

March 27, 2017

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

SYLLABUS:

2017-010

Pursuant to R.C. 304.03(A), a county recorder may accept for recording an instrument presented to her through an electronic filing system, so long as the county recorder has authorized the use of the electronic filing system for this purpose, the instrument is required or authorized by a provision in the Revised Code to be recorded, and the instrument is presented to the county recorder in accordance with applicable rules or an applicable agreement. A county recorder is required to adopt a security procedure pursuant to R.C. 304.02 prior to accepting instruments for recording that are presented to her through an electronic filing system.



MIKE DEWINE

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OPINION NO. 2017-010

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

Dear Prosecutor Faris:

We have received your request whether a county recorder may accept for recording instruments sent to the office of county recorder through an electronic filing system. A county recorder is a creature of statute and may therefore exercise only those powers and duties expressly conferred upon her by statute or necessarily implied thereby. *See* R.C. 317.01; 1999 Op. Att’y Gen. No. 99-014, at 2-109 (“[t]he office of county recorder is established by statute ... and county recorders have only the powers and duties they are given by statute”); 1981 Op. Att’y Gen. No. 81-086, at 2-334 (“[a] county recorder has only such powers and duties as are expressly given him by statute or necessarily implied from the language of the statute”).

A county recorder is responsible for recording various instruments. *See* R.C. 317.08(A); R.C. 317.13(A) (“the county recorder shall record in the official records ... all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the county recorder for that purpose”); 1999 Op. Att’y Gen. No. 99-014, at 2-109 (“[a]mong their duties, county recorders are responsible for recording various instruments that are presented to them”). An instrument is “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.” 2009 Op. Att’y Gen. No. 2009-046, at 2-334 (quoting *Black’s Law Dictionary* 869 (9th ed. 2009)). The instruments subject to recording by a county recorder are set forth in R.C. 317.08(A)(1)-(28)¹ and various other provisions in the Revised Code. *See, e.g.*, R.C. 317.09 (notices of certain federal liens); R.C. 317.10 (certified copies of bankruptcy

¹ The instruments enumerated in R.C. 317.08(A)(1)-(28) include, but are not limited to, deeds, R.C. 317.08(A)(1); notices as provided for in the Marketable Title Act, R.C. 317.08(A)(2); certain judgments or decrees, R.C. 317.08(A)(3); instruments creating or extinguishing easements, R.C. 317.08(A)(9)-(10), (15); instruments affecting mineral interests, R.C. 317.08(A)(5), (11); mortgages, R.C. 317.08(A)(19); and declarations regarding the provision of life-sustaining treatment, R.C. 317.08(A)(26).

matters); R.C. 317.15 (certified copies of deeds or other instruments recorded in the official records of a county other than the county in which the lands, tenements, or hereditaments are situated); R.C. 317.35 (plans and drawings filed under R.C. 9.56); R.C. 707.09 (transcript or other papers provided in R.C. 707.08); R.C. 1311.29 (mechanics' liens); R.C. 2937.27 (notices of liens and discharges filed pursuant to R.C. 2937.26); R.C. 4961.39 (grants of rights of way); R.C. 5301.32 (separate instrument of assignment or partial release acknowledged pursuant to R.C. 5301.01); R.C. 5301.38 (records of patents for land and copies of such patents).

