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Fraudulent Filings

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Section 51.605(c), TEXAS GOVERNMENT CODE

(c) A clerk must successfully complete 20 hours of continuing education courses . . in the performance of the duties of office at least one time in each 24-month period. *The 20 hours of required continuing education courses must include at least one hour of continuing education regarding fraudulent court documents and fraudulent document filings.*

(Emphasis added)

The views expressed here are personal views only. They do not necessarily reflect the official position or opinion of any governmental organization or unit, or of anyone else.

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[1] In this portion of the outline (the annotated text of § 51.901), I use **bold font** to identify text that I discuss in the footnotes. None of these footnotes appear in the actual statutory text.

1. THREE QUESTIONS ABOUT DOCUMENTS ALREADY FILED OR OFFERED FOR FILING THAT COULD BE FRAUDULENT:

a. WHAT ARE CLERK'S OBLIGATIONS AND POWERS

i. TO LOOK FOR FRAUD

ii. TO ACCEPT APPARENTLY FRAUDULENT DOCUMENT FOR FILING

iii. TO NOTIFY OTHERS IF APPARENT FRAUD

iv. TO DEAL WITH ALREADY FILED DOCUMENTS

b. HOW DO YOU RECOGNIZE FRAUDULENT DOCUMENTS

c. WHAT TO DO ABOUT GAPS AND AMBIGUITIES IN THE STATUTES – We will deal with this throughout

2. CLERK'S OBLIGATIONS -

a. <u>TO LOOK</u> – LIMITED OBLIGATION –

i. DO NOT HAVE TO PLAY DETECTIVE;

ii. SHOULD NOT INTENTIONALLY TURN A BLIND EYE TO OBIOUS FRAUD

iii. CURSORY REVIEW SUFFICIENT IF SATISFIED THAT DOCUMENT APPEARS TO BE ONE THAT LAW EXPRESSLY REQUIRES OR PERMITS CLERK TO FILE

3. WHAT IS A "FRAUDULENT DOCUMENT"?

a. NOT DIRECTLY DEFINED BY STATUTE.[2]

i. "FRAUD" IS AN ACTIONABLE TORT: The elements of fraud are (1) that a material representation was made; (2) that was false; (3) that, when communicated, the person making the representation knew it was false or made it recklessly without any knowledge of its truth as a positive assertion but if the representation is of the speakers intent to perform a future act, the representation must be intentional, not merely reckless; (4)

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[2] *See Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 507 (Tex. App.-Houston [1 Dist.] 2004) (Gov't Code § 51.901 does not define "fraudulent"). However, at least one case has treated the examples of fraudulent liens contained in § 51.901(c)(2) as a definition of "fraudulent" for purposes of this law. *See In re Purported Liens or Claims Against Samshi Homes, L.L.C.*, 321 S.W.3d 665, 667 (Tex. App.-Houston [14th Dist.] 2010).

it was made with the intention that it should be acted upon by the party; (5) the party acted in reliance upon that statement; and (6) the party thereby suffered injury. *In re FirstMerit Bank*, 52 S.W.3d 749, 758 (Tex. 2001). This and other leading cases number the elements somewhat differently but all get to the same result. *See Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *Star Houston, Inc. v. Shevack*, 886 S.W.2d 414, 417 (Tex.App.-Houston [1st Dist.] 1994, writ denied with per curiam opinion on unrelated issue); *Taylor v. Johnson*, 677 S.W.2d 680, 682 (Tex.App.- Eastland 1984, writ refused n.r.e.).

a) "In the context of a claim for fraud, "reckless" means "a state or quality of wanton disregard of the rights of others, or a conscious indifference to the results which may follow as a consequence of one's acts." *Stone v. Lawyers Title Ins. Corp*., 537 S.W.2d 55, 71-72 (Tex.App.--Corpus Christi 1976), *aff'd in part, rev'd on other grounds*, 554 S.W.2d 183 (Tex.1977). Under *Trenholm*, a statement is made recklessly when the speaker knows that he does not have sufficient information or basis to support the representation. 646 S.W.2d at 933; *see also Group Hospital Services, Inc. v. Daniel*, 704 S.W.2d 870, 874-75 (Tex.App.--Corpus Christi 1985, no writ) (finding that a statement was made recklessly, but did not rise to the level of conscious indifference necessary for a punitive damages award)."

   IT Corp. v. Motco Site Trust Fund, 903 F.Supp. 1106, 1128 (S.D.Tex. 1994).

b) Falsity must be material (*Trenholm, supra*, 646 S.W.2d at 930) – *i.e.*, the false representation would be important to a reasonable person in reaching a decision to do something in reliance the filing. *See H.W. Broadus Co. v. Binkley*, 88 S.W.2d 1040, 1042-43 (Tex. 1936).

c) But must the falsehood be explicit (*e.g.*, "This document is a valid judicial decree") or can it be implicit (*e.g*., using legal jargon, seals, words of command, and other indicators implying that the filer is filing a judicial order even if the terms "court order," "judgment," "decree," "injunction" or terms of like import are not on the face of the document? I think that implied misrepresentation is sufficient – Texas cases recognize actionable false represenation by deceptive conduct (*see Ten-Cate v. First Nat'l Bank of Decatur*, 52 S.W.2d 323, 326 (Tex. App.—Fort Worth 1932) and filing a document falsely pretending it is a court order is false conduct because usually there would be no valid reason for filing the paper if it were not a court order. Moreover, intentional concealment of material facts with intent to deceive can be actionable, *see Campbell v. Booth*, 526 S.W.2d 167, 172 (Tex. App.—Dallas 1975). Creating the appearance that a filing is a court document while concealing the true facts should render the filing fraudulent under that principle.

ii. THEREFORE, IN CONTEXT, I THINK THAT A "FRAUDULENT DOCUMENT" MEANS A FILING CONTAINING AT LEAST ONE MATERIALLY FALSE STATEMENT INTENDED TO DECEIVE OR [IF FALSITY DOES NOT RELATE TO FILER'S INTENT TO PERFORM FUTURE ACT] FILED WITH RECKLESS DISREGARD FOR WHETHER IT WILL DECEIVE.

b. Probably, each materially false statement in a document containing multiple false statements constitutes a separate act of fraud for criminal prosecution purposes, and perhaps for civil litigation too. *See Jones v. State*, -__ S.W.3d __, 2010 WL 3766654, at *4 (Nos. PD-0499-09, PD-0500-09, Tex. Crim. App. Sept. 29, 2010) ("the appropriate unit of prosecution [for violating Penal Code § 32.32 (false statements to obtain property or credit)] is the 'materially false or misleading statement,' not the loan application. Each 'materially false or misleading statement' constitutes a separate offense.").

c. PRESUMPTIONS ARE NOT EXCLUSIVE PROOF OF "FRAUDULENT DOCUMENT" BUT CAN AID CLERK IN IDENTIFYING "FRAUDULENT DOCUMENTS":

i. Penal Code § 32.21(f) "A person is presumed to intend to defraud or harm another if the person acts with respect to two or more writings of the same type and if each writing is a government record listed in Section 37.01(2)(C)." ["a license, certificate, permit, seal, title, letter of patent, or similar document issued by government"].

ii. Penal Code § 32.46 [Securing Execution of Document by Deception]. "If it is shown on the trial of an offense under this section that the simulating document was filed with, presented to, or delivered to a clerk of a court or an employee of a clerk of a court created or established under the constitution or laws of this state, there is a rebuttable presumption that the document was delivered with the intent described by Subsection (a) ["intent to defraud or harm any person"].

iii. Gov't Code § 51.901(c) [Fraudulent Document or Instrument[3]]. A document that is filed or offered for filing is presumed to be fraudulent if:

[3] In context here, the term "instrument" appears redundant with the term "document." A "document" usually includes any paper or other representation of information. *See*, e.g., TEX. FINANCE CODE § 14.001(a)91) ("In this chapter … 'document' includes books accounts, correspondence, records, and papers"). An "instrument" is generally understood to mean a document that effectuates a change in legal relationships. BLACK'S LAW DICTIONARY (2008 ed.) defines "instrument" as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory noted, or share certificate," however, BLACK'S further quotes with apparent approval, "An 'instrument' seems to embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters patent, rules, regulations, by-laws, whether in writing or imprint, or partly in both; in fact, any written or printed document that may have to be interpreted by the Courts." Edward Beal, Cardinal Rules of Legal Interpretation 55 (W.E. Randall ed.,3d ed. 1924)." I consider Beals' definition too broad and would limit "instruments" to documents that change legal relationships. For example, a check is a negotiable "instrument" because it constitutes an order to pay money; a deed is an instrument because it changes ownership of land. But both checks and deeds are also documents. By contract, I would say that a typical office memorandum

a) the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

i) a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or

ii) a purported judicial officer of a purported court or purported judicial entity described by Paragraph i); or

b) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:

i) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

ii) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person;[4] or

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that merely conveys or preserves information is a "document" but not an "instrument," even if it became necessary for a court to interpret the memo for some purpose.

[4] The courts are applying § 51.901(c) to ordinary commercial disputes -- to convert honest disagreements about whether a debt secured by a lien is due into disputes over wither the lien is fraudulent. This was not the legislative intent, but the history is admittedly sparse. The legislation was part of H.B. 1185 in 1997, aimed at paper terrorism, not ordinary business transactions [H.B. 1185 is reproduced in full below]. An illustration of this risk and a sensible treatment follows:

> Young asserts that the mechanic's and materialman's lien Neatherlin filed to secure Young's final payment for the Windsor model home was presumptively fraudulent because Neatherlin never completed his obligations under the parties' contract. See Tex. Gov't Code Ann. § 51.901(c) (Vernon 1998) (stating that, for purposes of that statute, a document is presumed to be fraudulent if it purports to create a lien against property and it was not created by consent or agreement of the property owner). However, Neatherlin unambiguously testified that he completed the terms of the contract with respect to the Windsor model home. The evidence Young cites in response-- mostly Young's own testimony--relates only to the question of whether the contract was in fact completed. Young points to no evidence showing that *Neatherlin knew he was not entitled to his final payment when he filed the lien or that he filed the lien with intent to cause Young injury or emotional distress*.

Young v. Neatherlin, 102 S.W.3d 415, 421-22 (Tex.App.-Houston [14 Dist.] 2003) (emphasis added). The emphasized language provides a wise gloss on the statutory text by requiring intent to defraud or malicious intent to injure in addition to lack of the debtor's consent. But the *Neatherlin* court did not restrict application of H.B. 1185 provisions such as Government Code § 51.901 to "sovereign citizen" situations. Moreover, another appellate court decision has expressly rejected as contrary to the statute's plain language an attempt to make it inapplicable to normal commercial disputes. *See Centurion Planning Corp., Inc. v. Seabrook Venture II*, 176 S.W.3d 498, 504-06 (Tex.App.-Houston [1 Dist.] 2004) (Legislature could have excluded regular commercial transactions, but did not). I believe that the *Young v. Neatherlin* approach is more appropriate. Clerks should refer disputants' attempts to characterize merely disputed liens as fraudulent liens to the appropriate district or county attorney for advice. The *Centurion Planning* opinion is discussed in T. Reed & M. Feiler, "Construction and Surety Law," 59 –S.M.U. L. REV. 1079, nn. 394-405 and accompanying text (Summer 2006). Other decisions that have applied various

iii) is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

4. PURE FINANCIAL FRAUD DISTINGUISHED FROM SPURIOUS "COMMON LAW" DOCUMENTS THAT MAY BE FRAUDULENT

a. Financial fraud – usually not apparent on face of the instrument, so clerk usually must file *if filing fee paid* because the document is regular on its face.

b. If questions about particular instrument – notify county or district attorney and/or sheriff, the Texas Attorney General, and perhaps federal authorities.

c. Science of recognizing forgeries & counterfeiting – not your job. Although if reasonable suspicion – notify law enforcement, being careful to be non-conclusory/non-accusatory. See suggested Form of Notice under GOV'T CODE § 51.901 below for general tenor of communications.

d. If the suspect documents were already filed (but newly discovered to be potentially fraudulent clerk may be obligated to notify victim. *See* TEX. GOV'T CODE § 51.901 (discussed below).

5. TOP 16 WAYS TO RECOGNIZE SPURIOUS (POTENTIALLY FRAUDULENT) FILINGS BY "COMMON LAW" CITIZENS FILINGS

This list is derived from a "Top 10 Ways to Recognize Common Law Litigants or Sovereign Citizens" list by former Texas Assistant Attorney General Ilse D. Bailey

i. Signature accompanied by:

- "Without Prejudice, UCC 1-201"
- Comma, Colon, or Semi-Colon after middle name (e.g., John D., Smith)
- Thumb print (often in red ink, simulating blood) instead of or beside signature

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provisions of H.B. 1185 to ordinary commercial transactions include *Taylor Elec. Services, Inc. v. Armstrong Elec. Supply Co.*, 167 S.W.3d 522 (Tex. App.- Fort Worth 2005) and *Ramirez v. Springer Financial Group, Inc.*, Case No. 13-03-466-CV 2005 WL 1039651 (Tex. App.- Corpus Christi May 05, 2005) (unpublished). I see nothing wrong with applying principles of fraud to civil liability underlying standard commercial transactions – indeed common law and more general pre-existing statutes probably already did so. I am simply uncomfortable wit the courts using statues that were not intended for that purpose. Of course, as time passes, and business people as well as attorneys become familiar with the statutes enacted in H.B. 1185, my concern will become vitiated because nobody will be able to claim with justification that they had no reason to suspect that the H.B. 1185 legislation applied to their conduct. Most recently, a federal court, without expressing any qualms about whether the statute should be limited to "sovereign citizen" situations, has applied another statutory cause of action created by H.B. 1185, the civil action for fraudulent liens under Tex. Civ. Pac. & Rem. Code § 12.005, to a traditional fraud situation. *See Vanderbilt Mortgage & Fin., Inc. v. Flores*, __ F. Supp. 2d __-, 2010 WL 3359563 *4 -*6 (Civ. Action No. C-09-312 S.D. Tex. Aug. 25, 2010).

- "TDC" (meaning "Threat, Duress, & Coercion") written beside signature, often hidden in fancy loops under signed name

ii. Style of case names, court, and/or governmental unit using inappropriate capitalization, or the terms "de facto" or "inc." (*e.g.*, "united states DISTRICT COURT" or "DISTRICT COURT OF THE UNITED STATES, INC." or "PANOLA COUNTY CLERK," de facto)

iii. First page of document (usually toward the top) includes so-called "flag of peace" (U.S. Flag without gold fringe around border) either printed on document or affixed as a sticker (similar to U.S. postage stamp)

iv. Litigant/filer declares self to be "sovereign," "freeman," "natural freeman," "common law citizen," "Citizen of the Republic of Texas," or similar term

v. Inappropriate or odd use of archaic legal terms, or of terms that sound legalistic but have no meaning, such as "in propria persona," "pro per," "plea of non-assumpsit," or "Claim: Writ of Error"

vi. Out of context citation of short passages from old court cases (often from low level courts or fictitious courts) or superseded statutes, often from other states, from Great Britain, from Medieval Europe, or from imagination. Lately, using "Redemption" scam, most popular citation is to House Joint Resolution ["HJR"] 192 (June 5, 1933), later codified by former 31 U.S.C. § 463. However, Section 463 was repealed in pertinent part as to subsequently issued instruments by Act of October 28, 1977, P.L. 95-147, sec. 4(c), 91 Stat. 1229 [now codified as 31 U.S.C. § 5118(d)(2)].[5]

vii. Urging the nullification of constitutional, treaty, or statutory law on the basis that such provision contravenes religious or natural law

viii. Pleadings purport to be filed in, or to remove case to, a "common law" court (removal often accomplished by use of inappropriate capitalization, for example, notice of" removal" to "UNITED states DISTRICT COURT" may later be asserted to have removed case to a U.S. District Court created not by federal statute, but by "common law" as somehow embodied in the U.S. Constitution

ix. Defendant demands proof of court's or prosecutor's jurisdiction or authority

x. Defendant moves to remove judge, prosecutor, or attorney for "treason against oath" or failure to file oaths required by constitution or statute

[5] The provision in question addresses the enforceability of "payable in specie" clauses (usually called "gold clauses") in contracts including public bonds. These provisions obligate payment in gold having the value of the contract amount, rather than in paper money. They were common before 1933. Citations to leading U.S. Supreme Court cases, and a good summary of the applicable arguments and legislation appears in *Gold Bondholders Protective Council v. Atchison, Topeka and Santa Fe Ry. Co.*, 649 P.2d 947 (Alaska 1982).

xi. Defendant rejects authority of the state to regulate his "rights", such as claimed rights to travel, to operate motor vehicle, or to possess weapon, without defendant's express prior consent to such regulation.

xii. Objection to court's jurisdiction if U.S. Flag in courtroom has gold fringe around border (sometimes called "maritime jurisdiction" flag or words of similar import).

xiii. Defendant/filer uses spurious social security number (including number not appearing to be a social security number where SSN called for - might be certified mail number or form number). Using certified mail receipt numbers for other purposes (such as to claim official registration or recognition by reference to this number as a "file" or "registration" number is not uncommon. At least one spurious Native American tribe uses the certified mail receipt number of a letter to the U.S. Bureau of Indian Affairs as "proof" that the BIA has recognized the group as a bona fide tribe.

xiv. Defendant/filer's address given with "TPZ" (Texas Postal Zone) or variant thereof, before zip code in address. For an example, see the "application for merit pedigree" form promulgated by ARF (Animal Research Foundation) of Quinlan TX, at http://www.stodghillsarfregistry.com/merit%20pedigree%20application.htm. ARF's motto: "We Register the World" (see seal on upper left corner of Web page). I do not mean to imply that this Web site is necessarily doing anything illegal.

xv. Defendant lacks driver's license, liability insurance or financial responsibility card, and/or vehicle plates, or one or more of them are homemade or are issued by non-governmental or fictional governmental entity (*e.g.*, Embassy of Heaven, Republic of Texas, Wachita Nation; Little Shell Pembina Band).

xvi. Document is stamped or otherwise marked "accepted for value", often accompanied by reference to U.C.C.1-201 or other U.C.C. §, or to H.J.R. 192. *See* vi., above. This is "Redemption Scam," also known as "Redemption Scheme." *See Old Wine in New Bottles* by Mark Pitcavage at http://www.adl.org/mwd/redemption.htm.

