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The Office of Vince Ryan
County Attorney

RQ-1177-GA

December 20, 2013

Honorable Greg Abbott
Office of the Attorney General
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

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OPINION COMMITTEE

FILE # ML-47490-14

I.D. # 47490

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Re: Whether, in accordance with an order from a district judge, the Harris County District Clerk may continue to accept for filing applications for protective orders under Family Code Title 4 transmitted via the "FREE Fax" system, although the Supreme Court order amending Tex.R.Civ.P. 21 requires that, effective January 1, 2014, electronic filing must be done through the TexFile electronic filing manager established by the Office of Court Administration; C.A. File No. 13GEN1805

Dear Attorney General Abbott:

On behalf of the Harris County District Clerk (the "Clerk"), and pursuant to section 402.043 of the Texas Government Code, I am requesting an opinion concerning the Clerk's implementation of the Supreme Court's electronic filing mandate effective January 1, 2014, despite an order from a district judge requiring the Clerk to continue accepting applications for protective orders in cases under Title 4 of the Texas Family Code, which are now filed through the Clerk's "FREE Fax" electronic file manager.

FACTUAL BACKGROUND

For several years, the Harris County District Clerk has accepted for filing electronic documents converted to PDF format and transmitted via a "FREE Fax" software system developed by the District Clerk. Filings that require no associated court fees are currently accepted via FREE Fax from government agencies, attorneys, and unrepresented parties in the 280th District Court, a specially designated "domestic violence court" to which all applications for protective orders pursuant to Family Code Title 4 are assigned. Tex. Gov't Code Ann. § 24.112(h) – (l).

Since December 2011, the Supreme Court has issued a series of orders mandating the electronic filing of pleadings and documents in civil cases beginning January 1, 2014 in the courts of counties with a population of 500,000, including Harris County. See Misc. Docket No.

12- 9206, Misc. Docket No. 13-9092, and Misc. Docket 13-9128. In amending Tex. R. Civ. 21, the Court ordered that except in juvenile cases, attorneys must electronically file documents through TexFile, the electronic filing system adopted by the Office of Court Administration. Tex.R.Civ.P. 21(f)(1) - (3). Electronic filing is optional for unrepresented parties. Tex.R.Civ.P. 21(f)(1). For good cause, a court may allow a party to file documents in paper form in a particular case. Tex.R.Civ.P. 21(f)(4)(C), and “documents to which access is otherwise restricted by law or court order” must not be filed electronically. Tex.R.Civ.P. 21(f)((B)(ii).

On December 1, 2013, the judge of the 280th District Court issued an order (attached as Exhibit 1) that “the Harris County District Clerk ensure that “applications for protective orders and other pleadings assigned to the 280th District Court of Harris County have the option of filing court documents and pleadings by means of FREE Fax.” The Clerk is concerned that continuing to accept filings of court documents and pleadings in these cases on and after January 1, 2014 would violate the Supreme Court order and amended Rule 21(f)(1) –(3), Tex.R.Civ.P.

DISCUSSION

The Supreme Court has “full rulemaking power in the practice and procedure in civil actions” and the authority to “promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice.” Tex. Gov’t Code Ann. § 22.004(a), (b). To that end, the Court issued its initial “Order Requiring Electronic Filing in Certain Cases on December 11, 2011. (Misc. Docket No. 12-9206). The order explained that electronic filing of court documents offered the benefits of increased productivity and accessibility, decreased storage expenses and risk of lost or damaged documents, and accelerated litigation progress. However, because attorneys confronted several different filing systems that varied from county to county, “without a centralized and uniform portal for accessing court case information, the advantages of filing electronically are greatly diminished.” (Id. at 2).

