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OPINION COMMITTEE



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June 1, 2018

Office of the Attorney General
Opinions Division
P.O. Box 12548
Austin, Texas 78711
Via CMRRR NO. 7014 1820 0001 9367 8999

RE: Request for Opinion

Dear Sir or Madam:

With the passage in recent years of the "Federal Signatures in Global and National Commerce Act (the "E-Sign Act"), 15 USC, Chapter 96 and the passage of the Uniform Electronic Transactions Act ("UETA") found in Chapter 43 of the Texas Business and Commerce Code, issues have arisen with respect to the recordability of certain documents and in particular, the recordability of documents in those Texas County Clerk's offices that do not accept the electronic recording of documents in their respective Official Public Records. This request for an Opinion is exclusive of documents submitted for filing in either Civil or Criminal court case files. These issues have been presented to this office by the Guadalupe County Clerk and we present them to you on her behalf.

The first point that needs to be made is that the Guadalupe County Clerk's office does not accept electronic recordings to its Official Public Records. No procedure has been adopted by Guadalupe County to do so nor has any necessary software/hardware/billing mechanism been purchased. Documents to be recorded in Guadalupe County are via hard copy only.

Another point: two primary factors are contributing to the recordability issue. One, "Filers" who have previously recorded documents in Counties that have adopted electronic recording procedures for the Official Public Records, will, after they learn that a particular county does not accept electronic recordings, apparently assume that all they have to do is print a copy of the electronic document and then deliver it to the Clerk's office. Two, there are some Clerk's offices in the State that do not question or rarely question the recordability of a document and perhaps are treating a copy of an electronic

document in accord with UETA even if that particular office does not accept electronic filing.

The "Documents" at issue and for which we are requesting your opinion, fall generally into one of three categories: 1) documents which, if containing original signatures would otherwise be recordable, but only reflect an "electronic signature" of the signatory, the Notary or both; 2) documents that purport to be copies or certified copies of documents filed with another state agency or governmental body, but only contain a copy of an electronic "certification" signature or are not certified in any manner and are mere copies of what was filed with the state agency; and 3) documents that either do not contain an acknowledgement or original signatures but might be covered for filing purposes in a separate statute.

Question 1: Must a County Clerk accept for recording a paper document that fits in Category 1?

Question 2: Must a County Clerk accept for recording a paper document that fits in Category 2?

Question 3: Must a County Clerk accept for recording a paper document that fits in Category 3?

For those counties that do not accept the electronic recording of public record documents, the primary statutes addressing the recording of documents by a County Clerk are Sections 11.004, 12.001, 12.0011 and 15.002 of the Texas Property Code. As per Section 12.001, a paper document concerning real or personal property must contain an original signature. With the exception of Section 15.002, all the other sections mandate that a document also be proved, acknowledged, sworn to with a proper jurat or proved according to law. Section 15.002 limits an "electronic document" to a document that is received by the County Clerk *in an electronic form*. (emphasis supplied). Logically, a County Clerk can only receive a document in electronic form if that particular office has authorized and adopted electronic recording processes/procedures. It is the position of this office that the phrase "in an electronic form" does not mean an electronically created/signed document that has simply been printed out on a printer.

Sections 191.001, 192.001 and 193.001 of the Texas Local Government Code set forth the duties of the County Recorder. It does need to be pointed out that there are some specific statutes relative to documents to be recorded that specifically exempt the document from certain recording requirements that might otherwise be applicable. Examples are Section 14.003, Texas Property Code; Section 12.001 (c) of the Property Code and 12.0011 (c), (d) and (e) of the Property Code.

Section 2054.060 of the Texas Government Code addresses "Digital Signature". Therein, a local government can accept a digital signature, but the only logical reading of this statute is that doing so is premised on the local government, working with the State, having adopted rules and procedures for accepting electronic recordings. Conversely, a local government (and County Clerk's office) should have no obligation to accept for recording a document that is a copy of an electronically created and/or signed document.

I do not have a readily available example of documents that have been submitted for recording that fit Category 1. Having said that, the description of said documents is clear: they either contain no original signatures whatsoever or either just the signor or just the notary's signature is original. The signatures are either a "facsimile stamp" or a copy of the original or contain "/s/". It is our position that documents submitted in this manner

do not meet the requirements of Section 12.0011 when submitted in paper format and may be rejected for recording purposes.