6. TO FILE OR NOT: DUTY TO ACCEPT FOR FILING (SUBJECT TO PAYMENT OR SATISFACTORY ARRANGEMENT FOR PAYMENT OF ANY APPROPRIATE FEES) OF ANY DOCUMENT EXPRESSLY AUTHORIZED OR PERMITTED BY LAW TO BE FILED AND TO REFUSE TO ACCEPT FOR FILING ANY OTHER DOCUMENT, EXCEPT:

Exceptions to duty to file or refuse to file:

i. IN LITIGATION, BRING ISSUE TO ATTENTION OF PRESIDING JUDGE FOR ACTION THE JUDGE MAY DEEM APPROPRIATE; AND

ii. IF IN ANY DOUBT OTHER THAN IN LITIGATION, SEEK OPINION OF APPROPRIATE GOVERNMENT ATTORNEY (USUALLY, COUNTY ATTORNEY). Tex. Gov't Code § 51.901(d)[6] .

iii. TEXAS ATTORNEY GENERAL WILL ALSO PROVIDE VERBAL ADVICE.

a. TO UNFILE? NEVER, ABSENT EXPRESS COURT ORDER. PROVISIONS FOR OWNER OR GOVERNMENT ATTORNEYS TO OBTAIN EX PARTE ORDER INVALIDATING SPURIOUS LIENS, BUT NOT TO UNFILE THEM.[7]

b. DO NOT USE INFORMAL OR UNOFFICIAL FILES TO AVOID CONFRONTATION – PERSON WHOSE FILING FEE IS ACCEPTED HAS RIGHT TO BELIEVE THE DOCUMENT WAS FILED. THEFT?

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[6] (d) If a county clerk believes in good faith that a document filed with the county clerk to create a lien is fraudulent, the clerk shall:

(1) request the assistance of the county or district attorney to determine whether the document is fraudulent before filing or recording the document;

(2) request that the prospective filer provide to the county clerk additional documentation supporting the existence of the lien, such as a contract or other document that contains the alleged debtor or obligor's signature; and

(3) forward any additional documentation received to the county or district attorney.

Tex. Gov't Code § 51.901(d). *See* annotated text of § 51.901, immediately below.

[7] Tex. Gov't Code § 51.902 provides for ex parte declaration of invalidity of fraudulent judgment lines and § 51.903 provides for *ex parte* declaration of invalidity of other fraudulent liens. One holder of a lien invalidated under the *ex parte* procedures of Government Code § 51.903 challenged the procedure, particularly the "irrebuttable" presumption of fraud, as a violation of "commercial due process. However the appeals court refused to consider the challenge for failure to raise it at the trial court level. *See In re Purported Lien or Claim against Taylor*, 219 S.W.3d 620, 622-23 (Tex. App.-- Dallas 2007, pet. denied & mandamus denied), *cert. denied*, 552 U.S. 891 (2007) *see Florance v. State*, No. 05-08-00984-CR, 2009 WL 2648177, at *2–3 (Tex. App.-Dallas Aug. 28, 2009) (entry of *ex parte* order invalidating fraudulent lien did not prevent later criminal conviction and sentencing for refusal to release the same fraudulent lien). The lienholder's subsequent unsuccessful ancillary civil litigation, including an attempt to sue the federal and state district judges, county district attorney's office, county investigator, county clerk, deputy clerks, attorneys and law firm representing county clerk, city prosecutor, assistant attorney general, county, State of Texas, and United States, alleging various claims under federal and state law were are summarized in *Florance v. Buchmeyer*, 500 F. Supp. 2d 618 (N.D. Tex.), *appeal dism'd*, 258 Fed.Appx. 702 (5th Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008). Both §§ 51.902 and 51.903 provide that appellate review of any declaration of lien invalidity is limited to a determination of whether the trial court entered the declaratory order substantially in conformity with the statutory forms. Thus in *In re Purported Judgment Lien Against Barcroft*, 58 S.W.3d 799 (Tex. App.-Texarkana 2001), the appeals court remanded directing that the trial court reform its declaratory order to conform to statute but held that there was no additional appellate review jurisdiction over the order. *Accord, see Partain v. Tex. State Bank*, No. 13-08-00462-CV, 2008 WL 4742346 (Tex. App.-Corpus Christi Oct. 30, 2008, pet. denied and pet. dism'd); *In re Long*, No. 13-07-00148-CV, 2007 WL 3380032 (Tex. App.-Corpus Christi Nov. 15, 2007).

7. DUTY TO NOTIFY owner at last known address in two business days if purported court order or lien or claim on any property appears to be fraudulent. Tex. Gov't Code § 51.901.

a. May be multiple "victims" under statute

b. What about other fraudulent documents? Will? Pleading? "Bill of Lading" under the Redemption scam?

c. Temptation to notify an apparent victim as public service.

d. But what if "victim" is in on the plan? Will notification compromise law enforcement investigation?

e. Best course – notify appropriate government attorney (usually county attorney) and, perhaps, appropriate law enforcement official, and defer to their judgment about whom else to notify, or let them do the notifications.

8. ANNOTATION: GOV'T CODE § 51.901.–FRAUDULENT DOCUMENT OR INSTRUMENT.[8]

(a) If a clerk of the supreme court, clerk of the court of criminal appeals, clerk of a court of appeals, district clerk, county clerk, district and county clerk, or municipal clerk has **a reasonable basis to believe in good faith**[9] that a document or instrument previously filed or recorded or **offered or submitted**[10] for filing or for filing and recording is fraudulent, the clerk shall:

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[8] In this portion of the outline (the annotated text of § 51.901), I use **bold font** to identify text that I discuss in the footnotes. None of these footnotes appear in the actual statutory text.

[9] "Good faith" probably here means a belief that is honestly held – not a pretext. *See Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314, 320-21 (Tex. 2002) (interpreting whistleblower statute). In the context of when an official acts in "good faith" so as to be entitled to immunity, "[t]his test of good faith does not inquire into what a reasonable person would have done, but into what a reasonable person could have believed. In making this inquiry, we rely solely on objective evidence." *Freeman v. Wirecut E.D.M., Inc.*, 159 S.W.3d 721, 729-30 (Tex.App.-Dallas 2005, no writ) (citations omitted). In other words, if the same standard applies under Gov't Code § 51.901(a), the test of good faith would not be what a specific clerk really believed, and not even what a reasonable clerk under the same circumstances would likely have believed, but only whether a reasonable clerk under the circumstances *could* have suspected fraud. Note that the critical factor is not that the clerk entertain a good faith belief that the document is fraudulent; it is a much lower threshold: The clerk must only have "a reasonable basis to believe in good faith." Perhaps this formulation is intended to resemble the "probable cause" level of proof necessary for a magistrate to issue of an search warrant? *See* TEX. CODE CRIM. P. Art. 18.01(b). If so, then there is a huge body of law on what that standard it – boiling down to a common sense of likelihood. *See Winkles v. State*, 634 S.W.2d 289, 298(Tex. Cr. App. 1981) (probable cause for search warrant means facts "interpreted in common sense in realistic manner" were sufficient to justify conclusion that property that is object to search is probably on premises to be searched when warrant issued). There is no case law directly on point.

[10] Read literally, this purports to require a clerk to give notice about a document that the clerk refused to file, and therefore about which the clerk probably lacks complete information and of which the clerk almost always will lack a copy. Sometimes, the person trying to file will leave a copy so that the clerk can give it to the county or district attorney for advice. If that happens, this will provide the needed information and copy. Otherwise, this portion of the statute may be impossible to implement. As always, consult your governmental attorney.

(1) if the document is a purported judgment or other **document purporting to memorialize or evidence an act, an order, a directive, or process of a purported court**,[11] provide written notice of the filing, recording, or submission for filing or for filing and recording to the stated or last known address of the **person against whom**[12] the purported judgment, act, order, directive, or process is rendered; or

(2) if the document or instrument purports to create a lien or assert a claim on **real or personal property or an interest in real or personal property**, provide written notice of the filing, recording, or submission for filing or for filing and recording to the stated or last known address of the person named in the document or instrument as the obligor or debtor and to any person named as owning any interest in the real or personal property described in the document or instrument.

(b) A clerk shall provide written notice under Subsection (a):

(1) not later than the second business day after the date that the document or instrument is offered or submitted for filing or for filing and recording; or

(2) if the document or instrument has been previously filed or recorded, not later than the second business day after the date that the clerk becomes aware that the document or instrument may be fraudulent.

(c) For purposes of this section, a document or instrument is **presumed to be fraudulent** if:

(1) the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

(A) a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or

(B) a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A); or

(2) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:

(A) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

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[11] *I.e.*, if the document recites that it was issued by a judge or court – even if an unrecognized judge or a fictitious court. However, a communication from a purported peace officer, attorney general, county attorney, etc. probably would not fit the description. What about a communication called a "notice" from a purported "clerk" of a fictitious court? Is a "notice" an "act" or "process"? Is the purported "clerk" acting on behalf of the fictitious court so that the act is by the purported "court"? These questions are not resolved. Consult your attorney if you confront this sort of situation. Personally, I would give the notice.

[12] As to in rem judgments, *see* subsection 51.901(a)(2). But what about a "non-party" victim who is not mentioned in a spurious in personam judgment, such as the parent of a minor child against which a specious judgment is purportedly issued; or the surviving spouse or heirs of a deceased "judgment" debtor who had no administered estate? Consult your County or District Attorney, but I would give notice.

(B) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or

(C) is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

(3) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and the document or instrument is filed by an inmate or on behalf of an inmate.

(d) If a county clerk believes in good faith that a document **filed with**[13] the county clerk to create a lien is fraudulent, the clerk shall:

(1) request the assistance of the county or district attorney to determine whether the document is fraudulent before filing or recording the document;

(2) request that the prospective filer provide to the county clerk additional documentation supporting the **existence of the lien**[14], such as a contract or other document that contains the alleged debtor or obligor's signature; and

(3) forward any additional documentation received to the county or district attorney.

(e) A presumption under Subsection (c)(3) may be rebutted by providing the filing officer the filing office in which the document is filed or recorded the original or a copy of a sworn and notarized document signed by the obligor, debtor, or owner of the property designated as collateral stating that the person entered in to a security agreement with the inmate and authorized the filing of the financing statement as provided by Section 9.509, Business & Commercial Code.

(f) In this section:

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[13] Read literally, subsection (d) would only apply to documents already accepted for filing. In context, the Legislature must have meant to refer to documents offered for filing but not yet filed, and later text in the subsection makes that clear (*i.e.*, "before filing or recording the document" and "request that the prospective filer." Otherwise, it should be law enforcement authorities and not clerks who would be seeking additional information and clarification in most instances. It would have been preferable to empower county attorneys to make the requests, and allow clerks to retain their impartial and nondiscretionary status. Also preferable would have been explicit authority for clerks not to accept proposed liens for filing of requested documents were not produced or if they provided insufficient support for the lien. Unfortunate too is the Legislature's failure to allow clerks to delay the notice periods under subsection (b) pending completion of the inquiry mandated by subsection (d). Of course, literal compliance with subsection (b)'s two-day notice period would give the proposed victim an early opportunity to take measures prevent the filing even while the clerk's inquiries proceed.

[14] "Existence of the lien" should not be read too narrowly. Clearly the Legislature meant to permit the Clerk to seek documents substantiating the underlying debt or obligation. Sometimes, even in legitimate instances, no lien will exist until the clerk files or records it. In other instances there may be a theoretical unrecorded lien that would be unenforceable against third parties until recorded. But often in order to determine the legitimacy of a proposed recordation, the clerk would have to obtain documents respecting underlying transactions.

(1) "Inmate" means a person housed in a secure correctional facility.

(2) "Secure correctional facility" has the meaning assigned by Section 1.07, Penal Code.

f. **Form of Notice under GOV'T CODE § 51.901**

VIA U.S. CERTIFIED MAIL – RECEPT NO. _____
[name and address of
addressee]

Re: Document [on file in the deed records of this office at Volume_____, Page _____] [purporting to be _____ offered for filing in the records of this office on or about [date]]

Dear _____:

You are hereby notified pursuant to Texas Government Code § 51.901 that the referenced document was offered for filing/in on file in the records of this office. For any further information, please contact [County Attorney].

Sincerely yours,

_____
Clerk

cc: County Attorney _____

i. The form does not characterize the document except as necessary to describe a document that was not filed;

ii. The form does not accuse any individual of doing anything illegal;

iii. The form does not volunteer assistance, but does not preclude a Public Information Act request

iv. Leave it to attorney or law enforcement to decide whether to provide a copy of the instrument or other information.

9. STATUTES

g. H.B. 1185 (1997)

H.B. 1185, enrolled as Acts 1997, 75th Leg., ch. 189, was signed by then-Governor Bush on May 21, 1997, to be effective immediately. H.B. 1185 created or amended several state laws respecting fraudulent filings. H.B. 1185 was amended to renumber provisions of the CIV. PRAC. & REM. CODE by Acts 1999, 76th Leg., ch. 62, § 19.01(3), eff. September 1, 1999. The full text of H.B. 1185 is available on-line from the Texas Legislature On Line Web Site by selecting "75th

REGULAR SESSION – 1997" and entering "hb1185" at URL http://www.capitol.state.tx.us/tlo/billnbr.htm.

H.B. 1185 is a key source for remedies and procedures for countering fraudulent filings by sovereign citizens.

One provision of H.B. 1185, Penal Code § 32.49, makes it an offense to refuse to release a fraudulent lien after due request. In the only case so far construing this provision, *Miller v. State*, 2005 WL 1744921, Case Nos. 05-04-00535-CR, 05-04-00536-CR (Tex.App.--Dallas, Jul 26, 2005) (unpublished) the court upheld the constitutionality of the rebuttable presumption of intent to harm or defraud that this law imposes for failure to release within 21 days after demand. *See also State v. Florance*, 2007 WL 2460088, Case No. 05-07-0088-CR (Tex.App.-Dallas,Aug. 31, 2007) (unpublished).

H.B. No. 1185

AN ACT

relating to the fraudulent exercise of certain governmental functions and the fraudulent creation or use of certain pleadings, governmental documents, and records; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sections 32.21(e) and (f), Penal Code, are amended to read as follows:

(e) An offense under this section is a felony of the third degree if the writing is or purports to be:

(1) part of an issue of money, securities, postage or revenue stamps;

(2) a government record listed in Section 37.01(2)(C) [~~37.01(1)(C)~~]; or

(3) other instruments issued by a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against another person.

(f) A person is presumed to intend to defraud or harm another if the person acts with respect to two or more writings of the same type and if each writing is a government record listed in Section 37.01(2)(C) [~~37.01(1)(C)~~].

SECTION 2. Section 32.46, Penal Code, is amended to read as follows:

Sec. 32.46. SECURING EXECUTION OF DOCUMENT BY DECEPTION. (a) A person commits an offense if, with intent to defraud or harm any person, he, by deception:

(1) [~~,~~] causes another to sign or execute any document affecting property or service or the pecuniary interest of any person; or

(2) causes or induces a public servant to file or record any purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

(A) a purported court that is not expressly created or established under the constitution or the laws of this state or of the United States;

(B) a purported judicial entity that is not expressly created or established under the constitution or laws of this state or of the United States; or

(C) a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A) or (B).