The duty of a county recorder to “record” an instrument means that a county recorder is required to copy the instrument into “one general record series to be known as the ‘official records.’” R.C. 317.08(A); *see also* 1990 Op. Att’y Gen. No. 90-061, at 2-262 n.1 (defining what it means to record) (quoting *Green v. Garrington*, 16 Ohio St. 548, 550 (1866)). A person who acquires an interest in real property is charged with constructive notice of any recorded instruments affecting the property. *See Columbia Gas Transmission Corp. v. Bennett*, 71 Ohio App. 3d 307, 315, 594 N.E.2d 1 (Montgomery County 1990) (“Ohio has long abided by the principle that a purchaser of real property is charged with constructive notice of all prior conveyances recorded in his chain of title.... Constructive notice is imputed notice which exists by reason of the proper filing of a conveying instrument”). A county recorder may copy or record instruments “in legible handwriting, typewriting, or printing, or by any authorized photographic or electronic process.” R.C. 317.13(A); *see also* R.C. 9.01 (“[w]hen any officer ... of a county ... who is charged with the duty or authorized or required by law to record ... any record, document, plat, court file, paper, or instrument in writing ... deems it necessary or advisable, when recording ... of any of them or of any such record, for the purpose of recording or copying, preserving, and protecting them, reducing space required for storage, or any similar purpose, to do so by means of any photostatic, photographic, ... electronic data processing,” or other means or processes “which correctly and accurately copies, records, or reproduces ... the original record, document, plat, court file, paper, or instrument in writing, such use of any of those processes, means, or displays for any such purpose is hereby authorized”).

R.C. 317.08(A) and R.C. 317.13(A) impose upon a county recorder a duty to record instruments that are “presented” to the county recorder for recording, so long as those instruments are authorized or required to be recorded by a provision in the Revised Code. *See* R.C. 317.08(A) (“[t]he county recorder shall record in the official records all of the ... instruments” listed in R.C. 317.08(A)(1)-(28) “that are presented for recording, upon payment of the fees prescribed by law”); *see also* R.C. 317.13(A) (“the county recorder shall record in the official records ... all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the county recorder for that purpose”). The term “presented” is not defined for purposes of R.C. Chapter 317. Accordingly, we shall assign the term its common meaning. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”). *Webster’s New World College Dictionary* 1152 (5th ed. 2014) defines “present” to mean “to hand over, give, or send ... to someone.” Therefore, an instrument is presented to a county recorder for recording within the meaning of R.C. 317.08(A) and R.C. 317.13(A) when it is handed over, given, or sent to the county recorder for recording.

No provision in R.C. Chapter 317 or anywhere else in the Revised Code requires an instrument to be presented to a county recorder in paper form, or otherwise specifies the manner by which an instrument is to be presented to a county recorder for recording.² We find guidance, however, in the provisions in R.C. Chapter 304, which govern the use of electronic records and signatures by county offices.

R.C. 304.03(A) declares as follows:

Whenever any rule or law requires or authorizes the filing of any information, notice, lien, or other document or record with any county office, a filing made by an electronic record shall have the same force and effect as a filing made on paper in all cases where the county office has authorized or agreed to the electronic filing and the filing is made in accordance with applicable rules or an applicable agreement.³ (Footnote added.)

The term “filing” is not defined for the purpose of R.C. 304.03(A). *See generally* R.C. 1.42. *Black’s Law Dictionary* 642 (7th ed. 1999) defines “file” to mean “[t]o deliver a legal document to the ... record custodian for placement into the official record.” *See also id.* at 390 (defining “custodian” to mean “[a] person or institution that has charge or custody of property, papers, or other valuables”), 643 (defining a “filing” to mean “[a] particular document ... in the file of a ... record custodian”). An instrument is “presented” to a county recorder for recording when the instrument is handed over, given, or sent to the county recorder for that purpose. *See Webster’s New World College Dictionary* 1152 (defining “present” to mean “to hand over, give, or send ... to someone”). The term “sent” is synonymous with “delivered.” *See Roget’s 21st Century Thesaurus* 218 (3d ed. 2005). Therefore, a rule or law that authorizes or requires “the filing of any information, notice, lien, or other document or record with any county office,” as that phrase is used in R.C. 304.03(A), includes any rule or law that authorizes or requires the presentation of an instrument to a county recorder.⁴ Pursuant to R.C. 304.03(A), whenever any

² Although no provision in the Revised Code specifies the manner by which an instrument is to be presented to a county recorder for recording, several statutes in R.C. Chapter 317 govern the format and content of such instruments. *See, e.g.*, R.C. 317.112(A) (requiring an instrument presented for recording to be of a quality to permit legible reproduction); R.C. 317.114(A)(1)-(9) (governing formatting requirements such as font, paper size, and margins).

