to give the court reporters a 5% raise, which was authorized by a statute, Section 52.051 of the Texas Government Code. It was a pretty significant dispute at the time. The commissioners' court refused to appropriate the raise.

The judges ordered it, and then they ultimately issued show cause orders against the commissioners, and then it was taken up to the Fifth Court of Appeals. The Fifth Court of Appeals ruled against the district judges, but ultimately the Texas Supreme Court said this was just a ministerial duty. The judges had the statutory authority to order this.

What I think is significant, Senator, and specifically speaks to the question that you raised just moments ago, was Justice Spears wrote a very elegant concurring opinion, which was actually joined by four of the justices, so you've got five out of nine there, talking about even apart from statute, courts have inherent authority to compel expenditure of public funds just to continue their own existence. If I may approach, I'd like to give you the case, if you'd be interested. Prior to taking office, because of the resign-to-run provision, I had a short-term law practice between the two benches, about 11 months, and so I was practicing law.

Of course, our budget cycle starts in about June of the year. Judge Delaney graciously, we were of opposite political persuasions. I'd already won my party's nomination, and there was no opponent in the general election, so I wasn't the judge-elect yet, but I was the presumptive judge-elect, unless I drew a write-in candidate, which is very rare.

Anyway, Judge Delaney graciously offered to allow me to participate in the budget process so that we could set the expenditures that we'd need for the next year and so forth and so on. He also tried to prevail upon me to give the electronic recording system a try myself, stick with it, and he's a very strong proponent of it. In fact, I think in early August of 2000, a presentation was made to me and him and then-County Judge Jones by For the Record, another electronic recording company, and I listened intently and I tried to give it a very fair shake, be open-minded about it.

I still remember some of the things that were presented then. I still had some of the concerns then that I still do now. Ultimately, another thing that I did was I wrote an open letter to all of the lawyers, as near as I could breach them all, in the community, asking them what their opinion was.

Do you prefer court reporters or do you prefer the electronic recording system? Because everybody in the county had had a substantial experience with the system at the time, and I didn't realize until yesterday afternoon that I had saved all these old letters in response. I actually got like 17 responses from various lawyers, and one lawyer wrote who does a lot of trust and wills work. He says he doesn't have enough experience to have an opinion.

Four said they didn't have an opinion either way. Twelve said they favored or strongly favored returning to a court reporter. Now, I would not like-I'll be happy to give these to you, but I'd like to ask these writers first if they would authorize that.

I don't think they were written in confidence or anything, but I'd still rather check with them first before I turn them over to the committee. But they expressed their- We don't really need them. Very well.

Well, the thing is that the lawyers that I spoke with, and some were speaking for firms, law firms of, you know, 10 or 12 lawyers, they were very much in favor of returning to the court reporter system. In fact, several of them are board certified. I mean, they're experienced lawyers.

They know what they're doing. We've also had some problems, even after I took the bench, with some residual problems with the vestiges of the court reporting system. One of the things that happened, we knew we had to maintain the capability of recovering the old records because sometimes people need them from hearings and times past, even if they're not up on appeal.

So we knew we had to keep the equipment functional. Well, it turns out that our electronic recording system, which made digital recordings, actually crashed in the early part of the year 2001. And there was a case on appeal where there was no electronic recording, no digital.

They called them put on magneto MO disks. We couldn't get those. The court of appeals kept asking the court for the record.

No record could be prepared. We had a backup tape system that was used, and the tapes were inaudible. And we had a case come back, and I had to have a hearing.

It was State v. Casimiro Lopez, if my memory serves correctly. And we had to make the decision. I mean, the guy would have been entitled to an automatic reversal because there was no record there through no fault of his own, ultimately.

And the case was memorable. Judge Delaney presided over it, but it was an ugly sexual assault case that happened out at the Juvenile Texas Youth Commission facility that was in Brazos County at the time. And the jury was lenient on the fellow.

He got four years. And two years had elapsed since he was sentenced, and he talked with his lawyer and said, you know, you can get an automatic reversal here. And ultimately the man decided not to pursue the appeal just because he was so close to paroling anyway, and the full range of punishment would have been available to the state had they retried the case, and he'd be facing up to 20 years.

So as a practical matter, as a pragmatic decision, he decided not to pursue it, but that would have been an automatic reversal. We knew the system was crashed in the spring of 2001, and I didn't want to spend the county money to go get it fixed because there wasn't a present need for it because I had a court reporter, Ms. Carolyn White, who does the same work that this court reporter does, has real-time reporting. No disrespect to the other reporters present, but I think I've got the best in the state.

