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THE MINISTERIAL DUTY IMPOSED ON A COUNTY RECORDER TO CERTIFY WHETHER PUBLIC RECORDS CONTAIN FINANCING STATEMENTS IN RELATION TO A PARTICULAR DEBTOR BUT NOT TO INTERPRET THE LEGAL EFFECT OF SUCH FILING—§§317.02, R.C., 1309.40, R.C.

SYLLABUS:

Upon the tender of the fee provided, a ministerial duty is imposed upon the county recorder by paragraph (G) of Section 1309.40, Revised Code, to examine the indexes and files of his office and to issue a written certificate as to whether said public records contain any financing statements in relation to one particular debtor which are effective in that they were filed within the time period prescribed by paragraphs (B) and (C) of said statute, but the county recorder is not required or permitted by said paragraph (G) to issue his interpretation or opinion as to the legal effect of such filings; and that upon the failure of the county recorder to fully list all such financing statements he and his surety are liable to a person for damages resulting from such omission.

Columbus, Ohio, September 19, 1962

Hon. Thomas R. Spellerberg, Prosecuting Attorney,
Seneca County, 164 East Market Street, Tiffin, Ohio

Dear Sir:

Your letter requesting my opinion reads as follows:

“The Recorder of Seneca County, Ohio, has asked me whether or not she is permitted to give a certificate as provided by Ohio Revised Code Sec. 1309.40 (G), in view of the fact that I had advised her in a letter dated July 6, 1962, that it would be my advice that she should not give these certificates.

"I would appreciate your advising whether or not you think that this section of the law is proper and valid in view of the peculiar wording thereof, to-wit:

"Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The uniform fee for such a certificate shall be one dollar plus fifty cents for each financing statement and for each statement of assignment reported therein. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of fifty cents per page.'

"It is my thought that this division of the law in effect is an attempt by the legislature to authorize the recorders to practice law which right is solely within the province of the Supreme Court of the State of Ohio. In any event the statute is silent as to what if any liabilities would rest upon the recorder in case that she would make a mistake and omit a statement or if in her opinion she felt that a statement that is filed is not effective and therefore did not show it in her certificate.

"I would appreciate being advised by you as follows: (1) Should the county recorder furnish certificates as provided in Sec. 1309.40 (G)? (2) If the answer to question 1 is yes, is the recorder liable on her bond? (3) If the answer to question 1 is yes, are there any other liabilities or obligations that may be imposed upon the county recorder? (4) Can the county recorder give informal telephonic statements to the effect that there are statements filed without giving any certificate as to the validity or priority?"

The mere issuance of a certificate by a county recorder, showing the status of the record, is not new to the law, but is a ministerial function of that office specifically required by Section 317.27, Revised Code. The language of Section 1309.40 (G), *supra*, requiring a certificate showing "presently effective" financing statements might, however, be construed by some to grant to the county recorder the power to determine the legal effect of such financing statements filed with his office. It is this language which will be considered by this opinion.

The practice of law is described in 6 Ohio Jurisprudence 2d, 33, Attorneys at Law, Section 6, as follows:

"The practice of law consists essentially of the performance of legal services for others. It is not limited to the conduct of cases

in court. It embraces the preparation of pleadings and other papers incident to the actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. However, one who furnishes to another a certificate or memorandum containing a statement of the substance of a document or facts appearing on the public records, which affect the title to real estate, without expressing any opinion as to the legal significance of what is found or as to the validity of the title, is not engaged in the practice of law. Nor does one act in his office as attorney when he voluntarily appears and testifies before a federal grand jury investigating his conduct.

“The question as to what constitutes the unlawful practice of law is considered in a subsequent section.”

I know of no Ohio case which has treated the question of whether the General Assembly has the power to authorize a public officer to perform services which amount to the practice of law. The practice of law is closely related to the courts and the power to regulate such practice in Ohio rests with the Ohio Supreme Court. *The State ex rel., Green v. Brown, Secretary of State*, 173 O.S. 114. Thus, it would appear that the General Assembly could not authorize a public officer to practice law.

The General Assembly has granted power to many administrative agencies to make determinations which are quasi-judicial in nature, 1 Ohio Jurisprudence 2d, 445, Administrative Law and Procedure, Section 36. However, even a cursory examination of paragraph (G) of Section 1309.40, *supra*, dispels any illusion that such a grant of power was therein given to the county recorder.

If the certificate so issued were to be considered as adjudicating the issue of the effectiveness of any filing, due process of law would require reasonable notice and an opportunity to be heard, neither of which are specified in or inferable from the language used in said Section 1309.40 (G).

Similarly, if the language of division (G) were construed to grant the power to the county recorder to determine and advise any person requesting his certificate whether, in his opinion, financing statements on file in his office were legally sufficient so as to be “presently effective,” such authority would, in any opinion be tantamount to authorization to

practice law as heretofore described. Such a construction would cause said statute to be unconstitutional as a legislative infringement upon the judicial powers of the state in violation of Article IV, Section 1 of the Ohio Constitution which vests the judicial power of the state in the courts. Since it is a basic rule of statutory construction that legislation will be construed so as to uphold its constitutionality, an interpretation that Section 1309.40, Revised Code, authorizes the county recorder to practice law should not be made when some other interpretation is possible. 10 Ohio Jurisprudence 2d, 235, Constitutional Law, Section 158.

