

August 30, 1994

OPINION NO. 94-055

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park
Mansfield, Ohio 44902

Dear Prosecutor Mayer:

You have submitted an opinion request in which you ask: "May a board of county commissioners contract with a private contractor to perform service by certified mail of processes, complaints, or other documents to certain local businesses on behalf of a ... clerk of [the court of common pleas]." By way of background, your opinion request states that a private contractor "has offered to perform service by certified mail of processes, complaints, and other documents to certain local businesses at a rate that is lower than the rate charged by the U.S. Post Office for service by certified mail." Additional information provided by your office indicates that service by the private contractor would not involve use of the U.S. mail.

Service of Process by the Clerk of the Court of Common Pleas

Pursuant to R.C. 2303.11, "[a]ll writs and orders for provisional remedies, and process of every kind, *shall be issued by the clerk of the court of common pleas*; but before they are issued a praecipe shall be filed with the clerk demanding the same." (Emphasis added.) Thus R.C. 2303.11 imposes upon the clerk of courts the duty to issue process of every kind. The clerk of the court of common pleas is an elected county officer. R.C. 2303.01. As noted in *State ex rel. McKean v. Graves*, 91 Ohio St. 23, 24, 109 N.E. 528, 528 (1914), the clerk is "*an arm of the court for issuing its process*, entering its judgments and performing like duties which the court itself might perform. His services are employed only for the more convenient performance of those functions of the court which are clerical in their nature." (Emphasis added.)

Ohio R. Civ. P. 4.1

As mentioned in your opinion request, Ohio R. Civ. P. 4.1(1)¹ addresses the duty of the clerk of courts regarding service by certified mail, stating in pertinent part:

All methods of service within this state, except service by publication as provided in Rule 4.4(A) are described herein. Methods of out-of-state service and for service in a foreign country are described in Rule 4.3. and Rule 4.5.

(1) Service by certified mail. Evidenced by return receipt signed by any person, service of any process shall be by certified mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. He shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. He *shall* affix adequate postage and *place the sealed envelope in the United States mail* as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

....

All postage shall be charged to costs. If the parties to be served by certified mail are numerous and the clerk determines there is insufficient security for costs, he may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage. (Emphasis added.)

R. Civ. P. 4.1(1), therefore, prescribes the manner in which the clerk of courts shall issue service by certified mail, and requires, among other things, the clerk's placement "in the United States mail" of the sealed envelope containing the process to be served. *See Hecker v. Norfolk & Western Railway Co.*, 86 Ohio App. 3d 543, 621 N.E.2d 601 (Marion County 1993) (finding the duties of the clerk of courts, upon the filing of a complaint with the clerk, to be governed by the Rules of Civil Procedure).

In the situation about which you ask, the clerk of courts is required by R. Civ. P. 4.1(1), when issuing service by certified mail, to place the envelope containing the copy of the process, complaint or other document to be served "in *the United States mail* as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered." (Emphasis added.) R. Civ. P. 4.1(1) expressly requires the clerk to use the United States mail. Although use of an alternative means of delivery may be more

¹ The Ohio Rules of Civil Procedure were adopted by the Supreme Court of Ohio pursuant to Ohio Const. art. IV, § 5(B), which authorizes the court to "prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right." Article IV, § 5(B) further states that, "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

economical, the rule in its current form provides no such option, and thus an amendment to the rule would be required in order to authorize the use of any such alternative means of delivery.²

Conclusion

It is, therefore, my opinion, and you are hereby advised that the clerk of the court of common pleas has no authority to use a private contractor instead of the United States mail in the service of process by certified mail as governed by R. Civ. P. 4.1(1).

Respectfully,

LEE FISHER
Attorney General

² Your question asked whether the board of county commissioners could contract with a private contractor to effect service "by certified mail" on behalf of the clerk of courts. However, because the clerk of courts is without authority to use a private contractor for this purpose, it is not necessary to address the powers of boards of county commissioners.

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SYLLABUS:

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The clerk of the court of common pleas has no authority to use a private contractor instead of the United States mail in the service of process by certified mail as governed by R. Civ. P. 4.1(1).