Relying on the Joint Committee on Information Technology, which spent several years evaluating how the electronic filing system could be improved, the Court accepted the recommendation to “mandate a statewide, uniform system of e-filing for all courts with a phased implementation starting with the most populous counties.” (Id. at 3) The Office of Court Administration retained a vendor to provide e-filing to all Texas courts through a system called “TexFile,” which lowers the fees for users by 48 percent, and “will also permit indigent and certain government filers to submit documents at no cost.” (Id.) The Supreme Court ordered that “once a court is subject to mandatory e-filing under this Order, courts and clerks must not offer to attorneys in civil cases any alternative electronic file transmission system (including fax filing)” and courts and clerks must not accept, file or docket any documents filed by an attorney in a civil case that is not filed in compliance with this Order” except in case of emergency.” (Id. at 4) [Emphasis added]

The attached order of the 280th District Court recites certain “Findings and Conclusions” to support the court’s authority to order the Clerk to continue accepting “FREE Fax” filing from attorneys after January 1, 2014. First, the Court finds that because applications for protective orders are “documents to which access is otherwise restricted by law” and therefore “must not be

filed electronically.” Tex.R.Civ.P. 21(f)(4)(C). This conclusion is based in part on a Family Code provision applicable to counties with a population of 3.4 million or more that keeps applications for protective orders temporarily confidential from anyone except the respondent until (1) the date the notice is served, or (2) the date of the hearing, or (3) the date the respondent is informed of the order. Tex. Fam. Code Ann. § 82.010(b). Second, the order notes that the Clerk is also required to collect identifying information about the respondent against whom a protective order is issued for distribution to various law enforcement agencies, and to maintain a confidential record of contact and address information for protected persons and members of their family or household for use only by the court. Tex. Gov’t Code Ann. § 411.042; Tex. Fam. Code Ann. §§ 85.007, 85.042. Some of this information (social security, taxpayer, identification and bank account numbers) is defined as “sensitive data,” and the party filing documents containing it must either redact it or “designat[e] the document as containing sensitive data when the document is electronically filed,” or, if it is not electronically filed, by including on the first page a capitalized notice to the clerk that it contains sensitive data. Tex.R.Civ.P. 21c (a) - (d). That newly adopted Rule 21c specifically permits these documents to be electronically filed, after this sensitive data is either redacted or the required notice is given to the Clerk, indicates that the Supreme Court did not intend them to be excluded from its mandatory “TexFile” electronic filing system.

The Clerk believes that the temporary confidential status of these applications and ex parte protective orders pending notice or service upon the respondent does not render them “documents to which access is restricted by law or court order” that “must not be filed electronically” via TexFile to avoid violating Tex.R.Civ.P. 21(f)(4)(B)(ii). The statute granting a temporary confidential status for these applications and orders “applies only in a county with a population of 3.4 million or more.” Tex. Fam. Code Ann. §82.010(a). The stated purpose of the Supreme Court electronic filing order was to “mandate a statewide, uniform system of e-filing for all courts.” (Misc. Docket No. 12-9206 at p.3) This purpose would be frustrated if the language in Tex.R.Civ.P. 21(f)(4)(C) prohibiting electronic filing of “documents to which access is otherwise restricted by law” were construed to prohibit “TexFile” filing of applications for protected orders and ex parte orders only in counties with a population of 3.4 million or more, where they enjoy a temporary confidential status, but not in the state’s remaining 253 counties. Only Harris County has a population of 3.4 million or more. (Texas State Library and Archives Commission, <http://www.census.gov/popest/data/counties/totals/2012/CO-EST2012-01.html>, accessed 12/ 18/ 2013).

The Clerk also contends that protective orders do not fall within the class of “documents to which access is restricted by law or court order” that must not be filed electronically merely because they may contain items of information deemed confidential by chapter 85 of the Family Code. The court’s order cites for support of this finding two Family Code provisions. Tex. Fam. Code Ann. §§ 85.007 and 85.042, and Tex. Gov’t Code Ann. § 411.042.

The first Family Code provision allows a court issuing a protective order the discretion, upon request by a person protected by the order or her family or household member, to exclude from the order the address and telephone number of a protected person, her place or employment, childcare facility or school. Tex. Fam. Code Ann. § 85.007(a). If the court grants such a request, it must order the Clerk to strike the information from the public records of the

court and maintain a confidential record for use only by the court. Tex. Fam. Code Ann. § 85.007(a). The provision does not state that the order itself should not be filed in the public record, only that the confidential address and telephone information must be stricken before the order is made available to the public.