(b) An offense under Subsection (a)(1) [~~this section~~] is a:

(1) Class C misdemeanor if the value of the property, service, or pecuniary interest is less than $20;

(2) Class B misdemeanor if the value of the property, service, or pecuniary interest is $20 or more but less than $500;

(3) Class A misdemeanor if the value of the property, service, or pecuniary interest is $500 or more but less than $1,500;

(4) state jail felony if the value of the property, service, or pecuniary interest is $1,500 or more but less than $20,000;

(5) felony of the third degree if the value of the property, service, or pecuniary interest is $20,000 or more but less than $100,000;

(6) felony of the second degree if the value of the property, service, or pecuniary interest is $100,000 or more but less than $200,000; or

(7) felony of the first degree if the value of the property, service, or pecuniary interest is $200,000 or more.

(c) An offense under Subsection (a)(2) is a state jail felony.

(d) In this section, "deception" has the meaning assigned by Section 31.01.

SECTION 3. Subchapter D, Chapter 32, Penal Code, is amended by adding Section 32.48 to read as follows:

Sec. 32.48. SIMULATING LEGAL PROCESS. (a) A person commits an offense if the person recklessly causes to be delivered to another any document that simulates a summons, complaint, judgment, or other court process with the intent to:

(1) induce payment of a claim from another person; or

(2) cause another to:

(A) submit to the putative authority of the document; or

(B) take any action or refrain from taking any action in response to the document, in compliance with the document, or on the basis of the document.

(b) Proof that the document was mailed to any person with the intent that it be forwarded to the intended recipient is a sufficient showing that the document was delivered.

(c) It is not a defense to prosecution under this section that the simulating document:

(1) states that it is not legal process; or

(2) purports to have been issued or authorized by a person or entity who did not have lawful authority to issue or authorize the document.

(d) If it is shown on the trial of an offense under this section that the simulating document was filed with, presented to, or delivered to a clerk of a court or an employee of a clerk of a court created or established under the constitution or laws of this state, there is a rebuttable presumption that the document was delivered with the intent described by Subsection (a).

(e) Except as provided by Subsection (f), an offense under this section is a Class A misdemeanor.

(f) If it is shown on the trial of an offense under this section that the defendant has previously been convicted of a violation of this section, the offense is a state jail felony.

SECTION 4. Subchapter D, Chapter 32, Penal Code, is amended by adding Section 32.49 to read as follows:

Sec. 32.49. REFUSAL TO EXECUTE RELEASE OF FRAUDULENT LIEN OR CLAIM. (a) A person commits an offense if, with intent to defraud or harm another, the person:

(1) owns, holds, or is the beneficiary of a purported lien or claim asserted against real or personal property or an interest in real or personal property that is fraudulent, as described by Section 51.901(c), Government Code; and

(2) not later than the 21st day after the date of receipt of actual or written notice sent by either certified or registered mail, return receipt requested, to the person's last known address, or by telephonic document transfer to the recipient's current telecopier number, requesting the execution of a release of the fraudulent lien or claim, refuses to execute the release on the request of:

(A) the obligor or debtor; or

(B) any person who owns any interest in the real or personal property described in the document or instrument that is the basis for the lien or claim.

(b) A person who fails to execute a release of the purported lien or claim within the period prescribed by Subsection (a)(2) is presumed to have had the intent to harm or defraud another.

(c) An offense under this section is a Class A misdemeanor.

SECTION 5. Section 37.01, Penal Code, is amended to read as follows:

Sec. 37.01. DEFINITIONS. In this chapter:

(1) "Court record" means a decree, judgment, order, subpoena, warrant, minutes, or other document issued by a court of:

(A) this state;

(B) another state;

(C) the United States;

(D) a foreign country recognized by an act of congress or a treaty or other international convention to which the United States is a party;

(E) an Indian tribe recognized by the United States; or

(F) any other jurisdiction, territory, or protectorate entitled to full faith and credit in this state under the United States Constitution.

(2) "Governmental record" means:

(A) anything belonging to, received by, or kept by government for information, including a court record;

(B) anything required by law to be kept by others for information of government; or

(C) a license, certificate, permit, seal, title, letter of patent, or similar document issued by government.

(3) [~~(2)~~] "Statement" means any representation of fact.

SECTION 6. Section 37.10, Penal Code, is amended by amending Subsection (d) and adding Subsection (h) to read as follows:

(d) An offense under this section is a felony of the third degree if it is shown on the trial of the offense that the governmental record was a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the second degree.

(h) If conduct that constitutes an offense under this section also constitutes an offense under Section 32.48 or 37.13, the actor may be prosecuted under any of those sections.

SECTION 7. Section 37.11, Penal Code, is amended to read as follows:

Sec. 37.11. IMPERSONATING PUBLIC SERVANT. (a) A person commits an offense if he:

(1) impersonates a public servant with intent to induce another to submit to his pretended official authority or to rely on his pretended official acts; or

(2) knowingly purports to exercise any function of a public servant or of a public office, including that of a judge and court, and the position or office through which he purports to exercise a function of a public servant or public office has no lawful existence under the constitution or laws of this state or of the United States.

(b) An offense under this section is [~~a Class A misdemeanor unless the person impersonated a peace officer, in which event it is~~] a felony of the third degree.

SECTION 8. Chapter 37, Penal Code, is amended by adding Section 37.13 to read as follows:

Sec. 37.13. RECORD OF A FRAUDULENT COURT. (a) A person commits an offense if the person makes, presents, or uses any document or other record with:

(1) knowledge that the document or other record is not a record of a court created under or established by the constitution or laws of this state or of the United States; and

(2) the intent that the document or other record be given the same legal effect as a record of a court created under or established by the constitution or laws of this state or of the United States.

(b) An offense under this section is a Class A misdemeanor, except that the offense is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under this section on two or more occasions.

(c) If conduct that constitutes an offense under this section also constitutes an offense under Section 32.48 or 37.10, the actor may be prosecuted under any of those sections.

SECTION 9. Section 71.02(a), Penal Code, is amended to read as follows:

(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, he commits or conspires to commit one or more of the following:

(1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, forgery, deadly conduct, assault punishable as a Class A misdemeanor, burglary of a motor vehicle, or unauthorized use of a motor vehicle;

(2) any gambling offense punishable as a Class A misdemeanor;

(3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;

(4) unlawful manufacture, transportation, repair, or sale of firearms or prohibited weapons;

(5) unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception;

(6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same;

(7) any unlawful employment, authorization, or inducing of a child younger than 17 years of age in an obscene sexual performance;

(8) any felony offense under Chapter 32, Penal Code;

(9) any offense under Chapter 36, Penal Code; [~~or~~]

(10) any offense under Chapter 34, Penal Code; or

(11) any offense under Section 37.11(a), Penal Code.

SECTION 10. Chapter 37, Penal Code, is amended by adding Section 37.101 to read as follows:

Sec. 37.101. FRAUDULENT FILING OF FINANCING STATEMENT. (a) A person commits an offense if the person knowingly presents for filing or causes to be presented for filing a financing statement that the person knows:

(1) is forged;

(2) contains a material false statement; or

(3) is groundless.

(b) An offense under Subsection (a)(1) is a felony of the third degree, unless it is shown on the trial of the offense that the person had previously been convicted under this section on two or more occasions, in which event the offense is a felony of the second degree. An offense under Subsection (a)(2) or (a)(3) is a Class A misdemeanor, unless the person commits the offense with the intent to defraud or harm another, in which event the offense is a state jail felony.

SECTION 11. Chapter 1, Code of Criminal Procedure, is amended by adding Article 1.052 to read as follows:

Art. 1.052. SIGNED PLEADINGS OF DEFENDANT. (a) A pleading, motion, and other paper filed for or on behalf of a defendant represented by an attorney must be signed by at least one attorney of record in the attorney's name and state the attorney's address. A defendant

who is not represented by an attorney must sign any pleading, motion, or other paper filed for or on the defendant's behalf and state the defendant's address.

(b) The signature of an attorney or a defendant constitutes a certificate by the attorney or defendant that the person has read the pleading, motion, or other paper and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry that the instrument is not groundless and brought in bad faith or groundless and brought for harassment, unnecessary delay, or other improper purpose.

(c) If a pleading, motion, or other paper is not signed, the court shall strike it unless it is signed promptly after the omission is called to the attention of the attorney or defendant.

(d) An attorney or defendant who files a fictitious pleading in a cause for an improper purpose described by Subsection (b) or who makes a statement in a pleading that the attorney or defendant knows to be groundless and false to obtain a delay of the trial of the cause or for the purpose of harassment shall be held guilty of contempt.

(e) If a pleading, motion, or other paper is signed in violation of this article, the court, on motion or on its own initiative, after notice and hearing, shall impose an appropriate sanction, which may include an order to pay to the other party or parties to the prosecution or to the general fund of the county in which the pleading, motion, or other paper was filed the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including reasonable attorney's fees.

(f) A court shall presume that a pleading, motion, or other paper is filed in good faith. Sanctions under this article may not be imposed except for good cause stated in the sanction order.

(g) A plea of "not guilty" or "no contest" or "nolo contendere" does not constitute a violation of this article. An allegation that an event took place or occurred on or about a particular date does not constitute a violation of this article.

(h) In this article, "groundless" means without basis in law or fact and not warranted by a good faith argument for the extension, modification, or reversal of existing law.

SECTION 12. Chapter 13, Code of Criminal Procedure, is amended by adding Article 13.26 to read as follows:

Art. 13.26. SIMULATING LEGAL PROCESS. An offense under Section 32.46, 32.48, 32.49, or 37.13, Penal Code, may be prosecuted either in the county from which any material document was sent or in the county in which it was delivered.

SECTION 13. Section 51.605(c), Government Code, is amended to read as follows:

(c) A clerk must successfully complete 20 hours of continuing education courses in the performance of the duties of office at least one time in each 24-month period. The 20 hours of required continuing education courses must include at least one hour of continuing education regarding fraudulent court documents and fraudulent document filings.

SECTION 14. Chapter 51, Government Code, is amended by adding Subchapter J to read as follows:

SUBCHAPTER J. CERTAIN FRAUDULENT RECORDS OR DOCUMENTS

Sec. 51.901. FRAUDULENT DOCUMENT OR INSTRUMENT. (a) If a clerk of the supreme court, clerk of the court of criminal appeals, clerk of a court of appeals, district clerk, county clerk, district and county clerk, or municipal clerk has a reasonable basis to believe in good faith that a document or instrument previously filed or recorded or offered or submitted for filing or for filing and recording is fraudulent, the clerk shall:

(1) if the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of a purported court, provide written notice of the filing, recording, or submission for filing or for filing and recording to the stated or last known address of the person against whom the purported judgment, act, order, directive, or process is rendered; or

(2) if the document or instrument purports to create a lien or assert a claim on real or personal property or an interest in real or personal property, provide written notice of the filing, recording, or submission for filing or for filing and recording to the stated or last known address of the person named in the document or instrument as the obligor or debtor and to any person named as owning any interest in the real or personal property described in the document or instrument.

(b) A clerk shall provide written notice under Subsection (a):

(1) not later than the second business day after the date that the document or instrument is offered or submitted for filing or for filing and recording; or

(2) if the document or instrument has been previously filed or recorded, not later than the second business day after the date that the clerk becomes aware that the document or instrument may be fraudulent.

(c) For purposes of this section, a document or instrument is presumed to be fraudulent if:

(1) the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

(A) a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or

(B) a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A); or

(2) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:

(A) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

(B) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or

(C) is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States.

Sec. 51.902. ACTION ON FRAUDULENT JUDGMENT LIEN. (a) A person against whom a purported judgment was rendered who has reason to believe that a document previously filed or recorded or submitted for filing or for filing and recording is fraudulent may complete and file with the district clerk a motion, verified by affidavit by a completed form for ordinary certificate of acknowledgment, of the same type described by Section 121.007, Civil Practice and Remedies Code, that contains, at a minimum, the information in the following suggested form:

MISC. DOCKET NO. _____

In Re: A Purported _____ In the Judicial District

Judgment Lien Against (Debtor) _____ In and For _____

(Name of Purported County, Texas)

Motion for Judicial Review of a Documentation Purporting to

Create a Judgment Lien

Now Comes (name) and files this motion requesting a judicial determination of the status of a court, judicial entity, or judicial officer purporting to have taken an action that is the basis of a judgment lien filed in the office of said clerk, and in support of the motion would show the court as follows:

I.

(Name), movant herein, is the person against whom the purported judgment was rendered.

II.

On (date), in the exercise of the county clerk's official duties as County Clerk of (county name) County, Texas, the county clerk received and filed or filed and recorded the documentation attached hereto and containing (number) pages. Said documentation purports to have been rendered on the basis of a judgment, act, order, directive, or process of a court, judicial entity, or judicial officer called therein "(name of purported court, judicial entity, or judicial officer)" against one (name of purported debtor).

III.

Movant alleges that the purported court, judicial entity, or judicial officer referred to in the attached documentation is one described in Section 51.901(c)(1), Government Code, as not legally created or established under the constitution or laws of this state or of the United States, and that the documentation should therefore not be accorded lien status.

IV.

Movant further attests that the assertions contained herein are true and correct.

PRAYER

Movant requests the court to review the attached documentation and enter an order determining whether it should be accorded lien status, together with such other orders as the court deems appropriate.

Respectfully submitted,

_____

(Signature and typed name

and address)

(b) The completed form for ordinary certificate of acknowledgment, of the same type described by Section 121.007, Civil Practice and Remedies Code, must be as follows:

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF _____

BEFORE ME, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over 21 years of age, of sound mind, with personal knowledge of the following facts, and fully competent to testify.

I further attest that the assertions contained in the accompanying motion are true and correct."

Further affiant sayeth not.

_____

SUBSCRIBED and SWORN TO before me, this

_____ day of _____, ____.

_____

NOTARY PUBLIC, State of Texas

Notary's printed name:

_____

My commission expires:

_____

(c) A motion filed under this section may be ruled on by a district judge having jurisdiction over real property matters in the county where the subject documentation was filed. The court's finding may be made solely on a review of the documentation attached to the movant's motion and without hearing any testimonial evidence. The court's review may be made ex parte without delay or notice of any kind. The court's ruling on the motion, in the nature of a finding of fact and a conclusion of law, is unappealable if it is substantially similar to the form suggested in Subsection (g).

(d) The district clerk may not collect a filing fee for filing a motion under this section.

(e) After reviewing the documentation attached to a motion under this section, the district judge shall enter an appropriate finding of fact and conclusion of law, which must be filed and indexed in the same class of records in which the subject documentation or instrument was originally filed.

(f) The county clerk may not collect a filing fee for filing a district judge's finding of fact and conclusion of law under this section.

(g) A suggested form order appropriate to comply with this section is as follows:

MISC. DOCKET NO. _____

In Re: A PurportedIn the _____ Judicial District

Judgment Lien Against (Debtor) In and For _____

(Name of Purported County), Texas

Judicial Finding of Fact and Conclusion of Law

Regarding a Documentation Purporting to Create a Judgment Lien

On the (number) day of (month), (year), in the above entitled and numbered cause, this court reviewed a motion verified by affidavit of (name) and the documentation attached thereto. No testimony was taken from any party, nor was there any notice of the court's review, the court having made the determination that a decision could be made solely on review of the documentation under the authority vested in the court under Subchapter J, Chapter 51, Government Code.

The court finds as follows (only an item checked and initialed is a valid court ruling):

_____ The documentation attached to the motion herein refers to a legally constituted court, judicial entity, or judicial officer created by or established under the constitution or laws of this state or of the United States. This judicial finding and conclusion of law does not constitute a finding as to any underlying claims of the parties.

_____ The documentation attached to the motion herein DOES NOT refer to a legally constituted court, judicial entity, or judicial officer created by or established under the constitution or laws of this state or of the United States. There is no valid judgment lien created by the documentation.

This court makes no finding as to any underlying claims of the parties involved and expressly limits its finding of fact and conclusion of law to a ministerial act. The county clerk shall file this finding of fact and conclusion of law in the same class of records as the subject documentation was originally filed, and the court directs the county clerk to index it using the same names that were used in indexing the subject document.

SIGNED ON THIS THE _____ DAY OF_____.

_____

DISTRICT JUDGE

_____ JUDICIAL DISTRICT

_____ COUNTY, TEXAS

Sec. 51.903. ACTION ON FRAUDULENT LIEN ON PROPERTY. (a) A person who is the purported debtor or obligor or who owns real or personal property or an interest in real or personal property and who has reason to believe that the document purporting to create a lien or a claim against the real or personal property or an interest in the real or personal property previously filed or submitted for filing and recording is fraudulent may complete and file with the district clerk a motion, verified by affidavit by a completed form for ordinary certificate of acknowledgment, of the same type described by Section 121.007, Civil Practice and Remedies Code, that contains, at a minimum, the information in the following suggested form:

MISC. DOCKET NO. _____

In Re: A Purported _____ In the _____ Judicial District

Lien or Claim Against (Debtor) _____ In and For _____

(Name of Purported County), Texas

Motion for Judicial Review of Documentation or Instrument

Purporting to Create a Lien or Claim

Now Comes (name) and files this motion requesting a judicial determination of the status of documentation or an instrument purporting to create an interest in real or personal property or

a lien or claim on real or personal property or an interest in real or personal property filed in the office of the Clerk of (county name) County, Texas, and in support of the motion would show the court as follows:

I.

