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RQ-0264-JC

Honorable John Cornyn
Texas Attorney General
Supreme Court Building
Administrative Office
P.O. Box 12548
Austin, Texas 78711-2548

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OPINION COMM.

FILE # MC-41542-00
I.D. # 41542

Re: Opinion Request Regarding Statutory Filing and Recording Duties of a County Clerk

Dear Attorney General Cornyn:

My office has examined the statutory duties of county clerks with regard to filing and recording real property instruments. Because of seemingly inconsistent provisions in the Texas Local Government Code and the Texas Property Code, the timeframe within which an instrument delivered to a county clerk must be filed is unclear. Accordingly, this office is requesting an opinion on the following issues:

1. Is a county clerk required to file stamp an instrument at the time the instrument is deposited in his/her office for recording or is the county clerk given a reasonable time after delivery to file stamp the instrument?
2. If your office determines a county clerk is statutorily required to file stamp all instruments at the time the instruments are delivered to the county clerk, may a county clerk establish a "cut-off" time prior to the actual closing time of the county clerk's office in order to process (file stamp) the large number of instruments generally delivered to a county clerk's office several hours prior to the close of business?
3. Are instruments that are received by a county clerk's office through the mail to be given the same priority for filing as instruments that are personally delivered to a county clerk's office for filing?

BACKGROUND

The Bexar County Clerk's Office, like county clerks' offices in other urban counties, has experienced a substantial increase in recent years in the volume of instruments being filed for record. The rise in filings is attributable, in part, to increased transactions by title companies resulting in numerous instruments being filed for recording at the county clerk's office toward the end of each business day. As each title company may deliver several hundred instruments daily to the county clerk's office, file stamping the instruments upon receipt is becoming problematic.

ISSUE 1 **Is a county clerk required to file stamp an instrument at the time the instrument is deposited in his/her office for recording or is the county clerk given a reasonable time after delivery to file stamp the instrument and, if so, what is "reasonable?"**

There are two statutes which refer to the time within which an instrument must be recorded by a county clerk:

Section 191.001 (c) of the Texas Local Government Code states:

"The county clerk shall record, exactly, *without delay*, and in the manner provided by this subtitle, the contents of each instrument that is filed for recording and that the clerk is authorized to record."

Section 11.04 (a) (1) of the Texas Property Code states:

"(a) A county clerk shall:

(1) correctly record, as required by law, *within a reasonable time after delivery*, any instrument authorized or required to be recorded in that clerk's office that is proved, acknowledged, or sworn to according to law..."

While Section 191.003 of the Texas Local Government Code provides that an instrument filed for recording with the county clerk is considered recorded from the time the instrument is filed; filing and recording are two separate acts which do not necessarily occur at the same time. The time of filing establishes the recording time, but the physical act of recording may occur later ("within a reasonable time" or "without delay"). While a county clerk is not mandated to record a document at the same time that it is filed, he is required to note on the document the precise time that it was filed. Tex. Loc. Gov't Code Ann. § 193.001(b). Thus, it appears the county clerk must immediately file stamp the instrument.

ISSUE 2 **If your office determines a county clerk is statutorily required to file stamp all instruments at the time the instruments are delivered to the county clerk, may a county clerk establish a "cut-off" time prior to the actual closing time of the county clerk's office in order to process (file stamp) the large number of instruments generally delivered to a county clerk's office several hours prior to the close of business?**

The Texas Attorney General's Office has consistently held that, absent a statute to the contrary, a commissioners court may not interfere with a county official's authority to set the hours his or her office will be open to the public. Tex. Att'y Gen. Op. No. C-350 (1964) at 1-2; 0-6679 (1945) at 2. A county official has implied authority to set the working conditions for his or her own employees. Tex. Att'y Gen. Op. No. JC-0131 (1999) at 2; JC-0239 (2000) at 3.

Section 157.021 of the Texas Local Government Code grants the commissioners court in a county with a population of 355,000 or more the authority to adopt and enforce uniform rules on the hours of work of department heads, assistants, deputies, and other employees whose compensation is set or approved by the court. Effective October 21, 1987, Bexar County Commissioners Court approved the Personnel Rules for Bexar County. Section 5.015 requires employees to work forty hours per week with the County's official work week commencing Saturday at 12:01 a.m. and ending Friday at 12:00 a.m. There are no stated hours during which Bexar County offices are required to remain open.

In this case, the Bexar County Clerk is considering closing the clerk's office as early as 3:30 p.m. each weekday in order that all instruments may be file stamped prior to close of business on the day the instruments are delivered to the County Clerk's Office. All employees would be working forty hours per week. Since closing the Bexar County Clerk's Office to the public prior to 5:00 p.m. on each business day appears to be a procedure that would enable the Bexar County Clerk to meet his statutory duty to record the instruments upon delivery to his office and this practice does not violate Bexar County policy, it would appear the Bexar County Clerk could utilize this procedure.

ISSUE 3 **Are instruments that are received by a county clerk's office through the mail to be given the same priority as instruments that are personally delivered to a county clerk's office for recording?**

The Court in Jones v. MacCorquodale, 218 S.W. 59, 61 (Tex. Civ. App. - Galveston 1919, writ ref'd), held that when an instrument is delivered by mail at the same time that an instrument is personally delivered to a county clerk's office for record, both instruments are entitled to be recorded upon arrival or deposit at the county clerk's office. Applying the holding in Jones, a county clerk would be required to file stamp all instruments received through mail deliveries during the day at the time of delivery rather than file stamping all instruments received through the mail throughout a particular business day at a certain time later in the day.

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CONCLUSION

Most likely the legislature did not anticipate the volume of filings currently occurring in the offices of county clerks in more heavily populated counties. Section 193.001(b) does not consider the practicality of file stamping all instruments at the time such instruments are personally delivered or deposited to a county clerk's office by mail. However, to allow a delay in file stamping an instrument following delivery would defeat the race-notice recording procedures which are the basis for Texas recording statutes.

We respectfully ask that your office make a determination on the four issues set out in this request.

Sincerely,



Susan D. Reed
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