It will be noted that paragraphs (B) and (C) of Section 1309.40, Revised Code, establish the time during which a legally effective financing statement will be treated as an effective *filed* financing statement. The words "presently effective" as used in paragraph (G) of Section 1309.40, Revised Code, can be construed so as to impose a duty upon the recorder to examine his index and files to ascertain whether they contain any financing statements which were filed within a time period so as to be considered effective within the time period prescribed by paragraphs (B) and (C) of Section 1309.40, Revised Code. Under such an interpretation, considering the law in Ohio as it presently exists in relation to what constitutes the practice of law as set forth at 6 Ohio Jurisprudence 2d, 34, *supra*, I am of the opinion that the furnishing of a certificate which merely lists what the public records show as financing statements effectively filed within the time periods prescribed by paragraphs (B) and (C) of Section 1309.40, Revised Code, would not amount to the practice of law. See *The State ex rel., Doria v. Ferguson, Auditor*, 145 Ohio St. 12. Furthermore, considering the duties of the county recorder with regard to Section 1309.40 (A), Revised Code, considered in Opinion No. 3072, Opinions of the Attorney General for 1962, issued June 15, 1962, and the statement of the court with regard to the general duties of county recorders in the case of *Samuel Ramsey v. Zachariah Riley, Recorder of Miami County*, 13 Ohio St., 157, quoted in said opinion, I must conclude that the legislature intended in enacting paragraph (G) of Section 1309.40, Revised Code, to impose a duty upon the county recorder to provide only such information as the public records of his office contain, without any interpretation or opinion of the legal significance of such information.

As to your second question, dealing with the liability of the county recorder and his surety if he omits from his certificate issued pursuant to paragraph (G) of Section 1309.40, Revised Code, a financing statement

which should have been included therein, your attention is directed to Section 317.02, Revised Code, which reads in part as follows:

“Before entering upon the duties of his office, the county recorder shall give a bond, conditioned for the faithful discharge of the duties of his office, signed by a bonding or surety company authorized to do business in this state, * * *”

Section 317.33, Revised Code, sets forth several instances which can give rise to a liability of the county recorder and his bondsmen, but failure to comply with the provisions of Section 1309.40, Revised Code, is not enumerated therein. I do not believe, however, that the listing contained in Section 317.33, Revised Code, should be considered exclusive so as to preclude liability of the recorder and his bondsmen for injury resulting from the improper performance of the duties imposed upon a county recorder by Section 1309.40 (G), *supra*. Such duties are clearly ministerial in nature, and misfeasance of a county recorder in issuing an incomplete certificate would clearly constitute an unfaithful discharge of the duties of his office. In accordance with the general rule in Ohio that a ministerial officer is liable for neglect of his statutory duty, 44 Ohio Jurisprudence 2d, 573, Public Officers, Section 81, and pursuant to the general rule applied in other jurisdictions where recorders are required to search and certify their records, 94 ALR, 1303, at page 1315, I am of the opinion that a county recorder who failed to give a complete certificate as required by Section 1309.40 (G), Revised Code, would be liable for damages to a person injured thereby. Since the bond of the county recorder is conditional upon his faithful performance of the duties of his office, the surety of such bond would be liable to the extent of such bond, for damages to a person injured by such misfeasance of the county recorder. *United States Fidelity Guaranty Co. v. Samuels*, 116 Ohio St., 586; *American Guaranty Co. v. McNiese*, 111 Ohio St., 532.

As to your third question dealing with possible other liabilities or obligations imposed by Section 1309.40 (G), *supra*, upon the county recorder, I know of no other unusual liabilities or obligation therein imposed. Said statute impresses a ministerial duty upon the county recorder to examine his indexes and files with respect to a specific named debtor and issue a certificate as to their contents to such debtor. The county recorder and his surety are answerable for the misconduct of a deputy county recorder in regard to Section 1309.40 (G), *supra*, pursuant to Section 317.05, Revised Code, to the same extent and under the same conditions as they

would be answerable for any other misconduct perpetrated by such deputy. Upon the refusal or willful neglect on the part of a county recorder to perform the duty imposed by Section 1309.40 (G), *supra*, he would be subject to removal from office pursuant to Section 3.07, et seq., Revised Code, in the same fashion as refusal to perform any other official duty.

As indicated earlier herein, the above liability or obligations are the same for the duty imposed by Section 1309.40 (G), *supra*, as for any other duty imposed by law upon the county recorder and I know of no unusual obligations or liability which would fall upon such officer as a result of such statute.

As to your final question dealing with the right of the county recorder to give informal telephonic statements as to the condition of his files with regard to the material described in Section 1309.40 (G), *supra*, I am of the opinion that said statute does not preclude the recorder from so giving such information, nor does said statute require that such information be so given. Needless to say, the provisions of Section 1309.40 (G), *supra*, would not be met by a telephonic message, and said statute provides no fee for such service and therefore no fee could be charged. The requirements of Section 1309.40 (G), *supra*, relating to the issuance of a certificate clearly imply the issuance of a written report as to the status of the index and files of the county recorder.

In accordance with the above, I am of the opinion and you are advised that upon the tender of the fee provided, a ministerial duty is imposed upon the county recorder by paragraph (G) of Section 1309.40, Revised Code, to examine the indexes and files of his office and to issue a written certificate as to whether said public records contain any financing statements in relation to one particular debtor which are effective in that they were filed within the time period prescribed by paragraphs (B) and (C) of said statute, but the county recorder is not required or permitted by said paragraph (G) to issue his interpretation or opinion as to the legal effect of such filings; and that upon the failure of the county recorder to fully list all such financing statements he and his surety are liable to a person for damages resulting from such omission.

Respectfully,

MARK McELROY

Attorney General