(Name), movant herein, is the purported obligor or debtor or person who owns the real or personal property or the interest in real or personal property described in the documentation or instrument.

II.

On (date), in the exercise of the county clerk's official duties as County Clerk of (county name) County, Texas, the county clerk received and filed and recorded the documentation or instrument attached hereto and containing (number) pages. Said documentation or instrument purports to have created a lien on real or personal property or an interest in real or personal property against one (name of purported debtor).

III.

Movant alleges that the documentation or instrument attached hereto is fraudulent, as defined by Section 51.901(c)(2), Government Code, and that the documentation or instrument should therefore not be accorded lien status.

IV.

Movant attests that assertions herein are true and correct.

V.

Movant does not request the court to make a finding as to any underlying claim of the parties involved and acknowledges that this motion does not seek to invalidate a legitimate lien. Movant further acknowledges that movant may be subject to sanctions, as provided by Chapter 10, Civil Practice and Remedies Code, if this motion is determined to be frivolous.

PRAYER

Movant requests the court to review the attached documentation or instrument and enter an order determining whether it should be accorded lien status, together with such other orders as the court deems appropriate.

Respectfully submitted,

_____

(Signature and typed name and address)

(b) The completed form for ordinary certificate of acknowledgment, of the same type described by Section 121.007, Civil Practice and Remedies Code, must be as follows:

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF _____

BEFORE ME, the undersigned authority, personally appeared _____, who, being by me duly sworn, deposed as follows:

"My name is _____. I am over 21 years of age, of sound mind, with personal knowledge of the following facts, and fully competent to testify.

I further attest that the assertions contained in the accompanying motion are true and correct."

Further affiant sayeth not.

_____

SUBSCRIBED and SWORN TO before me, this

_____ day of _____, ____.

_____

NOTARY PUBLIC, State of Texas

Notary's printed name:

_____

My commission expires:

_____

(c) A motion under this section may be ruled on by a district judge having jurisdiction over real property matters in the county where the subject document was filed. The court's finding may be made solely on a review of the documentation or instrument attached to the motion and without hearing any testimonial evidence. The court's review may be made ex parte without delay or notice of any kind. An appellate court shall expedite review of a court's finding under this section.

(d) The district clerk may not collect a filing fee for filing a motion under this section.

(e) After reviewing the documentation or instrument attached to a motion under this section, the district judge shall enter an appropriate finding of fact and conclusion of law, which must be filed and indexed in the same class of records in which the subject documentation or instrument was originally filed. A copy of the finding of fact and conclusion of law shall be sent, by first class mail, to the movant and to the person who filed the fraudulent lien or claim at the last known address of each person within seven days of the date that the finding of fact and conclusion of law is issued by the judge.

(f) The county clerk may not collect a fee for filing a district judge's finding of fact and conclusion of law under this section.

(g) A suggested form order appropriate to comply with this section is as follows:

MISC. DOCKET NO. _____

In Re: A Purported _____ In the _____ Judicial District

Lien or Claim Against (Debtor) _____ In and For _____

(Name of Purported County), Texas

Judicial Finding of Fact and Conclusion of Law Regarding a

Documentation or Instrument Purporting to Create a Lien or Claim

On the (number) day of (month), (year), in the above entitled and numbered cause, this court reviewed a motion, verified by affidavit, of (name) and the documentation or instrument attached thereto. No testimony was taken from any party, nor was there any notice of the court's review, the court having made the determination that a decision could be made solely on review of the documentation or instrument under the authority vested in the court under Subchapter J, Chapter 51, Government Code.

The court finds as follows (only an item checked and initialed is a valid court ruling):

_____ The documentation or instrument attached to the motion herein IS asserted against real or personal property or an interest in real or personal property and:

(1) IS provided for by specific state or federal statutes or constitutional provisions;

(2) IS created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by consent of an agent, fiduciary, or other representative of that person; or

(3) IS an equitable, constructive, or other lien imposed by a court of competent jurisdiction created or established under the constitution or laws of this state or of the United States.

_____ The documentation or instrument attached to the motion herein:

(1) IS NOT provided for by specific state or federal statutes or constitutional provisions;

(2) IS NOT created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal

property, if required under the law of this state or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person;

(3) IS NOT an equitable, constructive, or other lien imposed by a court of competent jurisdiction created by or established under the constitution or laws of this state or the United States; or

(4) IS NOT asserted against real or personal property or an interest in real or personal property. There is no valid lien or claim created by this documentation or instrument.

This court makes no finding as to any underlying claims of the parties involved, and expressly limits its finding of fact and conclusion of law to the review of a ministerial act. The county clerk shall file this finding of fact and conclusion of law in the same class of records as the subject documentation or instrument was originally filed, and the court directs the county clerk to index it using the same names that were used in indexing the subject documentation or instrument.

SIGNED ON THIS THE _____ DAY OF_____.

_____

DISTRICT JUDGE

_____ JUDICIAL DISTRICT

_____ COUNTY, TEXAS

Sec. 51.904. WARNING SIGN. A clerk described by Section 51.901(a) shall post a sign, in letters at least one inch in height, that is clearly visible to the general public in or near the clerk's office stating that it is a crime to intentionally or knowingly file a fraudulent court record or a fraudulent instrument with the clerk.

Sec. 51.905. DOCUMENTS FILED WITH SECRETARY OF STATE. (a) If the lien or other claim that is the subject of a judicial finding of fact and conclusion of law authorized by this subchapter is one that is authorized by law to be filed with the secretary of state, any person may file a certified copy of the judicial finding of fact and conclusion of law in the records of the secretary of state, who shall file the certified copy of the finding in the same class of records as the subject document or instrument was originally filed and index it using the same names that were used in indexing the subject document or instrument.

(b) The secretary of state may charge a filing fee of $15 for filing a certified copy of a judicial finding of fact and conclusion of law under this section.

SECTION 15. Section 12.013, Property Code, is amended to read as follows:

Sec. 12.013. JUDGMENT. A judgment or an abstract of a judgment of a court [~~in this state~~] may be recorded if:

(1) the judgment is of a court:

(A) expressly created or established under the constitution or laws of this state or of the United States;

(B) that is a court of a foreign country and that is recognized by an Act of congress or a treaty or other international convention to which the United States is a party; or

(C) of any other jurisdiction, territory, or protectorate entitled to full faith and credit in this state under the Constitution of the United States; and

(2) the judgment is attested under the signature and seal of the clerk of the court that rendered the judgment.

SECTION 16. Subtitle A, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 11 to read as follows:

CHAPTER 11. LIABILITY RELATED TO A FRAUDULENT COURT

RECORD OR A FRAUDULENT LIEN OR CLAIM FILED AGAINST REAL

OR PERSONAL PROPERTY

Sec. 11.001. DEFINITIONS. In this chapter:

(1) "Court record" has the meaning assigned by Section 37.01, Penal Code.

(2) "Exemplary damages" has the meaning assigned by Section 41.001.

(3) "Lien" means a claim in property for the payment of a debt and includes a security interest.

(4) "Public servant" has the meaning assigned by Section 1.07, Penal Code, and includes officers and employees of the United States.

Sec. 11.002. LIABILITY. (a) A person may not make, present, or use a document or other record with:

(1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

(2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal Code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and

(3) intent to cause another person to suffer:

(A) physical injury;

(B) financial injury; or

(C) mental anguish or emotional distress.

(b) A person who violates Subsection (a) is liable to each injured person for:

(1) the greater of:

(A) $10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney's fees; and

(4) exemplary damages in an amount determined by the court.

Sec. 11.003. CAUSE OF ACTION. (a) The following persons may bring an action to enjoin violation of this chapter or to recover damages under this chapter:

(1) the attorney general;

(2) a district attorney;

(3) a criminal district attorney;

(4) a county attorney with felony responsibilities;

(5) a county attorney;

(6) a municipal attorney;

(7) in the case of a fraudulent judgment lien, the person against whom the judgment is rendered; and

(8) in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal property.

(b) Notwithstanding any other law, a person or a person licensed or regulated by Chapter 9, Insurance Code (the Texas Title Insurance Act), does not have a duty to disclose a fraudulent, as described by Section 51.901(c), Government Code, court record, document, or instrument purporting to create a lien or purporting to assert a claim on real property or an interest in real property in connection with a sale, conveyance, mortgage, or other transfer of the real property or interest in real property.

(c) Notwithstanding any other law, a purported judgment lien or document establishing or purporting to establish a judgment lien against property in this state, that is issued or purportedly issued by a court or a purported court other than a court established under the laws

of this state or the United States, is void and has no effect in the determination of any title or right to the property.

Sec. 11.004. VENUE. An action under this chapter may be brought in any district court in the county in which the recorded document is recorded or in which the real property is located.

Sec. 11.005. FILING FEES. (a) The fee for filing an action under this chapter is $15. The plaintiff must pay the fee to the clerk of the court in which the action is filed. Except as provided by Subsection (b), the plaintiff may not be assessed any other fee, cost, charge, or expense by the clerk of the court or other public official in connection with the action.

(b) The fee for service of notice of an action under this section charged to the plaintiff may not exceed:

(1) $20 if the notice is delivered in person; or

(2) the cost of postage if the service is by registered or certified mail.

(c) A plaintiff who is unable to pay the filing fee and fee for service of notice may file with the court an affidavit of inability to pay under the Texas Rules of Civil Procedure.

(d) If the fee imposed under Subsection (a) is less than the filing fee the court imposes for filing other similar actions and the plaintiff prevails in the action, the court may order a defendant to pay to the court the differences between the fee paid under Subsection (a) and the filing fee the court imposes for filing other similar actions.

Sec. 11.006. PLAINTIFF'S COSTS. (a) The court shall award the plaintiff the costs of bringing the action if:

(1) the plaintiff prevails; and

(2) the court finds that the defendant, at the time the defendant caused the recorded document to be recorded or filed, knew or should have known that the recorded document is fraudulent, as described by Section 51.901(c), Government Code.

(b) For purposes of this section, the costs of bringing the action include all court costs, attorney's fees, and related expenses of bringing the action, including investigative expenses.

Sec. 11.007. EFFECT ON OTHER LAW. This law is cumulative of other law under which a person may obtain judicial relief with respect to a recorded document or other record.

SECTION 17. Section 9.412(c), Business & Commerce Code, is repealed.

SECTION 18. An action for an order under Subchapter J, Chapter 51, Government Code, as added by this Act, may be brought with respect to a recorded document or instrument without regard to whether the document or instrument was filed before, on, or after the effective date of this Act.

SECTION 19. A clerk must successfully complete one hour of continuing education regarding fraudulent court documents and fraudulent document filings required by Section 51.605(c), Government Code, as amended by this Act, before September 1, 1998.

SECTION 20. The change in law made by Section 16 of this Act applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law in effect on the date the cause of action accrues, and that law is continued in effect for this purpose.

SECTION 21. (a) The change in law made by this Act applies only to a criminal offense committed on or after the effective date of this Act. For the purposes of this Act, a criminal offense is committed before the effective date of this Act if any element of the offense occurs before that date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the criminal offense was committed, and the former law is continued in effect for this purpose.

SECTION 22. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 1185 was passed by the House on March 13, 1997, by the following vote: Yeas 142, Nays 0, 1 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 1185 on April 7, 1997, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 1185 on May 8, 1997, by the following vote: Yeas 145, Nays 0, 1 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 1185 was passed by the Senate, with amendments, on April 3, 1997, by the following vote: Yeas 31, Nays 0; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate

adopted the conference committee report on H.B. No. 1185 on May 10, 1997, by the following vote: Yeas 30, Nays 0.

_____
Secretary of the Senate

APPROVED: _____

Date

_____
Governor

---

b. S.B. 1589 (2005)

S.B. 1589 gives county clerks, as well as the Secretary of State, statutory authority to obtain legal advice and request additional documentation about suspect documents that are offered for filing. It is a long overdue provision. See comments on new TEX. GOV'T CODE § 51.901(d) above, in notes 10 and 11.

S.B. No. 1589

AN ACT

relating to fraudulent documents offered to the county clerk or the secretary of state for filing.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 51.901, Government Code, is amended by adding Subsection (d) to read as follows:

(d) If a county clerk believes in good faith that a document filed with the county clerk to create a lien is fraudulent, the clerk shall:

(1) request the assistance of the county or district attorney to determine whether the document is fraudulent before filing or recording the document;

(2) request that the prospective filer provide to the county clerk additional documentation supporting the existence of the lien, such as a contract or other document that contains the alleged debtor or obligor's signature; and

(3) forward any additional documentation received to the county or district attorney.

SECTION 2. Subchapter B, Chapter 405, Government Code, is amended by adding Section 405.021 to read as follows:

Sec. 405.021. FILING OR RECORDING OF FRAUDULENT DOCUMENT. If the secretary of state believes in good faith that a document filed with the secretary of state to create a lien is fraudulent, the secretary of state shall:

(1) request the assistance of the attorney general to determine whether the document is fraudulent before filing or recording the document;

(2) request that the prospective filer provide to the secretary of state additional documentation supporting the existence of the lien, such as a contract or other document that contains the alleged debtor or obligor's signature; and

(3) forward any additional documentation received to the attorney general.

SECTION 3. This Act takes effect September 1, 2005.

_____ _____

President of the Senate Speaker of the House

I hereby certify that S.B. No. 1589 passed the Senate on May 3, 2005, by the following vote: Yeas 31, Nays 0.

_____
Secretary of the Senate

I hereby certify that S.B. No. 1589 passed the House on May 25, 2005, by a non-record vote.

_____
Chief Clerk of the House

Approved:

_____
Date

_____
Governor

---

c. S.B. 788 (1999) (claims against and motions to recuse certain judges)

Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>
Changes in tables are made but not highlighted.

CHAPTER 608
S.B. No. 788
AN ACT RELATING TO CLAIMS AGAINST, INCLUDING MOTIONS FOR THE RECUSAL OR
DISQUALIFICATION OF, CERTAIN JUDGES

AN ACT
relating to claims against, including motions for the recusal or disqualification of, certain judges.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Chapter 30, Civil Practice and Remedies Code, is amended by adding Sections 30.016 and 30.017 to read as follows:

<< TX CIV PRAC & REM § 30.016 >>

<<+Sec. 30.016. RECUSAL OR DISQUALIFICATION OF CERTAIN JUDGES. (a) In this section, "tertiary recusal motion" means a third or subsequent motion for recusal or disqualification filed against a district court, statutory probate court, or statutory county court judge by the same party in a case.+>>

<<+(b) A judge who declines recusal after a tertiary recusal motion is filed shall comply with applicable rules of procedure for recusal and disqualification except that the judge shall continue to:+>>

<<+(1) preside over the case;+>>

<<+(2) sign orders in the case; and+>>

<<+(3) move the case to final disposition as though a tertiary recusal motion had not been filed.+>>

<<+(c) A judge hearing a tertiary recusal motion against another judge who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the tertiary recusal motion is rendered, unless the order is properly superseded.+>>

<<+(d) The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.+>>

<<+(e) If a tertiary recusal motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.+>>

<< TX CIV PRAC & REM § 30.017 >>

<<+Sec. 30.017. CLAIMS AGAINST CERTAIN JUDGES. (a) A claim against a district court, statutory probate court, or statutory county court judge that is added to a case pending in the court to which the judge was elected or appointed:+>>

<<+(1) must be made under oath;+>>

<<+(2) may not be based solely on the rulings in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and+>>

<<+(3) is automatically severed from the case.+>>

<<+(b) The clerk of the court shall assign the claim a new cause number, and the party making the claim shall pay the filing fees.+>>

<<+(c) The presiding judge of the administrative region or the presiding judge of the statutory probate courts shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of Subsection (a)(1) or (2).+>>

<< Note: TX CIV PRAC & REM § 30.016 >>

(b) SECTION 2. (a) This Act takes effect September 1, 1999, and applies to all cases:

(c) (1) filed on or after the effective date of this Act; or

(d) (2) pending on the effective date of this Act and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that date.

(e) (b) In a case filed before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date of this Act is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose.

(f) SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

(g) Passed the Senate on April 8, 1999: Yeas 30, Nays 0; passed the House on May 26, 1999, by a non-record vote.

Approved June 18, 1999.

Effective September 1, 1999.

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d. **H.B. 2566 (2007)**

House Bill 2666 (80th Legislature, 2007 Regular Session)

In 2207 the Texas State Legislature enacted HB 2566 which relates to documents or instruments filed by an inmate with a court concerning real or personal property.

H.B. No. 2566

AN ACT

relating to a document or instrument filed by an inmate with a court concerning real or personal property.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 12.001, Civil Practice and Remedies Code, is amended by adding Subdivisions (2-a), (2-b), (2-c), and (5) to read as follows:

(2-a) "Filing office" has the meaning assigned by Section 9.102, Business & Commerce Code.