The second provision requires the Clerk to send a copy of the protective order to the police chief, sheriff, or constable where the protected person resides, and each child-care facility or school the respondent is prohibited from visiting, and to the Department of Public Safety if the order suspends respondent's license to carry a concealed handgun, but does not restrict access to the court order itself. Tex. Fam. Code Ann. § 85.042.

The district court order cites section 411.012 of the Texas Government Code in support of its conclusion that a protective order may not be filed electronically because it is a document "to which access is restricted by law." The only reference to protective orders in that statute directs the Department of Public Safety to collect certain information concerning active orders, including the name and identifying information for the respondent, the name and county of residence of the person protected, the relationship between the respondent and protected person and the date the order expires. Tex. Gov't Code Ann. § 411.042(b)(6). The Department also collects the residence address and place of employment of the protected person, and the childcare facility or school a protected child attends, unless the court has ordered the Clerk to exclude that information from the order pursuant to section 85.007 of the Texas Family. See Tex. Gov't Code § 411.042(b)(6)(D) - (E). However, nothing in section 411.042 of the Texas Government Code mandates that public access to protected orders is restricted.

The order of the district court contains a finding that "except for a few select cases, parties electronically filing documents through the State's mandated electronic filing portal [TexFile], must pay a set fee for each transaction," thus violating the Family Code prohibition against charging a fee for filing an application for protective order and related documents. Tex. Fam. Code Ann. § 81.002. These fees and costs associated with protective orders are instead imposed by the court on the respondent to whom the order is directed. Tex. Fam. Code Ann. § 81.003. The District Clerk represents that the TexFile system is designed to accept applications for these documents without charging the filing party a fee at the time of filing. In addition, the Supreme Court Order states that "TexFile will also permit indigent and certain government filers to submit documents at no cost" in all civil cases. (Misc. Docket 12-9206, October 11, 2012, Page 3). The Harris County District Attorney, who is permitted to submit documents through TexFile at no cost, is responsible for filing and prosecuting applications for protective orders. Tex. Fam. Code Ann. § 81.007. Therefore, the electronic filing of these applications through TexFile will not violate the prohibition on charging fees to an applicant.

Finally, it should be noted that the Supreme Court Order mandating e-filing via TexFile in Harris County beginning January 1, 2014, applies only to attorneys; "unrepresented parties may electronically file documents, but it is not required." Tex.R.Civ.P. 21(f)(1). Paper copies may still be accepted from unrepresented parties, but beginning January 1, 2014, all "electronic filing must be done through TexFile, the electronic filing manager approved by the Office of Court Administration." Tex.R.Civ.P. 21(f)(3). For attorneys, only one alternative to TexFile beginning January 1, 2014, is allowed: "For good cause, a court may permit a party to file other

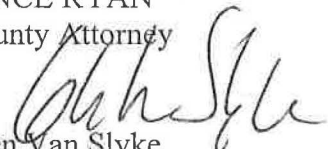
documents in paper form in a particular case.” Tex.R.Civ.P. 21(f)(4)(C). The order of the 280th District Court requiring the Clerk to continue offering the option of filing court documents and pleadings by means of Free Fax” does not comply with Tex.R.Civ.P. 21(f)(4)(C) because (1) it does not permit a party to file documents in paper form and (2) it is a general order, not an order entered “in a particular case” upon a showing of “good cause” by the party seeking to file documents in paper form.

Summary

Beginning January 1, 2014, the District Clerk of Harris County may not accept from attorneys or unrepresented parties applications for protective orders or related documents filed in the 280th Family District Court through FREE Fax transmission, without violating Tex.R.Civ.P. 21(f)(3), which requires that electronic filing must be done through TexFile, the electronic filing manager established by the Office of Court Administration. The District Clerk may accept these filings from attorneys only by electronic filing thorough TexFile. The District Clerk may accept these filings from unrepresented parties through TexFile or in paper form. The 280th District Court is not authorized to enter an order permitting an attorney or an unrepresented party to file an application for protective orders or related documents in the 280th District Court through FREE Fax transmission beginning January 1, 2014. The 280th Family District Court is authorized to enter an order for good cause permitting a party to file an application for protective orders or related documents in the 280th Family District Court in paper form in a particular case. Tex.R.Civ.P. 21(f)(4)(C).