Examples of documents that fit Category 2 are included herein as Exhibits A, B and C. Two issues are presented by these documents: One: the "Certification" is merely a copy of the original certification and/or the signatures were never original in the first place and a "signature stamp" was used. Two: What authority allows a County Clerk to file Corporate documents that have been previously filed with the Secretary of State? There is no original signature, there is no acknowledgement and there is no jurat. Furthermore, when reviewing Chapters 11 and 12 of the Texas Property Code, there is no section devoted to discussing the recording by a County Clerk of corporate documents filed with Secretary of State. However, arguably, copies of documents originally filed with the Secretary of State might be recordable if the procedures outlined in Property Code Section 12.0011(b)(2) are followed but this is presumptive that corporate filings somehow involve "real or personal property".

An example of a document that fits Category 3 is included herein as Exhibit D. This document was submitted for recording in hard copy and was a copy of a copy that had TCEQ's certification. Section 11.323 of the Texas Water Code requires the issuance of a "Certificate of Adjudication" upon final determination of certain water rights. Section 11.324 of the Water Code directs the Commission (Now TCEQ, f/k/a Texas Natural Resource Conservation Commission) to transmit the Certificate of Adjudication or a copy of same to the County Clerk of each county in which the appropriation (of water) is made. Section 5.174 of the Water Code allows for the Commission to provide "certified" copies of any document that is part of any of their activities. Though this statute does not state what must specifically be done to create a certified copy, subsection (a) of this section does state that a certified copy *with the seal of the commission* (emphasis supplied) is admissible as evidence in any court or administrative proceeding. Section 5.179 of the Water Code requires the Commission to have a seal and the contents of the seal. Unfortunately, this section has not been updated to reflect the name change to TCEQ.

The document that was submitted for recording did not contain original signatures, was not sworn to or acknowledged and did not, in the vicinity of the signature, contain the current seal of the Commission. Notwithstanding same, there is a specific statute (section 11.324) that directs that a Certificate of Adjudication or simply a copy of same be transmitted to a County Clerk's office for recording. It is the position of this office, a position not shared by the County Clerk, that the recording statute in the Water Code controls over any other recording requirements referenced earlier herein from the Property Code. Since 11.324 does not require a certified copy to be sent to the County Clerk, it is the position of this office that any defects in "certification" by the Commission would have no bearing on recordability and would only affect admissibility in some other proceeding.

Obviously, and consistent with the submission of original real estate documents, Section 11.324 contemplates the possibility that the original Certificate of Adjudication might be presented for recording in that 11.324 (c) directs that such a document be returned to the Holder of same.

At some point in the future, the Guadalupe County Clerk's office may complete all the pre-requisites to accept the electronic recording of documents in its Official Public

Records. This leads to the inescapable Question No. 4: Will your answers to the foregoing Questions 1-3 change if these same documents are submitted to a County Clerk's office that does accept the electronic recording of documents? Keep in mind that once a "portal" has been opened for the electronic recording of documents, the County Clerk will have absolutely no control over documents that arrive electronically. These documents will arrive electronically and the sender will be assuming that they will be recorded and become a part of the Official Public Records. Documents in Categories 1 and 3 may suddenly be "recordable", but documents such as those in Category 2 and for which there is no specific statute that allows for the recording by a County Clerk of corporate documents filed with the Secretary of State should, for the reasons set forth above, be rejected for recording notwithstanding arriving electronically.

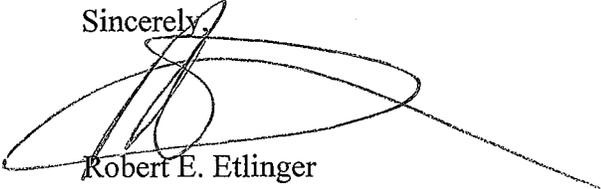
Prior Attorney General Opinions that have discussed the recording of documents are as follows (note: this list is not meant to be exhaustive of all AG Opinions that may have addressed recording issues):

V-239 (1947)
V-239-A (1947)
C-258 (1964)
H-146 (1973)
JM-883 (1988)
Letter Opinion No. 98-016 (1998)
GA-0228 (2004)
GA-0450 (2006) and
KP-0165 (2017)

Your responses to the foregoing questions will provide much needed guidance to both those Clerk's offices that do not have electronic recording procedures in place and those that have adopted electronic recording processes.

Thank you for your attention to this matter.

Sincerely,



Robert E. Etlinger
Asst. County Attorney
Guadalupe County, Texas

xc: Ms. Teresa Kiel, Guadalupe County Clerk