(2-b) "Financing statement" has the meaning assigned by Section 9.102, Business & Commerce Code.

(2-c) "Inmate" means a person housed in a secure correctional facility.

(5) "Secure correctional facility" has the meaning assigned by Section 1.07, Penal Code.

SECTION 2. Section 12.002, Civil Practice and Remedies Code, is amended by adding Subsections (a-1) and (a-2) and amending Subsection (b) to read as follows:

(a-1) Except as provided by Subsection (a-2), a person may not file an abstract of a judgment or an instrument concerning real or personal property with a court or county clerk, or a financing statement with a filing office, if the person:

(1) is an inmate; or

(2) is not licensed or regulated under Title 11, Insurance Code, and is filing on behalf of another person who the person knows is an inmate.

(a-2) A person described by Subsection (a-1) may file an abstract, instrument, or financing statement described by that subsection if the document being filed includes a statement indicating that:

(1) the person filing the document is an inmate; or

(2) the person is filing the document on behalf of a person who is an inmate.

(b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:

(1) the greater of:

(A) $10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney's fees; and

(4) exemplary damages in an amount determined by the court.

SECTION 3. Section 51.901, Government Code, is amended by amending Subsection (c) and adding Subsections (e) and (f) to read as follows:

(c) For purposes of this section, a document or instrument is presumed to be fraudulent if:

(1) the document is a purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of:

(A) a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States; or

(B) a purported judicial officer of a purported court or purported judicial entity described by Paragraph (A); [~~or~~]

(2) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and:

(A) is not a document or instrument provided for by the constitution or laws of this state or of the United States;

(B) is not created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property or an interest in the real or personal property, if required under the laws of this state, or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person; or

(C) is not an equitable, constructive, or other lien imposed by a court with jurisdiction created or established under the constitution or laws of this state or of the United States; or

(3) the document or instrument purports to create a lien or assert a claim against real or personal property or an interest in real or personal property and the document or instrument is filed by an inmate or on behalf of an inmate.

(e) A presumption under Subsection (c)(3) may be rebutted by providing the filing officer in the filing office in which the document is filed or recorded the original or a copy of a sworn and notarized document signed by the obligor, debtor, or owner of the property designated as collateral stating that the person entered into a security agreement with the inmate and authorized the filing of the financing statement as provided by Section 9.509, Business & Commerce Code.

(f) In this section:

(1) "Inmate" means a person housed in a secure correctional facility.

(2) "Secure correctional facility" has the meaning assigned by Section 1.07, Penal Code.

SECTION 4. Section 405.021, Government Code, as added by Chapter 407, Acts of the 79th Legislature, Regular Session, 2005, is amended to read as follows:

Sec. 405.021. FILING OR RECORDING OF FRAUDULENT DOCUMENT. (a) If the secretary of state believes in good faith that a document filed with the secretary of state to create a lien is fraudulent, the secretary of state shall:

(1) request the assistance of the attorney general to determine whether the document is fraudulent before filing or recording the document;

(2) request that the prospective filer provide to the secretary of state additional documentation supporting the existence of the lien, such as a contract or other document that contains the alleged debtor or obligor's signature; and

(3) forward any additional documentation received to the attorney general.

(b) For purposes of this section, a document or instrument is presumed to be fraudulent if the document or instrument is filed by an inmate or on behalf of an inmate.

(c) A presumption under Subsection (b) may be rebutted by providing the secretary of state the original or a copy of a sworn and notarized document signed by the obligor, debtor, or owner of the property designated as collateral stating that the person entered into a security agreement with the inmate and authorized the filing of the instrument as provided by Section 9.509, Business & Commerce Code.

(d) In this section:

(1) "Inmate" means a person housed in a secure correctional facility.

(2) "Secure correctional facility" has the meaning assigned by Section 1.07, Penal Code.

SECTION 5. The change in law made by this Act applies only to a document or instrument presented for recording on or after the effective date of this Act. A document or instrument presented for recording before the effective date of this Act is covered by the law in effect when the document or instrument was presented for recording, and the former law is continued in effect for that purpose.

SECTION 6. This Act takes effect September 1, 2007.

_____ _____

President of the Senate Speaker of the House

I certify that H.B. No. 2566 was passed by the House on May 10, 2007, by the following vote: Yeas 144, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2566 on May 25, 2007, by the following vote: Yeas 139, Nays 0, 2 present, not voting.

_____

Chief Clerk of the House

I certify that H.B. No. 2566 was passed by the Senate, with amendments, on May 23, 2007, by the following vote: Yeas 31, Nays 0.

_____

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

10. ATTORNEY GENERAL RESOURCES AND OPINIONS

The Texas Attorney General has established a new office within his Law Enforcement Defense Section – the UCC Opinions Attorney. The incumbent is Assistant AG Demetri Anastasiadis [Demetri.Anastasiadis@oag.state.tx.us; (512) 475-3078]. He can provide written opinions to the Secretary of State pursuant to GOVERNMENT CODE § 405.021; but he can also assist county and district clerks with oral advice in the event of difficulties. Of course, the county clerk's county attorney or the district clerk's district attorney, or the presiding judge as to attempted filings in pending cases, should be the first person consulted for advice.

a. TexasAttorney General Letter Opinion DM-389 (05/02/1996) – On line at http://www.oag.state.tx.us/opinions/opinions/48morales/op/1996/pdf/dm0389.pdf.

Office of the Attorney General
State of Texas

May 2, 1996

The Honorable James W. Carr
Lavaca County Attorney
Box 576, Second Floor Courthouse
Hallettsville, Texas 77964

Opinion No. DM-389

Re: Whether a county clerk must file a judgment issued by a "common law court" (RQ-876)

Dear Mr. Carr:

You have requested our opinion as to whether a county clerk must file a judgment rendered by a "common law" court.

In recent years, the so-called "Republic of Texas" movement has harassed various local public officials by, among other things, conducting "trials" in self-styled "common law" courts of the movement's invention, and attempting to file the "judgments" resulting from those trials, and other such documents, including pleadings, in the lawful district and county courts of this state. (footnote 1) In the most recent reported instance, two individuals, at odds with the federal Farmer's Home Administration over a prior debt, filed false XC-1 financing statements against three United States Department of Agriculture employees named as "debtors." *United States v. Greenstreet*, 912 F.Supp. 224, 227 @I.D. Tar. 1996). (footnote 2)

Some clerks of courts have been misled by the attempted filings of these bogus papers, apparently because, at first glance, they appear to be similar in form to documents routinely filed in the courts of the Texas. Invariably, however, they indicate on their face the purported existence of the "common law courts of the Republic of Texas," or similar bodies which have no

legal existence except in the minds of the partisans of this movement. As the court said in Kimmel: :We hold that the Common Law Court or the Republic of Texas, if it ever existed, has ceased to exist since February 16, 1846." Kimmel, 835 S.W.2d at 109.

The Texas Constitution states, in article V, section 1:

The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace. and in such other courts as may be provided by law.

The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

These specified courts, together with those statutory courts which the legislature has created, such as municipal courts, county courts at law, and the various specialized courts existing in the larger counties, constitute the only courts in which is vested the "judicial power of this State." Tex. Const. art. V, 3 1. No "common law court," whether of the so-called "'Republic of Texas" or otherwise, is among those ordained by constitution or statute.

Section 191.001(c), Local Government Code, provides: "The county clerk shag 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." A document specifying on its face that it is a judgment of a "common law" court is not one "that the clerk is authorized to record." Section 192.001, Local Government Code, states: "The county clerk shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded." An instrument originating from a "common law' court is not one "that is required or permitted by law to be recorded."

Finally, section 192.004, Local Government Code, provides: "The county clerk shall record separately from a deed or other conveyance each deed of trust, mortgage, or judgment that is required to be recorded to create a judgment lien and every other instrument that is intended to create a hen." A purported lien from a "common law" court is not a lawful instrument and therefore cannot create a hen. In Bernard v. Crowell, 38 S.W.2d 912 (Tex. Civ. App.-San Antonio 1931, no writ), the court said that "the clerk of a trial court has no discretion in the matter of filing papers recognized by law as properly belonging in the record of causes." Any document that purports to be an order or judgment from a "common law" court is not one that is "recognized by law as properly belonging in the record of causes," because a "common law" court is not a legally constituted court under the constitution or statutes of this state.

County and district clerks should reject any document that indicates on its face that it is to be tiled in, that it is an order or judgment from, or that it is a notice of a removal petition to, any purported state or local court not so named in constitution or statute.) (footnote 3) A clerk should maintain a list of legitimate courts ready at hand to assist in this de-termination, and should of course consult his or her county or district attorney should any questions arise. Local officials may also wish to post notices advising of the legal consequences that attach to the filing of fraudulent lien. (footnote 4) Furthermore, county and district attorneys would be well advised to draw up a set of detailed guidelines to assist clerical employees in assuring that no

legitimate findings are denied, and that both state and federal constitutional requirements are strictly observed. In some instances, it might be necessary for prosecutorial officials to monitor filings to ensure compliance with the law. (footnote 5)

SUMMARY

A district or county clerk should not accept for tiling any document that indicates on its face that it is to be filed in, that it is an order or judgment from, or that it is a notice of a removal petition to, any purported state or local court not named in the constitution or statutes of the state of Texas. County and district attorneys should assist clerical employees in making certain that no legitimate filings are denied, and that state and federal constitutional requirements are strictly observed.

Yours very truly,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRELY
Chair, Opinion Committee

Footnotes

[1] Seven examples of the kind of "documents" at issue are reproduced as appendices to the court's decision in Kimmel v. Burnet County Appraisal District, 835 S.W.2d 108, 109-115 (Tex.App.—Austin 192, writ dism'd w.o.j.).

[2] The individuals claiming to be "citizens" of the "Republic of Texas" often attack the legitimacy of the duly constituted courts of this state by disputing the validity of the Fourteenth Amendment to the United States Constitution, and they do so in the most virulently racist terms. As the court noted in Greenstreet:

Greenstreet argues that he is of "Freeman Character" and "of the White Preamble Citizenship and not one of the 14th Amendment legislated enfranchised De Facto colored races." He further claims that he is a "white Preamble natural sovereign Common Law De Jure Citizen of the Republic/State of Texas." As a result, he concludes that he is a sovereign, not subject to the jurisdiction of this Court.

Greenstreet, 912 F. Supp. At 228

[3] We note that if district and county clerks have already accumulated a number of documents relating to the so-called "Republic of Texas," they may be able to dispose of them in accordance to the so-called "Republic of Texas," they may be able to dispose of them in accordance with those portions of the records retention statutes that relate to the destruction of records. See Local Gov't Code chs. 202 (terms under which local governmental records may be destroyed), 203

9duties of records custodians for local governmental bodies); see also Gov't Code ch. 441, subch. J (revisions to local government records retention schedules). We caution, however, that local officials should exercise caution in this regard, since section 552.351, Government Code, creates a criminal offense for willful destruction of records, i.e. not in compliance with statutory requirement.

[4] In 1995, the legislature amended chapter 9 of the Texas Uniform Commercial Code to add section 9.412, which forbids the filing of a fraudulent lien, creates a cause of action in favor of the owner of property covered by the fraudulent lien, creates a cause of action in favor of the owner of property covered by the fraudulently filed financing statement, and makes such filing a criminal offense. See Bus. & Comm. Code § 9.412.

[5] Individuals claiming to be "citizens" of the "Republic of Texas" leave no doubt that they mean business, and they routinely issue public threats to "bring down" government. In a recent address before about 300 supporters at the State Capitol, the "provisional secretary of defense" of the "Republic" declared:

In about two seeks, we can crank up to the next round. When we start going after . . . personal property, it's going to get real serious. If we have to bring the whole government to a halt in order to get legal review before the Legislature so they can determine their lawful status, we'll do it.

Jeffry Needham, Republic Leaders Give Notice To Governor, IRS, SAN ANTONIO EXPRESS-NEWS, Mar. 19, 1996, at 3B.

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h. **Texas Attorney General Letter Opinion 98-016** (3/13/98) (on line at http://www.oag.state.tx.us/opinions/lo48morales/lo98-016.htm.

Office of the Attorney General
State of Texas

March 13, 1998
The Honorable John V
Dallas County District Attorney
Administration Building, 411 Elm Street
Dallas, Texas 75202

Letter Opinion No. 98-016

Re: Instruments that the county clerk must accept for filing and recording (RQ-950)

Dear Mr. Vance:

You ask what instruments the Dallas County Clerk must accept for filing and recording. You state that the Dallas County Clerk has recently noticed a great increase in the number of unusual documents presented for filing and recording in his office. Many of these do not belong in the traditional categories of documents filed with the clerk, such as land records, lien instruments, financing statements, probate records, or court pleadings. You identify some of the unusual instruments as follows:

1. Refusal to Pay Property Taxes,

2. Common Law Liens,

3. Affidavit Revoking Signature,

4. Affidavit of Refusal to Accept Post,

5. Affidavit of Direct Attack Upon Lawsuit,

6. Constructive Notice,

7. Notice of Non-Statutory Waiver of Tort Presented by Affidavit.

These examples of unusual documents presented for filing are often in affidavit form, while the following are not in affidavit form:

1. Surrender of Social Security Card,

2. Declaration of Person Being a Sovereign,

3. Notice of Asseveration,(1).

.4. Notice of Waiver of Tort,.

.5. Notice Regarding Lack of Jurisdiction..

You do not submit copies of any of the unusual documents you inquire about, nor do you attempt to explain what the proponents of these documents hope to accomplish by filing them and having them recorded as public records. Since we can only speculate from the names of the documents what they relate to, we cannot determine as a matter of law whether or not the county clerk may accept them for filing. We can, however, review the law establishing the county clerk's duties, to assist you in advising the clerk how to deal with these documents. .

Article V, section 20 of the Texas Constitution provides for the election of a county clerk, who will be clerk of the county and commissioners courts and recorder of the county, and "whose duties, perquisites and fees of office shall be prescribed by the Legislature." Thus, the county clerk's duties, including filing and recording duties, will be found in the statutes.(2) Section 192.001. of the Local Government Code provides that the county clerk "shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded.".(3)

Unless a .statute provides that a .document is .authorized, required, or permitted to be recorded in the clerk's office., he may not accept it for filing.(4) .

In *City of Abilene v. Fryar*, 143 S.W.2d 654 (Tex. Civ. App.--Eastland 1940, no writ), the court addressed the county clerk's refusal to file trust deeds securing city bonds unless stamps demonstrating payment of a tax were affixed to them, as required by statute.(5) The city provided the clerk with warrants covering the cost of stamps claimed to be necessary and then sued to enjoin the clerk from cashing the warrants. The court, explaining why the city had no right to litigate the question of its tax liability in an injunction suit, described the clerk's duty as follows:.

> [I]f the law imposed the tax in question it vested no authority in the Clerk to file or record the deeds of trust without being stamped; but to the contrary, expressly prohibited the Clerk from doing so. If the law did not impose said tax, under the circumstances, it was the ministerial duty of the Clerk to file and record the instruments without being stamped. The Clerk's duty was not affected by any mistaken understanding or construction of the law. The Clerk charged with a ministerial duty is presumed to know the law, and if she makes a mistake as to such question there is a plain and adequate legal remedy for requiring performance of the duty. . . . Such remedy is an action of mandamus.(6) .

The court further stated that the clerk's "sole duty, other than to supply the stamps if requested, was.

> to obey the statutory prohibition not to file or record the instruments unless they were stamped."(7).

The *Fryar* case makes it clear that the clerk may file and record a document only if authorized, required, or permitted. to do so by a statute. In addition, numerous attorney general opinions on the county clerk's authority to file particular documents address this issue by construing the relevant statutes.(8) If a document covered by a filing statute is regular on its face, the clerk may not refuse to file it based on extraneous facts.(9) However, the clerk must be able to determine from the face of the document that it complies with the applicable statute. For example, this office held that the county clerk may not file an assumed business name certificate if the acknowledgment is written in a language other than English, because the clerk would then be unable to determine whether or not the instrument was regular on its face..(10). If the clerk, through a mistaken understanding of the statute, refuses to file a document that is statutorily required to be filed, the remedy is an action of mandamus, which enables the court to construe the recording statute and determine as a matter of law whether it applies to the document in question..

There are numerous provisions scattered throughout the Texas statutes and codes that. authorize, require, or permit the county clerk to .record documents.(11) We cannot discuss or even enumerate all such provisions, but we will mention some of the more important.(12) As already pointed out, .section 192.001 of the Local Government Code provides that the county clerk "shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded," and other sections of .chapter 192 refer to other kinds of documents that may be filed and recorded.(13) The Property Code includes provisions on filing liens and other

instruments relating to real property.(14) Many provisions on the filing of litigation-related documents with the office of the clerk are found in the Texas Rules of Civil Procedure.(15) .