But I love the electronic, excuse me, I love the real-time system that she uses, which is what you all saw demonstrated. There was no need to get it fixed at the time because we didn't have any present requests pending to access the old records. Well, ultimately, sure enough, it came up where, sure enough, in another court, well, there was a case that Judge Delaney again presided over.

I was actually the lawyer on the case, State v. Shannon Sharp. There were some new proceedings against this fellow on an MTR because I'd been the lawyer on the case, so I was disqualified. I transferred it over to Judge Langley's court in the 85th District Court, and the lawyer there was asking for a transcription of the record, and this was from November 2000, shortly before I took office.

No record could be prepared, and ultimately, this was one of those cases where it almost went up. I mean, you almost had a reversal because there was no record that could be prepared because of the problems that we had recovering the data. We had a crash system that made digital recordings, and we also had this backup tape system where the tapes were often inaudible.

And, in fact, this went back and forth. The Court of Appeals issued an order requiring Judge Langley to make some findings of fact and rulings of law, and I've actually got a copy of the memo that my coordinator wrote to me outlining all the work that she did and this, that, and the other, and there's Judge Delaney's findings of fact attached, which have to do with the difficulties we had in making an accurate record of these old proceedings from November of 2000. And, at the time, we learned that the system was crashed, and we didn't have a present need to fix it.

Now, all of a sudden, we had this need. We looked into it, and it was going to be very expensive to do. In fact, we checked with the company.

I think it was For the Record, and my recollection is that they said, well, we can convert 10 of these DAT tapes into some kind of media file that you can use, and we'll do 10 of them for $4,500. Well, that would be the least that they would accept, so I'm having to spend. this amount of money, of county money, just to get a record in one case.

Again, ultimately, because it was a collateral matter, Judge Langley decided that that record wasn't needed on appeal, but, again, we were in a very difficult situation, and I do have copies of this. I do have 13 copies of this one, this document for you for your perusal and consideration. Additionally, in December of 2000, after, you know, polling the lawyers in Brazos County and then the community and also listening to the presentation in August of 2000, ultimately I decided to switch back to a live certified shorthand reporter, and I had to write the Commissioner's Court because there wasn't a line item in the budget for a court report, and I said, hey, folks, here's the reasons why.

Please amend the budget. Of course, I'm already three months into the fiscal year because the county fiscal year starts October 1, as opposed to the states. Already three months into the fiscal year, we've got to do a budget amendment.

We've got to appropriate some money here to hire this person, and I explained the reasoning why and went through, look, this was not a hastily made decision. You know, I tried to be as objective as I could. And some of the significant reasons, Senators, and what's very important to me is accuracy in the record, in any records that go up on appeal, whatever the case may be, and I even listed some anecdotal examples that I had here in cases that I tried as a lawyer, and I listed three of them.

One of them was tried in the 85th District Court, which had a certified shorthand reporter. That was a case that was a State v. Robinson. It was a recent case.

It was an engaging and organized criminal activity case. There were two other co-defendants, so you've got three lawyers on the defense side. Very complicated case.

There was 1,288 pages transcribed, nine volumes of transcribed proceedings, and the instances I went through and manually counted them, the instances where it said inaudible or indiscernible in the record were only eight. Now, in State v. Smith, a case that I tried as a lawyer in front of Judge Delaney in about September of 2000, that case was appealed as well, we had such difficulty with the transcript there we could get a transcript, but there are so many instances where it said inaudible or indiscernible, there was actually 171 occurrences of that out of 717 pages. Similarly, there was a robbery case I handled the appeal on.

I didn't try that case. I just handled the appeal. Three volumes of record, 304 pages transcribed, and there was 45 instances where it said inaudible or indiscernible.

And this, I think, and this is not scientific, obviously, but this is my anecdotal experience as a lawyer that I'm telling the Commissioner's Court back in December of 2000 why I wanted to hire a certified shorthand reporter. Records are important. We cannot compromise justice for the sake of a few dollars.

Now, I'm all for saving money, and I try to be as efficient as I can, but something like this is important because this implicates due process. This implicates fairness to the defendants, to the state, to litigants in civil cases. I'm concerned about the choice issue that is, I guess, and I haven't read these cases, but if one of these companies made the pitch to the county commissioners that we can save $300,000 a year by going to this system, would you have, and the county commissioner says, well, we want to save the money, and you say, well, we don't think this is appropriate, who would win on that? I think, well, clearly the judges would.

