



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 29, 2020

The Honorable Dana Norris Young
Cherokee County Attorney
Post Office Box 320
Rusk, Texas 75785

Opinion No. KP-0318

Re: Authority of a judge of a court of record to appoint an official court recorder in lieu of an official court reporter (RQ-0327-KP)

Dear Ms. Young:

Citing “an increased shortage of court reporters, and the need to avoid delays in court proceedings when an official court reporter retires, passes away or is otherwise unavailable,” you ask whether a judge of a court of record¹ may appoint an official court recorder in lieu of an official court reporter.² If so, you next ask whether the statutory provisions relating to the salary of a court reporter³ apply to court recorders. Request Letter at 1.

Section 52.041 of the Government Code provides that “[e]ach judge of a court of record shall appoint an official court reporter.” TEX. GOV’T CODE § 52.041. The word “shall” typically signifies the imposition of a mandatory duty. *See id.* § 311.016(2) (providing that the term “shall” imposes a duty unless the statute expressly provides otherwise, or the context necessarily requires a different construction). While instances exist in which courts construe the word “shall” as directory, nothing in the relevant statutes or larger context here requires such a construction. *Cf., AC Interests, L.P. v. Tex. Comm’n on Envtl. Quality*, 543 S.W.3d 703, 708 (Tex. 2018) (recognizing that the word “shall” is generally construed to be mandatory but that it may be held

¹A “court of record” is a court “that is required to keep a record of its proceedings.” BLACK’S LAW DICTIONARY 431 (10th ed. 2014). In the Texas court system, all courts are courts of record except the justice courts and most municipal courts. *See* <https://www.txcourts.gov/media/1445794/court-structure-chart-october-2019.pdf>.

²*See* Letter from Honorable Dana Norris Young, Cherokee Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 31, 2019), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0327KP.pdf> (“Request Letter”).

³An “official court reporter” is “the shorthand reporter appointed by a judge as the official court reporter.” TEX. GOV’T CODE § 52.001(a)(3). Section 52.001(a)(5) defines “shorthand reporting” as “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.” *Id.* § 52.001(a)(5). A court recorder, on the other hand, makes an electronic recording of court proceedings. *See* TEX. R. APP. PROC. 13.2.

to be merely directory). Thus, a court would likely construe section 52.041 to impose a mandatory duty on the judge of a court of record to appoint an official court reporter.

You state that Texas Rule of Appellate Procedure 13.1 “seems to allow for the use of electronic recording equipment operated by an official court recorder instead of a stenographic recording by an official court reporter.” Request Letter at 1. Rule 13.1 lists the duties of the “official court reporter or court recorder” and the rules of appellate procedure contemplate a role for a court recorder. TEX. R. APP. PROC. 13.1; *see also id.* 13.2⁴ (providing for additional duties of a court recorder). Yet, Rule 13.1 does not authorize the designation of an official court recorder in lieu of the official court reporter. *See id.* 13.1. Instead, Rule 13.1 merely identifies the tasks and duties of the respective positions. *See id.*

You further inform us that the Texas Supreme Court and the Texas Court of Criminal Appeals specifically authorized the 2nd Judicial District Court of Cherokee County, Texas, among others, to make a record of civil and criminal court proceedings by electronic recording.⁵ *See* Request Letter at 2.⁶ The Order provides that “[n]o stenographic record shall be required of any proceedings that are electronically recorded.” Order at § 2. It also provides that the court subject to the Order “shall designate one or more persons as court recorders.” *Id.* By using the word “shall,” the Order imposes a duty on the court to appoint a court recorder. TEX. GOV’T CODE § 311.016(2); *see supra* at 1–2. But the Order does not provide for the court to appoint a court recorder in lieu of the official court reporter.

While this Order and others like it along with Rule 13.1 provide for the making of a record of court proceedings by electronic recording, for the appointment of a court recorder, and for procedures to ensure those recordings are reliable, they do not provide authorization for a judge of a court of record to fail to comply with section 52.041.⁷ *See generally* Order at §§ 1–11. Undoubtedly, those courts with an order regarding electronic recording of proceedings from the Texas Supreme Court and the Texas Court of Criminal Appeals may utilize a court recorder as

⁴The court recorder’s additional duties ensure “the proper functioning of the electronic recording system so that a transcribable recording is made.” *In re D.D.A.*, No. 14-05-00046-CV, 2006 WL 1547869, at *1 (Tex. App.—Houston [14th Dist.] June 8, 2006, no pet.) (mem. op.).