Newly enacted legislation may assist the clerk in dealing with some of the unusual documents you inquire about. House Bill No. 1185,(16) adopted by the 75th Legislature, addresses fraudulent judgment liens issued by so-called "common law courts" and fraudulent documents purporting to create liens or claims on personal and real property that have been filed with court clerks and the secretary of state.(17) Among other provisions, it establishes criminal offenses for filing a fraudulent court document or a fraudulent financing statement and provides a means of clearing public records of such documents.(18) We will focus on the provisions relating to the county clerk's duties..

House Bill No. 1185 amended the continuing education requirement applicable to county clerks, district clerks, and county and district clerks to require at least one hour regarding fraudulent court documents and fraudulent document filings.(19) It also added subchapter J to Government Code chapter 51,(20) which permits a person against whom a fraudulent judgment or lien against real or personal property has been filed to have it removed. A document is presumed to be fraudulent if it is "a purported judgment or other document purporting to memorialize an act, an order, a directive, or process of . . . a purported court or a purported judicial entity not expressly created or established under the constitution or the laws of this state or of the United States."(21) A document is also presumed to be fraudulent if it "purports to create a lien or assert a claim against real or personal property or an interest in real or personal property" and the lien is not provided for by law, created by consent of the obligor, debtor, or owner of the property or a representative of that person, or an equitable, constructive, or other lien imposed by a court.(22) .

When the clerk of a court reasonably believes that a previously filed judgment, court order, or lien is fraudulent, he or she shall notify the person against whom the purported judgment or order is rendered, or who is affected by the purported lien.(23) The written notice is to be provided not later than the second business day after the date that the document or instrument is offered or submitted for filing, or, if it has already been filed or recorded, not later than the second business day after the date that the clerk becomes aware that the document or instrument may be fraudulent.(24) Persons who have reason to believe that their interests are affected by a fraudulent document may file a motion with the district clerk requesting the court to determine the status of the document.(25) Subchapter J describes in detail the kind of fraudulent documents it applies to and sets out the text of a suggested motion for judicial review of a document. It also provides that a clerk of a court, including a county court, "shall post a sign in letters at least one inch in height, that is clearly visible to the general public in or near the clerk's office stating that it is a crime to intentionally or knowingly file a fraudulent court record or a fraudulent instrument with the clerk."(26) .

Some of the unusual documents you describe may be subject to the procedures set out in subchapter J. In particular, the documents described as "common law liens" should be examined to determine if they are fraudulent documents within the legislation. .

If the county clerk is presented with fraudulent documents for filing, despite the criminal penalties for filing such documents and the sign in the clerk's office stating that it is a crime to intentionally or knowingly file a fraudulent court record or a fraudulent instrument with the

clerk, he should give the written notice required by House Bill 1185.(27) When the clerk is presented with any other document, he has a ministerial duty to accept it for filing if .a statute authorizes, requires or permits it to be recorded in the clerk's office., and if it is regular on its face. If no statute authorizes, requires, or permits a document to be recorded in the clerk's office, he may not accept it for filing. If the Dallas County Clerk is unable to determine whether a particular document or type of document is within a filing statute, he may seek advice from the criminal district attorney pursuant to section 41.007 of the Government Code.(28) .

S U M M A R Y

The county clerk has a ministerial duty to accept a document for filing and recording if .a statute authorizes, requires or permits it to be filed in the clerk's office., and if it is regular on its face. If no statute authorizes, requires, or permits a document to be filed in the clerk's office, he may not accept it for filing. When the county clerk believes that a previously filed document or a document presented for filing is fraudulent within Government Code chapter 51, subchapter J, he is to provide the notice required by that provision..

Yours very truly,

Susan Garrison
Assistant Attorney General
Opinion Committee

Footnotes

1. "Asseveration" refers to an affirmation of fact, usually with no implication that an oath has been taken. Bryan. A. Garner, A Dictionary of Modern Legal Usage 77 (1987); see Black's Law Dictionary 152 (4th ed. 1968).

2. See Comm'rs Court of Titus County v. Agan, 940 S.W.2d 77 (Tex. 1997) (construing similar language in Tex. Const. art. XVI, section 44(a), pertaining to county treasurer).

3. See also Local Gov't Code § 191.001 (duty of clerk to record contents of each instrument filed for recording that clerk is authorized to record).

4. Turrentine v. Lasane, 389 S.W.2d 336, 337 (Tex. Civ. App.--Waco 1965, no writ) (citing statutes that establish duty of county clerk to record all deposited written instruments authorized, required or permitted to be recorded in his office).

5. Former article 7047e, V.T.C.S. (1925), imposed a stamp tax on certain promissory notes. See ..Act of Oct. 26, 1936, 44th Leg., 3d C.S., ch. 495, art. IV, § 9, 1936 Tex. Gen. Laws.. 2040, 2080, repealed by ..Act of May 21, 1941, 47th Leg., R.S., ch. 449, § 1, 1941 Tex. Gen. Laws.. 723, 723.

6. City of Abilene v. Fryar, 143 S.W.2d 654, 657 (Tex. Civ. App.--Eastland 1940, no writ) (citation omitted).

7. *Id.* at 659.

8. Attorney General Opinions JM-1277 (1990) (county clerk may not accept cash bond in satisfaction of bond requirement in statute regulating charitable raffles); JM-825 (1987) (county clerk may not file assumed business name certificate if acknowledgment is written in a foreign language); H-1155 (1978) (county clerk may not refuse to file pleadings that appear inadequately certified but may flag them or otherwise bring them to the attention of the court); M-511 (1969) at 4 (unprobated will may not be recorded by county clerk except when attached as an exhibit to an otherwise recordable affidavit of heirship); C-695 (1966) at 3 (field notes of a subdivision cannot be recorded in plat records unless accompanied by map or plat of subdivision); V-1529 (1952) at 13 (county clerk must accept a certificate of nomination that is regular on its face, and may not determine questions of illegality in the nomination that depend upon an investigation of extraneous facts); V-1450 (1952) at 3-4 (clerk has authority and duty to file birth and death certificates only as provided by statute).

9. Attorney General Opinions WW-908 (1960) at 9; V-1529 (1952) at 13 (county clerk must accept certificate of nomination that is regular on its face, and may not determine questions of illegality in nomination that depend upon an investigation of extraneous facts).

10. Attorney General Opinion JM-825 (1987) at 2; see also Attorney General Opinion H-1155 (1978) at 2 (clerk may exercise discretion with respect to documents offered for filing only when expressly authorized by applicable statute).

11. See, e.g., V.T.C.S. art. 5192 (stevedore's bond); Agric. Code § 144.041 (livestock brands); Bus. &. Com. Code §§ 9.401 (certain security interests), 35.07 (utility security interests), 36.10 (certificate assumed name under which business is conducted or professional services rendered).

12. The statutes and rules of procedure that authorize, permit, or require the county clerk to accept documents for filing are included in the General Index to Vernon's Texas Statutes and Codes, Annotated, if the district attorney's office or the county clerk wishes to compile a list of them. See also Texas Dep't of Housing and Community Affairs, Guide to Texas Laws for County Officials 82-94 (1995-96 ed.) (list of statutes stating duties and authority of county clerk).

13. See Local Gov't Code §§ 192.002 (military discharge records), .004 (judgment lien and "every other instrument that is intended to create a lien"), .005 (certain probate records).

14. Prop. Code §§ 11.001(a) (instruments relating to real property), 12.013 (judgment or abstract of judgment); chs. 14 (federal tax liens and other liens), 52 (judgment liens), 53 (mechanic's, contractor's, or materialman's lien).

15. See Tex. R. Civ. P. 21 (filing of pleadings, pleas, and motions).

16. Act of May 10, 1997, 75th Leg., R.S., ch. 189, 1997 Tex. Sess. Law Serv... 1045, 1045 (adopting and amending provisions to be codified in Penal Code, Government Code, and other codes).

17. Senate Research Center, Bill Analysis, H.B. 1185, 75th Leg., R.S. (1997),.. see Attorney General Opinion DM-389 (1996) (background on fraudulent judgment liens).

18. Act of May 10, 1997, supra, §§ 8, 10, 14, 1997 Tex. Sess. Law Serv... 1045, 1048-50 (to be codified at Penal Code §§ 37.13, .101; Gov't Code § 51.901).

19. *Id.* § 13, 1997 Tex. Sess. Law Serv. 1045, 1050 (to be codified at Gov't Code § 51.605(c)).

20. *Id.* § 14, at 1045, 1050-56 (to be codified at Gov't Code §§ 51.901 - .905).

21. *Id.* § 14, at 1045, 1050 (to be codified at Gov't Code §§ 51.901(c)(1)).

22. *Id.* (to be codified at Gov't Code §§ 51.901(c)(2)).

23. *Id.* (to be codified at Gov't Code § 51.901(a)).

24. *Id.* (to be codified at Gov't Code § 51.901(b)).

25. *Id.* § 14, at 1045, 1051-56 (to be codified at Gov't Code § 51.902 - .903).

26. *Id.* § 14, at 1045, 1056 (to be codified at Gov't Code § 51.904).

27. House Bill 1185 amended Property Code section 12.013 to provide that a judgment or an abstract of a judgment of a court may be recorded if the judgment is of a court "expressly created or established under the constitution or laws of this state or of the United States; . . . that is a court of a foreign country and that is recognized by an Act of congress or a treaty or other international convention to which the United States is a party; or . . . of any other jurisdiction, territory, or protectorate entitled to full faith and credit in this state under the Constitution of the United States," and the judgment is attested under the signature and seal of the clerk of the court that rendered it. *See* Attorney General Opinion DM-389 (1996) (district or county clerk need not accept for filing document indicating on its face that it proceeds from a purported state or local court not named in the constitution or statutes of the state of Texas). Even though a fraudulent judgment is not authorized to be recorded, House Bill 1185 contemplates that the clerk will as a practical matter accept such documents on occasion and then implement the notice provisions.

28. A "criminal district attorney" within the Texas Constitution is a class or kind of district attorney. *Hill County v. Sheppard*, 178 S.W.2d 261 (Tex. 1944); see also Attorney General Opinion JM-727 (1987).

(c) **Texas Attorney General letter Opinion JC-0213 (4/20/2000)** – Online at http://www.oag.state.tx.us/opinions/opinions/49cornyn/op2000/pdf/JC0213.PDF

OFFICE OF THE ATTORNEY GENERAL - STATE OF TEXAS
JOHN CORNYN

April 20, 2000

The Honorable Chris Harris
Chair, Senate Committee on Administration
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Opinion No. JC-0213

Re: Whether the "fraudulent filing" provisions of the Business and Commerce Code apply to those transactions excepted under section 9.104 thereof (RQ-0154-JC)

Dear Senator Harris:

You have requested our opinion as to whether the "fraudulent filing" provisions of section 9.412 of the Business and Commerce Code apply to those transactions excepted under section 9.104. For reasons that appear below, we conclude that they do not apply.

Your letter refers to sections 9.104 and 9.412, which are found in the present version of chapter 9 of the Business and Commerce Code and are effective until July 1, 2001, as well as to sections 9.109(d) and 9.5185, which are part of an amended and renumbered chapter 9 that will take effect on July 1, 2001. On July 1, 2001, the provisions in section 9.104 will be found in section 9.109, and the provisions in section 9.412 will be found in section 9.5185. *See* Act of May 17, 1999, 76th Leg., R.S., ch. 414, §§ 1.01, 3.10, 1999 Tex. Gen. Laws 2639, 2650, 2656, 2711, 2750. In this opinion, we refer to the present version of chapter 9.

Section 9.412 of the Business and Commerce Code provides, in relevant part:

> (a) A person may not intentionally or knowingly present for filing or cause to be presented for filing a financing statement if the person knows that the financing statement:
>
> (1) is forged;
>
> (2) contains a material false statement; or
>
> (3) is groundless.

TEX. BUS. & COM. CODE ANN. § 9.412(a) (Vernon Supp. 2000). There follows a statement of criminal penalties for violation of subsection (a) and a provision for civil relief of a property owner injured thereby. *See id.* § 9.412(b), (d).

Section 9.412 was first enacted in 1995[1] in response to a wave of spurious court filings by individuals who were attempting to challenge the sovereignty of the government of the State of Texas. *See* Tex. Att'y Gen. LO-98-016 (county clerk required to provide notice if fraudulent filing is suspected); *see also* Tex. Att'y Gen. DM-389 (1996). The bill analysis for the 1997 amendment to section 9.412 declares:

> [Individuals and organizations] have filed fraudulent judgment liens issued by so-called "common law courts" and fraudulent documents purporting to create liens or claims on personal and real property with the secretary of state and many county and district court clerks throughout the state. Many of the filings have been against the State of Texas and public officers and employees, as well as private individuals. These filings have clogged the channels of commerce and have amounted to harassment and intimidation of both public officials and ordinary citizens. This bill provides both civil and criminal remedies for those against whom such fraudulent filings have been made.

SENATE COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 1185, 75th Leg., R.S., (1997). Representatives of a number of financial trade associations have expressed concern that section 9.412 "could inadvertently create an opportunity for individuals to remove valid liens or claim damages for consensual or valid transactions. . . . Absent a clear and careful reading of the definition [of fraudulent filing], this section can be used to destroy commerce in the state of Texas by disrupting normal debtor/creditor relationships." Letter from Karen M. Neeley, Independent Bankers Ass'n of Texas, John Heasley, Texas Bankers Ass'n, J. Eric T. Sandberg, Texas Savings & Community Bankers Ass'n, to Elizabeth Robinson, Chair, Opinion Committee, Office of the Texas Attorney General, at 2 (Jan. 5, 2000) (on file with Opinion Committee).

Section 9.104 of the Business and Commerce Code, styled "Transactions Excluded From Chapter," provides that "t]his chapter does not apply" to thirteen kinds of transactions described in the section. You ask whether section 9.412 applies to these thirteen transactions. The answer is clear. No part of chapter 9 is applicable to a transaction listed in section 9.104. Section 9.412 is a part of chapter 9. As a result, section 9.412 is not applicable to a transaction listed in section 9.104.

We conclude that the "fraudulent filing" provisions of section 9.412 of the Business and Commerce Code do not apply to any transaction listed in section 9.104 thereof.

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[1]*See* Act of May 24, 1995, 74th Leg., R.S., ch. 547, § 1, 1995 Tex. Gen. Laws 3316.

SUMMARY

The "fraudulent filing" provisions of section 9.412 of the Business and Commerce Code do not apply to any transaction listed in section 9.104 thereof.

Yours very truly,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

CLARK KENT ERVIN
Deputy Attorney General - General Counsel

ELIZABETH ROBINSON
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General - Opinion Committee

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d. **Texas Attorney General letter Opinion JC-0317 (12/15/2000)** – Online at http://www.oag.state.tx.us/opinions/opinions/49cornyn/jc-0317.htm. Words of Protest Irrelevant Surplussage (on traffic citation, but arguably elsewhere too). Does this allow or require clerk to disregard such words in documents offered for filing?

December 15, 2000

The Honorable Senfronia Thompson
Chair, Committee on Judicial Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Opinion No. JC-0317

Re: Whether the addition of certain protest words to a traffic citation constitutes a valid promise to appear in court (RQ-0270-JC)

Dear Representative Thompson:

In 1999, this office opined on certain general principles of contract law with respect to the potential effect of certain protest words written under a signature on an Internal Revenue Service form. *See* Tex. Att'y Gen. Op. No. JC-0153 (1999). The constituent for whom you inquired on that occasion now wishes to know the effect of the same or similar formulae of protest on a traffic ticket.[1] Your constituent has, in our view, misunderstood the distinction between contract law, which governs the relations of particular parties who have come to an agreement, and public law, which governs all persons within that law's jurisdiction.

While it matters for the purpose of contract law whether or not two parties have agreed to be bound to certain conditions in a bargain, it is of no consequence whether any individual agrees to be bound by the traffic regulations or penal laws of the State of Texas. So long as such a person is in Texas, he or she is bound by those laws. *See United States v. Masat*, 948 F.2d 923, 934 (5th Cir. 1991) (rejecting argument that court lacks jurisdiction over one who declares himself "non-citizen," "non-resident" and "freeman"). Your constituent's legal obligation to appear in court does not require his agreement. His choices in the matter are simple. When he is stopped, the police officer has the discretion to issue him a ticket or take him into custody. If the police officer issues the ticket, your constituent can sign it or be arrested. On the indicated court date he can appear in court, or he can subject himself to arrest. He cannot, merely by writing "forced to sign under threat, duress and coercion"[2] on his traffic ticket, avoid the consequences of the traffic laws.

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[1]*See* Letter from Honorable Senfronia Thompson, Chair, Committee on Judicial Affairs, Texas House of Representatives, to Honorable John Cornyn, Texas Attorney General (Aug. 17, 2000) (on file with Opinion Committee).