Senator, under Mays versus Fifth Court of Appeals, I think clearly judges would. First of all, there's statutory authority. Well, is that ministerial? Because that's basically, I mean, that was dealing with a 5% raise.

Right. This is dealing with the infrastructure, which the counties have the duty to provide, and I would assume the duty to not provide, I mean, the duty to, if we give them the ability by statute to make a choice, this precedent really wouldn't apply because we would basically give them the choice because the courts, I would imagine that the proponents of this change would not necessarily want the judges to be able to overrule the county commissioners because the judges are going to be biased towards the current system. Would you agree with, I mean, I'm making an argument, I guess.

My question would be is do you believe, now what county are you in? Brazos County. Brazos County. Okay.

That's where College Station is located, where your daughters go into school. Okay. Is that, where is that? Okay.

Well, we aggies think it's the center of the universe. We're here sending money this semester. I guess the point is, is that if we give the commissioners the ability to do that, you know, who's going to win those battles? Well, Senator, you have a very valid point.

Mays was decided on statutory authority. If you all create a new statute to authorize that, then that argument goes away. However, Spears, again, wrote a very eloquent concurring opinion, which was joined by four other justices, talking about court's inherent power.

Quite frankly, I hope that we never fight that fight. I mean, I think that in a tripartite government, the three branches ought to respect each other and accommodate each other. I think the judges are the best people to observe and see and know what the needs of the court are.

So, short answer to your question is yes, Mays wouldn't control, but I think the concurring opinion would have strong bearing on the issue. I will also say, though, I don't have any objection at all with judges being given the opportunity to make that choice. If a judge, really, like Judge Delaney, if he wanted to make that choice, that's his decision.

I have no problem with that. I think the people that the, for the record, or Court Smart, the people that they ought to be lobbying or they should be trying to persuade are the individual judges, in my personal opinion. What I'm saying is I think, if anything, it ought to be an individual decision left up to the various judges.

As opposed to the county commissioners. Yes, sir. All right.

Are there other questions? Okay, Judge Davis, you. Is Judge Delaney going to testify? Yes, Judge Delaney is listed as a witness. I'm not seeing him on the list.

No, he signed up this morning. Oh, okay. We have three or four witnesses that are in addition to the list you have.

You have about three, Judge Davis? Yes, sir. I just want to make a couple of observations. You can, a hundred years ago, people used to attend elevators.

They'd punch the buttons for you. And I know that it's, you know, we don't do that now. We can eliminate a lot of positions.

But in some situations, you cannot eliminate the benefit and the utility of having a human being there. And the thing about court reporters is they can focus. You've got a human mind there focusing on the witness.

They can discern what's being said. If something's not being said, if something isn't audible, wait a minute, speak up, please. And that happens frequently.

You've got, real time, you've got someone there actually monitoring the process to ensure the integrity of the proceedings and the record. An example came to mind here. You know, we have audio recording.

My real time reporter like this has audio recording. And, you know, I can say, like I saw early on, the name Michelle Hendricks. I said, I could say, Madam Court Reporter, could you take me to that place? And she could just use the computer, take me exactly to that place, and I could look at what was said there, and I could also hear what was said.

So we actually have the audio. It's just that with the electronic recording systems, all you have is the audio. And I don't think that you could hone in on a point like that with just the audio.

And where this is particularly valuable is like in a Vore-Dyer examination. You know, we're arguing, the lawyers are arguing about what Mr. Jones said or Mrs. Jones said and whether or not they've disqualified themselves and established bias as a matter of law. Well, let's look and see what exactly Mr. Jones said.

Judge, unless I misunderstood, I thought they, Court Smart, indicated that they did have cameras so that you not only had the audio, you had video of the witnesses, the judge, the lawyers as well. So you had a combination of audio and video. Well, I understood that, Senator.

What I'm saying is if I wanted to go back, and one thing I do frequently with my court reporter, especially during Vore-Dyer examinations, okay, let's go back and see what this person said. She can get right to the witness, scroll back, as opposed to having to rewind the tape or scroll back on a digital disc, on some kind of disc. Right.