³ A county office is required to adopt a security procedure pursuant to R.C. 304.02 “[p]rior to the use of electronic records.” R.C. 304.02; 2006 Op. Att’y Gen. No. 2006-025, at 2-217.

⁴ An instrument is “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.” 2009 Op. Att’y Gen. No. 2009-046, at 2-334 (quoting *Black’s Law Dictionary* 869 (9th ed. 2009)). Therefore, an instrument is “any information, notice, lien, or other document or record,” as that phrase is used in R.C. 304.03(A).

rule or law requires or authorizes the presentation of an instrument to a county recorder for recording, a presentation “made by an electronic record shall have the same force and effect as a [presentation] made on paper in all cases where the county office has authorized or agreed to the electronic filing and the filing is made in accordance with applicable rules or an applicable agreement.”

R.C. 304.01(D) defines “[e]lectronic record” to “mean[] a record created, generated, sent, communicated, received, or stored by electronic means.” A “record” is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” R.C. 304.01(H). “‘Information’ means data, text, images, sounds, codes, computer programs, software, databases, or the like.” R.C. 304.01(F). An instrument is “[a] written legal document that defines rights, duties, entitlements, or liabilities.” 2009 Op. Att’y Gen. No. 2009-046, at 2-334 (quoting *Black’s Law Dictionary* 869 (9th ed. 2009)). A written legal document created on paper is “data” or “text” that is “inscribed on a tangible medium.” See generally *Webster’s New World College Dictionary* 908 (defining “medium” to mean “any material ... as used for expression”), 1480 (defining “tangible” to mean “that can be touched or felt by touch; having actual form and substance”). A written legal document created electronically is “data or text” that is “stored in an electronic or other medium and is retrievable in perceivable form.” Accordingly, an instrument, whether created on paper or electronically, is a “record” within the meaning of R.C. 304.01(H).

An instrument is an *electronic* record if the instrument is “created, generated, sent, communicated, received, or stored by electronic means.” R.C. 304.01(D). “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” R.C. 304.01(C). We understand that the Clermont County Recorder desires to use an electronic filing system that enables a person to give or send an instrument, in electronic form, to the Clermont County Recorder. Thus, an instrument presented to the Clermont County Recorder for recording through an electronic filing system is an “electronic record” within the meaning of R.C. Chapter 304 because it is a record sent, communicated, or received by electronic means.⁵ Accordingly, pursuant to R.C. 304.03(A), whenever any rule or law requires or authorizes the presentation of an instrument to a county recorder for recording, an instrument presented to the county recorder through an electronic filing system “ha[s] the same force and effect as” an instrument presented to the county recorder in paper form “in all cases where the county [recorder] has authorized or agreed to the electronic filing and the filing is made in accordance with applicable rules or an applicable agreement.” See generally *Black’s*

⁵ Whether an instrument is originally created in paper or electronic form has no bearing on whether the instrument is an electronic record in this instance. An instrument originally executed on paper must be converted into an electronic form before it is able to be sent to a county recorder through an electronic filing system. An instrument converted from paper to electronic form for the purpose of being presented to a county recorder through an electronic filing system is a record sent, communicated, or received by electronic means within the meaning of R.C. 304.01(D).

Law Dictionary 330 (a “rule” means “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation”).

Provisions in R.C. Chapter 317 and elsewhere in the Revised Code regulate the content and form of instruments presented to a county recorder for recording. R.C. 317.114(A)(1)-(9), for example, require certain instruments or documents “presented for recording” to comply with formatting requirements such as print and paper size, ink color, and margins.⁶ R.C. 317.112(A) requires an instrument presented for recording, by which an interest or lien on real estate or personal property is affected, to “be of a quality that permits the legible reproduction of the instrument.” If an instrument is not of a quality that permits its legible reproduction, a county recorder may require the person who presented the instrument to either (1) present the “original document” to the county recorder for recording if the instrument first presented was a copy of the original and the original is of a quality to permit legible reproduction, R.C. 317.112(B)(1)(a); or (2) “prepare ... and present for recording or filing a true copy of the instrument” that “contain[s] a certification ... that it is a true copy of the instrument.” R.C. 317.112(B)(1)(b).