[2]Letter from Charles Louis Bailey III, to Honorable Senfronia Thompson, Chair, Committee on Judicial Affairs, Texas House of Representatives (June 6, 2000) (on file with Opinion Committee) [hereinafter Charles Louis Bailey III

(continued...)

The statutes in question here are to be found in subchapter A, chapter 543 of the Transportation Code. Pursuant to section 543.001, a peace officer may arrest without warrant a person found committing any of a variety of traffic violations.[3] *See* TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999). The police officer then either takes the arrestee "immediately . . . before a magistrate," *id.* § 543.002, or issues "a written notice to appear in court," *id.* § 543.003 (Vernon Supp. 2000). Such a notice is to be issued if "the offense charged is speeding or a violation of the open container law; . . . and the person makes a written promise to appear in court as provided by Section 543.005." *Id.* § 543.004. "To secure release, the person arrested must make a written promise to appear in court by signing the written notice prepared by the arresting officer. . . . The arresting officer shall retain the paper or electronic original of the notice and deliver the copy of the notice to the person arrested. The officer shall then promptly release the person from custody." *Id.* § 543.005. The appearance date on the notice must be at least ten days later "unless the person arrested demands an earlier hearing." *Id.* § 543.006 (Vernon 1999). A wilful violation of the written promise to appear is a misdemeanor. *See id.* § 543.009.

The import of this statutory scheme is clear. When a policeman stops a driver for a moving violation, he writes a ticket. The driver signs the ticket, thereby promising to appear in court. If the driver does not sign the ticket, he is not released. If the driver signs the ticket and does not appear in court, he is subject to arrest.

Your constituent, however, appears to believe that he may escape the consequences of chapter 543 of the Transportation Code. He has asked you:

> By placing these words after one's signature, "forced to sign under threat, duress and coercion," when no "meeting of the minds has occurred," and the ticketed party . . . has no intentions of making a court appearance, is the signatory relieved of his promise to appear in court if no adhesion contract exists?[4]

Your constituent has noted the conclusion of Attorney General Opinion JC-0153 that such a form of words, when appended to a contract, "may indicate that the person signing has not agreed to the terms of the document, and consequently that there has been no 'meeting of the minds' that is necessary to form a binding agreement." Tex. Att'y Gen. Op. No. JC-0153 (1999) at 4. He then

---

[2](...continued)
Letter].

[3]The question of whether an arrest for a misdemeanor punishable only by a fine violates the Fourth Amendment of the Constitution is at present before the United States Supreme Court in *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999), *cert. granted*, 120 S.Ct. 2715 (2000) (No. 99-1408).

[4]Charles Louis Bailey III Letter, *supra* note 2, at 1.

makes the assumption that a traffic ticket is a contract. His implicit argument is that the contract is void, because it is adhesive and he has not truly agreed to it.

We note, as a preliminary matter, that even were we to accept the notion that a traffic stop is a bargaining session in which the writing of a ticket is an offer and the signing of the ticket an acceptance, the principles of contract law would not provide your constituent with the relief he seeks. It is hornbook law that "[a] person will not be permitted to accept the beneficial part of a transaction and repudiate the disadvantageous part. In other words, one who retains benefits under a transaction cannot avoid its obligations, and is estopped to take a position inconsistent therewith. Similarly, one cannot accept and reject the same instrument, or, having availed himself of the benefits conveyed by a part of an instrument, reject its other provisions." 34 TEX. JUR. 3D *Estoppel* § 13 (1984). Transparently, a motorist who signs a ticket and drives away rather than spending the night in police custody has availed himself of what a reasonable person would regard as a very substantial benefit. He cannot then be heard to say that he has no intention to appear in court.

The traffic laws of this state are, however, no more a matter of contract than are its penal laws. They govern all those within the jurisdiction of Texas; they cannot be evaded at whim by a verbal formula. Your correspondent's apparent notion that his relation to our laws is purely contractual, and as such may be unilaterally abrogated by him, has no basis in law. *See Coyle v. State*, 775 S.W.2d 843, 847 (Tex. App.–Dallas 1989, no writ) (rejecting argument that defendant "has cancelled all contracts that would require her, in her view, to recognize any authority other than God."); *cf. Barcroft v. State*, 881 S.W.2d 838, 840 (Tex. App.–Tyler 1994, no pet.) (Uniform Commercial Code inapplicable in criminal trial for exceeding speed limit).

Having signed a traffic ticket, one is obliged to appear in court. Wilful failure to so appear is a misdemeanor. *See* TEX. TRANSP. CODE ANN. § 543.009 (Vernon 1999). The law does not contemplate that any mental reservations with which one signs, or any form of words one appends to that signature, will have the remotest effect on one's obligation to appear.

S U M M A R Y

The addition of protest words to a signature on a traffic ticket has no effect whatsoever on the obligation of the ticketed party to appear in court.

Yours very truly,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

CLARK KENT ERVIN
Deputy Attorney General - General Counsel

SUSAN D. GUSKY
Chair, Opinion Committee

James E. Tourtelott
Assistant Attorney General - Opinion Committee

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e. **Texas Attorney General letter Opinion GA-0228 (08/05/2004)** – Online at http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2004/pdf/ga0228.pdf.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2004

The Honorable Eugene D. Taylor
Williamson County Attorney
Williamson County Courthouse Annex
Second Floor
405 Martin Luther King Boulevard
Georgetown, Texas 78626

Opinion No. GA-0228

Re: Whether a county clerk must accept for recording a paper copy, containing printed images of signatures or a printed image of a notary seal, of an electronic record of a real estate transaction (RQ-0186-GA)

Dear Mr. Taylor:

You ask whether a county clerk must accept for recording a paper copy, containing printed images of signatures or a printed image of a notary seal, of an electronic record of a real estate transaction.[1] You focus your inquiry on the effects of the Federal Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), 15 United States Code chapter 96 (2000); the Uniform Electronic Transactions Act (the "UETA"), found in Texas Business and Commerce Code chapter 43, *as adopted by* Act of May 24, 2001, 77th Leg., R.S., ch. 702, § 1, 2001 Tex. Gen. Laws 1341, 1341-47; and various state laws relating to a county clerk's duties as county recorder. *See* Request Letter, *supra* note 1, at 2.

I. Factual Background

You state that the Williamson County Clerk's Office is unable to accept electronically filed documents at this time and, consequently, accepts only paper documents for filing. *Id.* at 1-2. The Clerk's Office requires real estate filings "to contain original signatures and notary stamps or seals rather than photocopied or faxed documents." *Id.* at 1. Nonetheless, you state, some people have submitted as real estate filings "paper versions of documents which were 'electronically generated.'" *Id.* at 2. These paper copies contain "printed representations of signatures captured as digital images" instead of "original pen and ink signatures." *Id.* "Likewise," you continue, "the notary seals on these documents are computer generated rather than stamped or embossed." *Id.* As support for their position that the clerk must accept these copies, the persons attempting to file "point to" the UETA and subchapter I of the E-Sign Act, providing for electronic records and signatures in commerce. *Id.* at 2; TEX. BUS. & COMM. CODE ANN. ch. 43 (Vernon 2002 & Supp. 2004); 15 U.S.C. ch. 96, subch. I (2000). The persons further "claim that a County Clerk can be charged with a civil

[1] *See* Letter from Honorable Eugene D. Taylor, Williamson County Attorney, to Honorable Greg Abbott, Texas Attorney General (Feb. 18, 2004) (on file with the Opinion Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

penalty" under section 11.004(b) of the Property Code, which sets out the county clerk's duties with respect to real property instruments, "if the [c]lerk refuses to accept" the paper copies. Request Letter, *supra* note 1, at 2; *see* TEX. PROP. CODE ANN. § 11.004 (Vernon 2004).

In light of this situation, you ask four questions about a clerk's obligation to accept paper copies of real estate transaction documents:

> 1. Does [the UETA] or [the E-Sign Act] require a County Clerk to accept real estate filings which contain printed images of signatures rather than original pen and ink signatures?
>
> 2. Does [the UETA] and/or Government Code § 406.013 [pertaining to a notary public's seal] require a County Clerk to accept real estate filings which contain a printed image of a notary seal rather than an original stamped or embossed seal?
>
> 3. Does [the UETA] and/or Government Code § 406.013 require a County Clerk to accept real estate filings which are faxed? Is this requirement limited to paper documents purporting to be electronically generated or may any real estate filing be faxed?
>
> 4. Is a County Clerk subject to the civil penalty provisions of Property Code § 11.004(b) for refusing to accept an "electronically generated" real estate filing?

Request Letter, *supra* note 1, at 2.

II. Applicable Statutes

A. Texas Statutes Relating to the Recording Process Generally

"A conveyance of an estate of inheritance, a freehold, or an estate for more than one year . . . must be in writing . . . ." TEX. PROP. CODE ANN. § 5.021 (Vernon 2004). A county clerk may record an instrument concerning real or personal property if the instrument (1) "has been acknowledged, sworn to with a proper jurat, or proved according to law," *id.* § 12.001(a), and (2) "is signed and acknowledged or sworn to by the grantor in the presence of . . . witnesses or acknowledged or sworn to before and certified by an officer authorized to take acknowledgments or oaths," *id.* § 12.001(b). An "officer authorized to take acknowledgments or oaths" includes a notary public, whose seal must comply with section 406.013 of the Government Code. *See id.*; *see also* TEX. GOV'T CODE ANN. § 406.013(c) (Vernon Supp. 2004). Under section 406.013, a notary public must affix to the sworn document a seal of office "by a seal press or stamp that embosses or prints a seal that legibly reproduces the required elements of the seal under photographic methods." TEX. GOV'T CODE ANN. § 406.013(c) (Vernon Supp. 2004). This requirement does not apply, however, "to an electronically transmitted authenticated document," although the electronically transmitted authenticated document "must legibly reproduce" the seal's required elements. *Id.* § 406.013(d).

Under section 11.004(a) of the Property Code, a county clerk must "correctly record . . . any instrument authorized or required to be recorded in that clerk's office," including real estate filings. TEX. PROP. CODE ANN. § 11.004(a) (Vernon 2004). A clerk who violates section 11.004 is liable for damages and "for a civil penalty of not more than $500" under subsection (b). *Id.* § 11.004(b). Finally, a clerk must be vigilant with respect to the authenticity of documents relating to real property interests, and if the clerk reasonably suspects that such a document filed, recorded, or submitted for filing or recording is fraudulent, the clerk must notify the parties listed in the document. *See* TEX. GOV'T CODE ANN. § 51.901(a) (Vernon 1998); *see also id.* § 51.901(c) (setting out circumstances in which a document is presumed to be fraudulent).

B. The Federal E-Sign Act

Subchapter I of the E-Sign Act, 15 United States Code sections 7001 through 7006, governs electronic records and signatures in or affecting interstate or foreign commerce. *See* 15 U.S.C. § 7001(a) (2000); Michael J. Hays, Note, *The E-Sign Act of 2000: The Triumph of Function over Form in American Contract Law*, 76 NOTRE DAME L. REV. 1183, 1193 (2001). Neither subchapter II, which pertains to transferable records, nor subchapter III, which pertains to international electronic commerce, applies here. *See* 15 U.S.C. §§ 7021, 7031 (2000).

Under the "general rule of validity" that section 7001 (part of subchapter I) articulates, with respect to a transaction affecting interstate or foreign commerce, the electronic form of a signature, contract, or other transaction-related record "may not be denied legal effect, validity, or enforceability solely because it is in electronic form," notwithstanding any other law. *Id.* § 7001(a). A transaction, for the E-Sign Act's purposes, is "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including . . . the sale, lease, exchange, or other disposition of any interest in real property." *Id.* § 7006(13)(B). Subchapter I does not require a person, "other than a governmental agency with respect to a record other than a contract to which it is a party," to use or accept electronic records or electronic signatures. *Id.* § 7001(b)(2). And nothing in subchapter I "limits or supersedes" a state regulatory agency's rule "that records be filed with [the] agency . . . in accordance with specified standards or formats." *Id.* § 7004(a). *But see id.* § 7004(b)(2) (requiring that a state agency's regulation be consistent with 15 United States Code section 7001).

Section 7002(a) expressly permits a state to supersede section 7001 by adopting the UETA:

> A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law—
>
> > (1) constitutes an enactment or adoption of the [UETA] as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act [authorizing a state to exempt from UETA transactions governed by (1) law governing the execution of wills; (2) certain parts of the Uniform Commercial

> Code; (3) [the Uniform Computer Information Transactions Act]; and (4) [other laws, if any, identified by the State]] shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or
>
> (2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—
>
> (i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and
>
> (ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and
>
> (B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.

Id. § 7002(a).

C. The Texas UETA

In 2001 Texas adopted the UETA, a uniform act promulgated by the National Conference of Commissioners on Uniform State Laws in 1999,[2] as chapter 43 of the Business and Commerce Code. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 702, § 1, 2001 Tex. Gen. Laws 1341, 1341-47. The UETA applies generally to electronic records and electronic signatures relating to a transaction (defined as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs," TEX. BUS. & COMM. CODE ANN. § 43.002(15) (Vernon 2002)), although a transaction subject to the UETA remains "subject to other applicable substantive law." *Id.* § 43.003(a), (d). An electronic record is "a record created, generated, sent, communicated, received, or stored by electronic means." *Id.* § 43.002(7); *see also id.* § 43.002(5), (12) (defining the terms "electronic" and "record"). An electronic signature is "an

[2] *See* Letter from John M. McCabe, Legal Counsel/Legislative Director, National Conference of Commissioners on Uniform State Laws, to Honorable Greg Abbott, Texas Attorney General, at 1 (rec'd Apr. 9, 2004) (on file with the Opinion Committee) [hereinafter NCCUSL Brief].

electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." *Id.* § 43.002(8).

While the UETA must be construed "to facilitate electronic transactions consistent with other applicable law," *id.* § 43.006(1), it does not require the creation, receipt, or use of an electronic record or signature in any circumstance, and the UETA applies only to "transactions between parties each of which has agreed to conduct transactions by electronic means." *Id.* § 43.005(a)-(b). Section 43.007 recognizes electronic records and electronic signatures:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (d) If a law requires a signature, an electronic signature satisfies the law.

Id. § 43.007.

Section 43.019 explicitly "modifies, limits, or supersedes" the E-Sign Act, as 15 United States Code section 7002(a) authorizes a state to do. *Id.* § 43.019; *see* 15 U.S.C. § 7002(a) (2000). Section 6(a) of the 2001 enacting legislation appears to limit section 43.019's effect, however:

> Notwithstanding Section 43.019 . . . Chapter 43 . . . does not modify, limit, or supersede the provisions of . . . 15 U.S.C. [§§] 7001 ["General rule of validity"] and 7003 ["Specific exceptions"] . . . and specifically does not authorize the electronic delivery of any notice of the type described by . . . 15 U.S.C. [§] 7003[(b)] . . . .

Act of May 24, 2001, 77th Leg., R.S., ch. 702, § 6(a), 2001 Tex. Gen. Laws 1341, 1347-48. Section 7003(b), 15 United States Code, provides that section 7001, the "general rule of validity," does not apply to court documents; notices of the cancellation or termination of utility services; certain notices regarding debt on and possession of an individual's primary residence; cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); notices of product recalls; and certain documents that accompany toxic or dangerous materials, such as hazardous materials. *See* 15 U.S.C. § 7003(b) (2000).

C. Preemption Issues

It is not clear, from the E-Sign Act or from the Texas UETA, whether or to what extent the Texas UETA modifies, limits, or supersedes the E-Sign Act. Commentators have found the E-Sign Act's "exemption to preemption" confusing and suggest that it may be subject to multiple

interpretations. *See* Nathan A. Huey, Note, *E-Mail and Iowa's Statute of Frauds: Do E-Sign and UETA Really Matter?*, 88 IOWA L. REV. 681, 695-99 (2003); Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws* (2001), *available at* www.nccusl.org/nccusl/whatsnew-article1.asp) (last visited July 5, 2004) [hereinafter Fry]; Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 BUS. LAW. 293, 324-33 (2000) [hereinafter Wittie & Winn]. No court has considered the E-Sign Act's preemptive effect. With respect to Texas's version of the UETA in particular, section 43.019 of the Business and Commerce Code purports to modify, limit, or supersede the E-Sign Act in full, but section 6 of the enacting legislation restricts section 43.019's effect and specifically does not supersede 15 United States Code sections 7001 and 7003. *See* TEX. BUS. & COMM. CODE ANN. § 43.019 (Vernon 2002); Act of May 24, 2001, 77th Leg., R.S., ch. 702, § 6(a), 2001 Tex. Gen. Laws 1341, 1347-48.

Given this uncertainty, we are reluctant to determine which act prevails in Texas. To the extent your questions concern section 7001 or 7003 of the federal statute, we assume that the federal law preempts the relevant portions of the UETA. To the extent your questions involve sections other than sections 7001 or 7003, we assume the UETA prevails.