⁵Order Approving Rules Governing the Procedure for Making a Record of Court Proceedings in the 2nd Judicial District Court of Cherokee County, Texas by Electronic Recording, No. 19-013 (Nov. 18, 2019) (“Order”) (attached to Request Letter and on file with the Op. Comm.).

⁶Under the authority granted to it by the Legislature to promulgate rules for practice in Texas courts, the Texas Supreme Court has adopted orders governing electronic recording of proceedings in certain courts. *See* TEX. GOV’T CODE § 22.003(a), (b) (authorizing the Texas Supreme Court to promulgate rules for the practice and business of the Supreme Court and all other courts); *see also id.* § 22.108 (granting similar authority to the Court of Criminal Appeals in criminal cases). Courts operating under one of these orders “operate under essentially identical rules of electronic recording.” *Nat’l Union Fire Ins. Co. v. Ninth Ct. App.*, 864 S.W.2d 58, 60 (1993); *see also* Order § 11 (providing that “[e]xcept to the extent inconsistent with these rules, all other statutes and rules governing the procedures in civil and criminal actions shall continue to apply to those proceedings”).

⁷“[T]here is no requirement that the position of official court reporter . . . must be a full-time position.” Tex. Att’y Gen. Op. No. GA-0372 (2005) at 3–4; *see also* Tex. Att’y Gen. Op. Nos. GA-0164 (2004) at 7 (noting that “typically, court reporters serve the judges who appoint them, rather than work traditional 40-hour-per-week jobs; their jobs are described in terms of the tasks or duties to be performed, not the number of required hours”), JM-1083 (1989) at 4.

provided by their particular order and Rule 13.1.⁸ However, as a general matter, a court is unlikely to conclude that a judge of a court of record may appoint an official court recorder in lieu of appointing an official court reporter.⁹ This is bolstered by the fact that the Legislature provides for the scenario in which an official court reporter is unable to perform his or her duties, such as in circumstances you describe, by authorizing the judge of the court to “appoint a deputy court reporter to perform the court reporting services during the absence of the official court reporter.” TEX. GOV’T CODE § 52.042(a).

Your second question regarding the statutory provisions relating to the salary of a court reporter is contingent on a different conclusion, but we nonetheless address it generally. Government Code subsection 52.051(a) provides that “[a]n official district court reporter shall be paid a salary set by the order of the judge of the court [which] is in addition to transcript fees, fees for a statement of facts, and other necessary expenses authorized by law.” *Id.* § 52.051(a). Local Government Code section 152.905 provides the procedures for a district judge to set compensation for certain positions. *See* TEX. LOC. GOV’T CODE § 152.905(a). Section 152.905 expressly applies to the positions of “county auditor, assistant auditors, and court reporters.” *Id.* By their express terms, neither provision applies to the position of court recorder and nothing in either provision provides a basis to conclude that they may apply to other judicial positions. Thus, as a practical matter, a court should hire and remunerate a court recorder as it does any of its other staff not covered by these provisions.

⁸*See Sareen v. Sareen*, 350 S.W.3d 314, 316 (Tex. App.—San Antonio 2011, no pet.) (acknowledging the disagreement among various courts of appeal over the scope of Rule 13.1).

⁹Some courts of record have specific provisions governing the official court reporter. For instance, the Cherokee County Court at Law judge “may appoint an official court reporter or the judge may contract for the services of a court reporter under guidelines established by the commissioners court.” TEX. GOV’T CODE § 25.0392(h). To the extent such a statute is specific compared to the general statute of 52.041, it would likely prevail over section 52.041 such that a judge acting thereunder acts in accordance with the law. *See id.* § 311.026(b); *In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015) (stating that “conflicts between general and specific provisions favor the specific”).

S U M M A R Y

Government Code 52.041 expressly requires each judge of a court of record to appoint an official court reporter. Accordingly, a court is unlikely to conclude that a judge of a court of record may appoint an official court recorder in lieu of an official court reporter.

Government Code section 52.051 and Local Government Code section 152.905 provide for the setting of salaries of court reporters. Neither apply to the position of court recorder, and nothing in either provision provides a basis to conclude that they may apply to other judicial positions. Thus, as a practical matter, a court should hire and remunerate a court recorder as it does its other staff not covered by these provisions.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large initial "K".

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