

OPINION NO. 81-086**Syllabus:**

County recorders are not under any duty, when receiving a fictitious name certificate or a certificate of limited partnership, to search the records to determine whether there is an existing partnership recorded with the same name, and, if so, to reject for filing the certificate being presented.

To: Gregory A. White, Lorain County Pros. Atty., Elyria, Ohio
By: William J. Brown, Attorney General, December 16, 1981

I have before me your request for my opinion whether, when a county recorder receives a fictitious name certificate or a certificate of limited partnership, he has a duty to search his records to determine whether there is an existing partnership with the same name and, if there is, to reject for filing the certificate being presented. Your question concerns both the extent of the recorder's duty in recording a partnership and the requirements for a fictitious name certificate or limited partnership certificate to be validly recorded.¹ For ease of discussion, I will address the issue regarding the county recorder's duties first.

It is a general rule that a county official, such as 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. State ex rel. Hoel v. Goubeaux, 110 Ohio St. 287, 144 N.E. 251 (1924). Further, there are many cases and opinions which support the proposition that "the office of County Recorder is one consisting of ministerial functions without any duty imposed upon it to make determinations of legal sufficiency of any paper or document whatsoever which may be entitled to record." 1965 Op. Atty Gen. No. 65-113, at 2-244; e.g., Ramsey v. Riley, 13 Ohio 157 (1844).

¹I am assuming that your question pertains only to fictitious name partnerships and limited partnerships. After a careful review of the Uniform Partnership Law, R.C. Chapter 1775, I have found no requirement that a general partnership must file with the recorder before legally conducting business. See R.C. 1775.06.

R.C. 317.13 sets forth the general recording functions of the county recorder and reads, in part, as follows:

The county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded, presented to him for that purpose. (Emphasis added.)

The legislature has specifically made use of the word "shall," which imposes a mandatory duty upon the county recorder to record all instruments which are presented for record that are sufficient in their format. State ex rel. City of Niles v. Bernard, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978) ("[t]he term 'shall' usually is interpreted to render mandatory the provision containing it").

The county recorder's duties in regard to fictitious name partnership and limited partnership certificates are set forth in R.C. 1777.02, R.C. 1777.05 and R.C. 1781.02. R.C. 1777.02 provides that, with certain exceptions:

every partnership transacting business in this state under a fictitious name, or under a designation not showing the names of the persons interested as partners in the partnership, shall file for record, with the county recorder of the county in which its principal office or place of business is situated and of each county in which it owns real property, a certificate to be recorded and indexed by the recorder stating the names in full of all the members of the partnership and their places of residence.

Thus, R.C. 1777.02 requires that a certificate be filed with the county recorder when a firm name does not include the partners' names. However, R.C. 1777.02 does not require the county recorder to examine his records and reject for filing a certificate using a fictitious name already in use.

With regard to the formation of a limited partnership, R.C. 1781.02(A)(1)(a)-(n) prescribes the information that the certificate shall include. Of particular import is R.C. 1781.02(A)(2), which states that the certificate shall be filed for record "in the office of the county recorder of the county in which the principal place of business of the partnership is located. When the certificate is filed with the recorder of any county, he shall endorse the date of the filing of the certificate and record and index the certificate in a separate book." R.C. 1781.02(B) provides that a limited partnership may be considered valid "if there has been substantial compliance in good faith with the requirements of division (A) of this section." The statute imposes upon a county recorder no duty to reject for filing a limited partnership certificate proposing to use a name already in use.

R.C. 1777.05 requires the county recorder to "keep a register of the names of the firms and persons mentioned in the partnership certificates filed in his office, entering in alphabetical order the name of every such partnership, and of each partner interested therein." See 1979 Op. Att'y Gen. No. 79-071. R.C. 1777.05 does not, however, provide that county recorders are vested with the authority to reject fictitious name certificates or limited partnership certificates of partnerships that are proposing to use a name already in use by another partnership.

I can find no statute which imposes upon a county recorder the duty of rejecting for filing a fictitious name certificate or certificate of limited partnership on the basis that there is another partnership with the same name. Nor, as mentioned above, am I aware of any means by which a county recorder may create requirements that are not expressly or implicitly provided by statute, so as to require that certificates of limited partnership or of partnerships having fictitious names be rejected for filing if a like or similar name is already in use. See State ex rel. Hoel v. Goubeaux, *supra*; R.C. 1777.02; R.C. 1777.05.

It is instructive to compare the duty of the Secretary of State with regard to the reservation of names for corporations to the duty of the county recorder with respect to partnership names. R.C. 1701.05 states, in part: "[T]he secretary of state shall not accept for filing in his office any articles if the corporate name set forth therein is likely to mislead the public or if the name is not such as to distinguish it from the name of any other corporation. . . , unless there is also filed in the office of the secretary of state the consent of such other corporation to the use of such name. . ." (emphasis added). The Secretary of State, unlike a county recorder, has an affirmative duty to determine if the corporate name being presented is already in use and, if so, to reject the corporate name, unless the corporation using it consents to such use. No statute specifically confers corresponding power on the county recorder with respect to partnership names.

Based on the foregoing, it is my opinion, and you are so advised, that county recorders are not under any duty, when receiving a fictitious name certificate or a certificate of limited partnership, to search the records to determine whether there is an existing partnership recorded with the same name, and, if so, to reject for filing the certificate being presented.