Respectfully yours,

VINCE RYAN
County Attorney

By 
Glen Van Slyke
Assistant County Attorney

Encl.

Order of 280th District Court

cc:

Hon. Chris Daniel, District Clerk
Harris County Civil Courts Bldg.
201 Caroline
Houston, Texas 77002

Hon. Lynn Bradshaw-Hull
280th Judicial District Court
Harris County Civil Courts Bldg.
201 Caroline
Houston, Texas 77002



**280th Judicial District Court
Harris County, Texas**

ORDER

The Texas Supreme Court's filing rules state that "documents to which access is otherwise restricted by law or court order" must not be electronically filed. *See* TEX. R. CIV. P. 21 (f)(4). The rules also indicate that "[f]or good cause, a court may permit a party to file other documents in paper form in a particular case." *See* TEX. R. CIV. P. 21(f)(4)(C).

As the designated Harris County District Court giving preference to domestic violence cases this Court has a duty to "provide timely and efficient access to emergency protective orders and other court remedies for persons the court determines are victims of domestic violence." *See* TEX. GOV'T CODE §24.112. To ensure compliance with the Texas Family Code, the Texas Government Code, and the Texas Rules of Civil Procedure the Court makes the following

FINDINGS AND CONCLUSIONS:

1. An application for a protective order filed in Harris County is confidential and access to it is explicitly restricted by law. *See* TEX. FAM. CODE §82.010.
2. The Government Code requires the clerk of the court issuing an original or modified protective order to collect specific identifying information about each respondent for distribution to various law enforcement agencies. *See* TEX. GOV'T CODE § 411.042; TEX. FAM. CODE § 85.042.
3. Once the Court grants a request for confidentiality of contact and protected addresses made by a protected person or a member of the family or house hold of a protected person, the clerk must maintain a confidential record of the information for use *only* by the Court. *See* TEX. FAM. CODE § 85.007.
4. The plain language of the Rules of Civil Procedure indicates that protective orders, as "documents to which access is otherwise restricted by law or court

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Chris Daniel
District Clerk

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order," must not be filed electronically. See TEX. R. CIV. P. 21(f)(4)(C) & TEX. FAM. CODE § 82.010.

5. The Family Code prohibits charging an applicant a fee for filing a protective order and the Clerk may not assess fees for any services relating to a protective order, including, but not limited to motions to dismiss, modify, withdraw, certified copies, comparing copies of documents to originals, court reporters' records, or motions to transfer. See TEX. FAM. CODE § 81.002.
6. Except for a few select cases, parties electronically filing documents through the State's mandated electronic filing portal, must pay a set fee for each transaction.
7. Continuing to permit applicants for protective order to use the District Clerk's Free Fax Filing service would allow Harris County to remain in compliance with the Family Code and the Texas Rules of Civil Procedure and ensure confidential, timely and efficient access to Court resources.
8. Texas Rule of Civil Procedure 21c, entitled "Privacy Protection for Filed Documents," states that if a document containing unredacted sensitive data, is not electronically filed, the filing party must notify the Clerk "by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA." See TEX. R. CIV. P. 21c (d)(2).
9. Once the District Clerk is notified that a document contains unredacted sensitive data, the document must not be made available on the internet to anyone other than the parties and their attorneys, except through a public access terminal located in the courthouse." See TEX. R. CIV. P. 21c (f).

Accordingly, effective immediately, the Court **ORDERS** the Harris County District Clerk to ensure that 1) applications for protective orders and other pleadings assigned to the 280th District Court of Harris County, Texas have the option of filing court documents and pleadings by means of Free Fax and 2) documents filed in protective order cases are labeled in compliance with Rule 21c (d)(2).

December 4, 2013
Date signed


Lynn Bradshaw-Hull
Judge, 280th District Court, Harris County, Texas

STATE OF TEXAS
COUNTY OF HARRIS

Chris Daniel, District Clerk of Harris County, Texas, certifies that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date. Witness my official hand and seal of office this

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS



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