III. Relevant National Conference of Commissioners on Uniform State Laws Comments and Attorney General Opinions

Your questions generally involve a county recording officer's duty to accept documents resulting from electronic transactions under the E-Sign Act and the UETA. *See* Request Letter, *supra* note 1, at 2. The National Conference of Commissioners on Uniform State Laws (the "NCCUSL"), which drafted the UETA, has noted the general uncertainty as to whether either act requires local recording officers to accept electronic documents:

> [E]ven though documents that result from electronic transactions are valid and enforceable between the parties [under the E-Sign Act and the UETA], there is no broad agreement about whether those documents may be recorded in the various local land records offices in the several states. Laws and regulations in many states frequently limit a recordable document to one that is in writing or on paper. They may also require that the recorded document be an original document. Similar laws and regulations may require signatures to be in writing and acknowledgments to be signed. Being electronic and not on paper, being an electronic version of an original paper document, or having an electronic signature or acknowledgment instead of a handwritten one, an electronic document might not be recordable under the laws of these states . . . .[3]

[3]National Conference of Commissioners on Uniform State Laws, Uniform Real Property Electronic Recording Act at 1, *available at* http://www.law.upenn.edu.bll/ulc/urpera/URPERA2004AnnMtgDraft.htm (last visited July 5, 2004) [hereinafter NCCUSL Draft] (citation omitted).

The NCCUSL currently is drafting a Uniform Real Property Electronic Recording Act "to assist state and local government[s] in making a full transition to electronic media."[4] The draft's prefatory note describes the UETA and the E-Sign Act as giving "legal effect to real estate transactions that are executed electronically and allow[ing] them to be enforced between the parties thereto." NCCUSL Draft, *supra* note 3, at 1. Presumably, the new Uniform Real Property Electronic Recording Act, will, if adopted, further clarify a local recording officer's duties with respect to electronic transactions.[5]

No courts have considered issues analogous to those you raise.[6] Attorneys general in California and New York have considered analogous issues, however.

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[4]NCCUSL Brief, *supra* note 2, at 3.

[5]Our conclusion is consistent with the comments of the State Bar of Texas, Business Law Section, relating to the UETA. *See generally* TEX. BUS. & COMM. CODE ANN. ch. 43 (Vernon Supp. 2004). In comments on section 43.008, the Business Law Section states that, while an electronic real estate conveyance would be "effective between the parties," it "would not be recordable in the deed records of the particular county until the county had adopted an electronic filing system in accordance with Chapter 195, Local Government Code. . . . Thus, until electronic filing of real estate conveyances in the proper records becomes possible, conveyances written on paper . . . will be preferable so that the purchaser's rights against third parties can be protected through the filing system." *Id.* § 43.008 cmt. 2.

[6]A lower New York court questioned the E-Sign Act's constitutionality to the extent that it (1) attempts to "commandeer[] the activities of a state to achieve a federal purpose" and (2) goes "beyond issues of interstate commerce." *People v. McFarlan*, 744 N.Y.S.2d 287, 293 (N.Y. Sup. Ct. 2002). The New York court considered the E-Sign Act's applicability to a printout of a computer-generated photo array of possible suspects. *See id.* at 289, 293. The court felt that the E-Sign Act may well be unconstitutional, at least in part:

> While the thrust of E-Sign, that it relates to "transactions in or affecting interstate commerce," when applied to the instant case, would seem to exclude the police records used in this case, as there is no transaction as defined by [15] U.S.C.A. § 7006(13), the effect of preemption is much broader. E-Sign would, for example, purport to cover the same police record if it were used (or perhaps referred to) in a commercial transaction. The impact of imposing upon a State a rule as to such state's records when used in a transaction, but not when the same records are not, is in the real world a rule imposing the rule on such state's records for all purposes. . . . This effective imposition of a federal rule on State records thus may well constitute a violation against the rule against commandeering the activities of a state to achieve a federal purpose. [*See*] *Printz v. U.S.*, 521 U.S. 898 . . . (1997) (holding [under article I, section 8 of the United States Constitution] that the Brady Hand Gun Act provisions requiring the states to conduct background checks on gun purchases was unconstitutional).
>
> A second reason why E-Sign may not apply in New York, at least [with] respect to transactions not in interstate commerce, is the Tenth Amendment to the United States Constitution. The issue here is whether and to what extent the federal government may use the language of the interstate commerce clause to go beyond issues of interstate commerce to impose a better nationwide rule. While admittedly, life would be simpler and perhaps better if the same rule applied to all contracts, their formation and interpretation across the country, creating uniformity for commercial laws has generally been left to state action.

Id. at 293-94 (footnote omitted).

In 2002 the California attorney general implicitly determined that the E-Sign Act does not require a county recorder to accept electronic documents, which would include electronic signatures. *See* Op. Cal. Att'y Gen. No. 02-112 (2002). In that opinion, the California attorney general addressed whether county recorders may "implement electronic recordation of documents in their respective jurisdictions," analyzing whether "a conflict exists between" the state statutes governing the county recorder's duties and responsibilities, the California version of the UETA, and the E-Sign Act. *Id.* at 2. California law requires a county recorder to accept for recordation an instrument, paper, or notice that "contain[s] an original signature or signatures, except as otherwise provided by law, or [that is] a certified copy of the original." *Id.* (quoting CAL. GOV'T CODE § 27201(b)(1)). In certain limited circumstances, California law permits a county recorder to accept for recording a digitized image of a recordable instrument in lieu of a written paper if the "image conforms to all other applicable statutes that prescribe recordability, except the requirement of original signatures." *Id.* at 3 (quoting CAL. GOV'T CODE § 27279(b)(1)). The opinion notes that the California UETA provides that county recorders' duties, "in respect to recording instruments," are prescribed by the state statutes governing recorders' duties and responsibilities. *Id.* at 6. In addition, though the California version of the UETA—like section 43.007 of the Texas Business and Commerce Code—stipulates that electronic records and electronic signatures satisfy laws requiring written records or written signatures, the attorney general stated that this stipulation applies only to "the legal effect and enforceability of the transactions themselves . . . and not to the recordation of a document reflecting a transaction between two independent parties." *Id.* at 7. The attorney general construed the E-Sign Act similarly:

> E-sign concerns the legal effect, validity and enforceability of electronic records and electronic signatures relating to transactions between private parties. E-sign refers throughout to "a contract or other record relating to a transaction in or affecting interstate or foreign commerce." Also similarly defined, the term "transaction" means "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons. . . ." (15 U.S.C. § 7006(13).) E-sign contains no reference to the legal duty of a county recorder to record documents.
>
> Accordingly, E-sign does not preempt the [relevant] provisions of [the California] Government Code . . . specifying the duties of county recorders. . . . Nothing in E-sign may be construed as a direct enactment positively impairing the public policy of this state relating to the recordation of documents.

Id. at 10. Finding that neither the UETA nor the E-Sign Act requires a county recorder to accept electronic documents, the attorney general concluded that county recorders generally are not authorized under the state law prescribing their duties and responsibilities to implement electronic recordation of documents. *See id.* at 12.

In another opinion, the California attorney general determined that the UETA does not require the secretary of state to accept for filing a nonprofit organization's certificate of voluntary dissolution containing facsimiles of the directors' signatures rather than their original signatures.

See Op. Cal. Att'y Gen. No. 02-514 (2002). Focusing on the California statute analogous to section 43.007 of the Texas Business and Commerce Code, which states that an electronic record or electronic signature satisfies a law requiring a written record or signature, the attorney general pointed out, first, that the UETA does not require the receipt of a record or signature by electronic means or in an electronic form. *See id.* at 3 (citing CAL. CORP. CODE § 1633.7). Moreover, this statute applies only to "the legal effect and enforceability of the transaction itself . . . and not to the filing or recordation of a document reflecting the transaction." *Id.* Second, the UETA applies only "to transactions between" consenting parties, and the "filing or recordation of a document concerning the transaction does not render the act of filing or recordation itself a new 'transaction' or make the public agency a 'party' to the original transaction." *Id.*

In 2001 the New York attorney general similarly concluded that "there is a substantial possibility that" the E-Sign Act does not preclude "a county recording officer from rejecting a filing submitted for recordation that bears only an electronic signature but lacks an 'original signature.'" Op. N.Y. Att'y Gen. No. 2001-3, 2001 WL 1095069, *1 (2001). Reviewing New York laws that prescribe a county recorder's duties, the attorney general found that recording officers are barred "at the present time from accepting filings submitted for recordation that contain electronic signatures." *Id.* at *2. The attorney general determined that, although the E-Sign Act covers activities relating to "the transfer of an interest in real property from one person . . . to another," it "does not . . . cover the related but distinct activity of recordation of a private transaction, which is purely governmental in nature." *Id.* at *3. With respect to section 7004 of the E-Sign Act, which preserves a state regulatory agency's authority to require "that records . . . filed with [the] agency" comply with "specified standards or formats," the attorney general found it "unclear" whether a county recording officer would be a state regulatory agency encompassed by section 7004. *Id.* at *6. Ultimately, however, the attorney general concluded that the section was intended to "'protect recording systems . . . from any obligation to immediately convert to electronic records.'" *Id.* (quoting Fry, *supra* p. 6, at 11). The attorney general also cites section 7001(e) of the E-Sign Act, which authorizes a state to enact a statute that denies validity of an electronic record if the electronic record "is not in a form that is capable of being retained and accurately reproduced," 15 U.S.C. § 7001(e) (2000), as evidence that Congress was reluctant to "force states to immediately adopt new standards and formats that accommodate electronic filings." Op. N.Y. Att'y Gen. No. 2001-3, 2001 WL 1095069, *6 (2001). "If the integrity and authenticity of a paperless record cannot be assured over time because a state cannot, for example, properly store and retrieve filings that contain electronic signatures," then section 7001(e) of the E-Sign Act permits the state to "refuse to accept such filings." *Id.* "In sum," the New York attorney general concluded, "although the issue ultimately may be decided by the courts, it is our estimation . . . that there is a substantial possibility that E-SIGN does not . . . obligate county recording officers to accept for recordation a filing that contains only an electronic signature but lacks an . . . 'original signature.'" *Id.* at *7.

IV. Analysis

A. The First Question

Having set out the relevant law and attorney general opinions, we turn to your questions. You ask first whether, under the UETA or the E-Sign Act, a county clerk must accept real

estate filings that contain printed images of signatures rather than original pen and ink signatures. *See* Request Letter, *supra* note 1, at 2.

We conclude, like our counterparts in California and New York, first, that the E-Sign Act does not require a county clerk to accept real estate filings that contain printed images of signatures rather than original pen and ink signatures. While section 7001 of the E-Sign Act is not clearly limited to transactional documents, we believe that a court probably would construe it to be so. The New York attorney general cited a pre-enactment statement by Congressman Dingell that recording of real property documents is "precisely the type of 'uniquely governmental' transaction unaffected by the preemptive sweep of" section 7001(a)(1). Op. N.Y. Att'y Gen. No. 2001-3, 2001 WL 1095069, *5 (2001). Section 7001 of the E-Sign Act states that "with respect to any transaction in or affecting interstate or foreign commerce," an electronic signature by itself does not render a contract or other record "relating to such transaction" invalid. 15 U.S.C. § 7001(a)(1) (2000). A real property filing is not a "transaction" for purposes of the E-Sign Act, *see id.* § 7006(13) (defining the term "transaction"), but a document intended for filing among a clerk's real property records may be a record "relating to" a real property conveyance. *See id.* § 7001(a)(1); *see* Wittie & Winn, *supra* p. 6, at 320-21 (stating that the phrase "relating to" extends the E-Sign Act's reach "beyond actual transaction documents to include all ancillary records, such as applications, filings, notices, and similar documentation"). The E-Sign Act defines the term "transaction," but it does not define the phrase "relating to," and no court has yet defined the term. *See* 15 U.S.C. § 7006(13) (2000).

Second, the UETA does not require a county clerk to accept electronically transmitted documents or signatures. *See* TEX. BUS. & COMM. CODE ANN. § 43.005(a) (Vernon 2002); *see also* 13 TEX. ADMIN. CODE §§ 7.141(4), 7.142(a)-(b) (2004). The UETA applies only to transactions between consenting parties. *See* TEX. BUS. & COMM. CODE ANN. § 43.005(b) (Vernon 2002). Third, and finally, you do not ask about an electronic signature; you ask about a paper copy of an electronic signature. Nothing in the E-Sign Act or the UETA applies to such a record. *See generally id.* ch. 43.

We accordingly conclude that a county clerk is not required to accept real estate filings that contain copies of electronic signatures.

B. The Second Question

You ask second whether the UETA or section 406.013 of the Government Code requires a county clerk to accept real estate filings containing a copy of an electronically transmitted notary public seal. *See* Request Letter, *supra* note 1, at 2. Although you do not ask about the E-Sign Act, we believe, for the reasons cited by the California and New York attorneys general and the reasons cited in answer to your first question, that the E-Sign Act does not require a county clerk to accept real estate filings containing a copy of an electronically transmitted notary public seal. Additionally, nothing in the UETA requires a clerk to accept documents for filing, any portion of which is transmitted electronically. Moreover, as we have pointed out, neither the E-Sign Act nor the UETA pertains to copies of electronic documents. Section 406.013 of the Government Code, which excepts from the requirement that a notary public seal be affixed to a document an "electronically transmitted authenticated document," does not thereby require a clerk to accept for

filing a document containing a copy of an electronically transmitted notary public seal. *See* TEX. GOV'T CODE ANN. § 406.013(d) (Vernon Supp. 2004).

We consequently conclude that neither the UETA nor section 406.013, Government Code, requires a county clerk to accept for filing a document containing a copy of an electronically transmitted notary public seal.

C. The Third Question

You ask third whether the UETA or section 406.013 of the Government Code requires a county clerk to accept faxed real estate filings. *See* Request Letter, *supra* note 1, at 2. A fax is an electronic record for purposes of the UETA. *See* TEX. BUS. & COMM. CODE ANN. § 43.002(5), (7) (Vernon 2002) (defining the terms "electronic" and "electronic record"); *see also Madden v. Hegadorn*, 565 A.2d 725, 728 (N.J. Super. Ct. Law Div.), *aff'd*, 571 A.2d 296 (N.J. Super. Ct. App. Div. 1989) (per curiam) (explaining the "common knowledge that 'fax' machines electronically scan documents, reduce the documents to a series of digital signals and transmit them over telephone lines to a receiving machine which reassembles the signals and then reproduces the original documents"); Tex. Att'y Gen. Op. No. JC-0471 (2002) at 4 (describing how a fax machine works). The UETA does not require a clerk to receive faxes, or other electronic records, in any circumstances. *See* TEX. BUS. & COMM. CODE ANN. § 43.005(a) (Vernon 2002). Nor does section 406.013, which serves only to except documents that are permitted to be electronically transmitted from the embossed or printed notary public seal requirement. *See* TEX. GOV'T CODE ANN. § 406.013(c)-(d) (Vernon Supp. 2004).

We thus conclude that neither the UETA nor section 406.013 of the Government Code requires a county clerk to accept faxed real estate filings.

D. The Fourth Question

Finally, you ask whether a county clerk who refuses to accept an electronically generated real estate filing may be liable for civil penalties under section 11.004(b) of the Property Code. *See* Request Letter, *supra* note 1, at 2. Under section 11.004(b), a county clerk who fails to correctly record an instrument that is "authorized or required to be filed in that clerk's office" is liable "for a civil penalty of not more than $500." TEX. PROP. CODE ANN. § 11.004(a)(1), (b) (Vernon 2004). A county clerk has no duty to accept and record a paper copy of an electronically generated real estate filing. Indeed, the State Library and Archives Commission's rules make this clear: a county clerk may *choose* to participate in an electronic filing system. *See* 13 TEX. ADMIN. CODE §§ 7.141(4), 7.142(a), (b) (2004). Moreover, because an electronically generated document does not comply with statutory requirements for real estate filings, *see* TEX. PROP. CODE ANN. §§ 5.021, 12.001(a) (Vernon 2004), a county clerk is prohibited from recording such a document.

Consequently, a county clerk does not violate section 11.004 by refusing to record an electronically generated real estate filing, and the clerk is not liable for civil penalties under section 11.004(b).

S U M M A R Y

Nothing in the E-Sign Act, 15 United States Code chapter 96, or the Uniform Electronic Transactions Act (the "UETA"), chapter 43 of the Texas Business and Commerce Code, requires a county clerk to accept real estate filings that contain copies of electronic signatures. Similarly, nothing in the UETA, nor in section 406.013 of the Government Code, requires a county clerk to accept real estate filings containing a copy of an electronically transmitted notary public seal. Neither the UETA nor section 406.013 requires a county clerk to accept faxed real estate filings. Furthermore, current statutory requirements in the Property Code appear to prohibit a county clerk's recording of an electronically generated record or a copy of such a record, including an electronically generated signature or notary public seal or a faxed document. Finally, a county clerk who refuses to accept an electronically generated real estate filing is not liable for civil penalties under section 11.004(b) of the Property Code.

Very truly yours,

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