I have had her. Senator Duncan has another question. I don't know this for a fact, but I would assume, I don't know if the video is a standard package or if that's an additional package that you'd have to pay more for for the video cameras and that sort of thing.

I can't answer your question, Senator. Well, my guess, you know, is that if, yeah, it's going to be more. I mean, obviously, they could sell just the recording device or the video, and obviously it's not going to be the same price.

Right. Well, that just makes sense. Yes, sir.

If I could make one more remark, Senators. I believe it was two or three legislative sessions ago, the legislature now requires that people who translate have to be certified, and if memory serves correctly, it's actually a class-A misdemeanor for someone to translate if they're not properly certified. I think that that is laudable for the legislature to ensure that the litigants fully understand what's going on here.

I think we ought to have that same concern for the accuracy of records that might be used on appeal. Court reporters have to be certified, and they're held accountable to certain standards, whereas somebody who's just operating a tape machine would not necessarily be held to those kind of standards. So, of course, I love my court reporter.

I like our system a whole lot. I think it works great. In conclusion, if individual judges want to opt to use electronic recording, I see nothing wrong with that if they want to deal with the headache of having records come back sometimes, as we've seen.

But I thank you for letting me make these remarks today. Thank you, Judge. We appreciate your being here.

Chair calls Commissioner Hoagland and Collin Kent, who has a bunch of questions to answer from Senator Duncan. I'll try my best to answer you, sir. Can you identify yourself and who you represent, Commissioner? My name's Jerry Hoagland.

And you can take a seat because you'll pick up the mic a lot better. All right, great. If you would, get this piece of paper right here.

It's being distributed right now. My name is Jerry Hoagland. I'm a county commissioner in Collin County and have been so since 1980.

So I have some experience in the courthouse. Not an attorney, incidentally. This first page that you've been given is an actual reproduction of a page of a court record in Collin County that Collin County paid for.

This page, this first page that you have right in front of you there, is an actual trial that Collin County, a condemnation case that Collin County was involved in. We paid the court reporter $4.50 for that page right there. These CDs right here cost about $0.10 to $0.19 each and will contain probably around 500 pages of information.

So this is an economic request on the part of the Collin County Commissioner's Court, largely. The second page of information that you have there, the bottom figures show that we spent in 2005 a total of $1.847 million for court reporter salaries, substitute court reporters, transcripts, everything we paid for. The top section of the page is for 2006.

As you can see, it's gone up year-to-date to $1.951 million and will probably go well over $2 million. I don't understand this figure. Let's break this down.

Okay. Is this just on salaries or is it on... You see that current salary column there, the first column? You can see that every court reporter is paid the same exact amount of money by the district judges in Collin County. What I'm trying to figure out is... That's the base salary.

Are you paying more than... What's 14 into $1.75 million? It's well over $100,000 per year. Is that what you're paying for your court reporter? Yes. Yes, sir.

By the time we pay... The base salary is $84,000, and then they get longevity, and then they get benefits. So the total is all of them are over $100,000. It's that far right-hand column.

Okay. There you go. There you go.

Far right-hand column. The only reason I bring that up is most people think that we're talking about in the range of $50,000, $60,000 a year for salaries for court reporters, and that's just not the case. The district judges, by law, by state law, have been given the authority to set the salaries for our court reporters.

And as you can see, every one of them are paid the same with the exception of one there, who's about $200 less. Any other questions about that financial information? Now we'll move to the third page. We have some district judges and some county court-at-law judges who would like to try out electronic court reporting, and that's really why I'm here today is to request that you give us that latitude or give them the permission to move in that direction.

There are two statutes that need to be scrubbed or cleaned up, if you will. One of them here is this Article 36.28, wherein it says that the judge will have the court reporter read back the transcription or something to that effect. And so that would need to be changed if we're going to an electronic court reporting system.

I'm also told that Section 52.041 also needs modification in order for the judges to transition to this electronic court reporting methodology. And what's 52.041? That has to do with—it requires the court of record, the judge in that case, says he shall appoint an official court reporter. So if we're not using a court reporter, we would have to say some other means of transcription or something to that effect.

Thank you. What I'd like to do—I've got three pages here that I'd like to read into the record, and then I want to tell you about a personal visit that we had to the state of Florida by some county officials from Collin County. We took nine people down there.

I'd like to tell you some information about that visit down there. And lastly, tell you that we are building a new courthouse in McKinney, and tell you what we're doing in regards to electronic court reporting in that new courthouse.

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

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