In certain circumstances a county recorder may not accept instruments for recording. A county recorder may not accept instruments for recording that, among other things, include an individual’s personal information, R.C. 317.082(B); contain illegible signatures, R.C. 317.11; or fail to include the name of the person who, and the governmental agency, if any, that prepared the instrument, R.C. 317.111. Provided an instrument complies with these and other applicable statutes, R.C. 304.03(A) authorizes a county recorder to accept the instrument for recording when the instrument is presented to the county recorder through an electronic filing system.⁷

Accordingly, pursuant to R.C. 304.03(A), a county recorder may accept for recording an instrument presented to her through an electronic filing system, so long as the county recorder has authorized the use of the electronic filing system for this purpose, the instrument is required or authorized by a provision in the Revised Code to be recorded, and the instrument is presented

⁶ R.C. 317.114 does not apply to documents “that originate[] with any court or taxing authority,” R.C. 317.114(C)(1); that are “authorized to be recorded under [R.C. 317.24],” R.C. 317.114(C)(2); that are “authorized to be recorded” and “originate[] from any state or federal agency,” R.C. 317.114(C)(4); and that were “executed before July 1, 2009,” R.C. 317.114(C)(5). R.C. 317.114 also does not apply to any plat defined in R.C. 711.001 “that is required or authorized by the Revised Code to be recorded.” R.C. 317.114(C)(3).

⁷ R.C. 304.03(A) does not require a county recorder to use an electronic filing system. *See* R.C. 304.04 (“[n]othing in this chapter or [R.C. Chapter 1306 (Uniform Electronic Transactions Act)] requires or shall be construed to require any county office to use or permit the use of electronic records and electronic signatures”).

to the county recorder in accordance with any applicable rules or an applicable agreement.⁸ A county recorder is required to adopt a security procedure pursuant to R.C. 304.02 prior to accepting instruments for recording through an electronic filing system.

Conclusion

It is our opinion, therefore, and you are hereby advised that, pursuant to R.C. 304.03(A), a county recorder may accept for recording an instrument presented to her through an electronic filing system, so long as the county recorder has authorized the use of the electronic filing system for this purpose, the instrument is required or authorized by a provision in the Revised Code to be recorded, and the instrument is presented to the county recorder in accordance with applicable rules or an applicable agreement. A county recorder is required to adopt a security procedure pursuant to R.C. 304.02 prior to accepting instruments for recording that are presented to her through an electronic filing system.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General

⁸ Prior opinions of the Attorney General advised that a county recorder should not accept for recording a photographic or photostatic copy of an instrument otherwise entitled to be recorded. *See, e.g.*, 1962 Op. Att’y Gen. No. 2849, p. 154 (syllabus) (“[c]opies of instruments specified in Sections 317.08 and 317.13, Revised Code, should not be accepted by the county recorder for record; however, where a statute specifically states that a copy of a particular instrument may be filed for record in the office of the county recorder (Section 1701.80, Revised Code, for example) the recorder is required to accept such copy for record”); 1942 Op. Att’y Gen. No. 5369, p. 559 (syllabus) (“[a]n instrument purporting to be a photographic or photostatic copy of a deed to real estate is not entitled to record in the deed records of a county, and the county recorder has neither the right nor duty to receive and record it”). These opinions were issued, however, before the development of computer technology made possible the use of electronic records in the conduct of private and governmental affairs and the enactment of laws authorizing that use. *See, e.g.*, 2003-2004 Ohio Laws, Part III, 4884 (Sub. H.B. 204, eff., in part, Nov. 5, 2004) (enacting, *inter alia*, R.C. 304.01-.04).