

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 02-112
	:	
of	:	September 4, 2002
	:	
BILL LOCKYER	:	
Attorney General	:	
	:	
ANTHONY S. DA VIGO	:	
Deputy Attorney General	:	
	:	

THE HONORABLE GORDON SPENCER, DISTRICT ATTORNEY,
COUNTY OF MERCED, has requested an opinion on the following question:

May county recorders implement electronic recordation of documents in their
respective jurisdictions?

CONCLUSION

County recorders may not implement electronic recordation of documents in
their respective jurisdictions other than in the Counties of Orange and San Bernardino.

ANALYSIS

The question presented for resolution concerns the interpretation and application of three different statutory schemes. We are asked whether a conflict exists between any of the statutory provisions, and if so, which provision is to control the duties of a county recorder to record electronically transmitted documents. We conclude that the three statutory schemes are not in conflict with each other.

1. Government Code Sections 27201-27388

The first statutory scheme that requires analysis is Government Code sections 27201-27388¹ governing the duties and responsibilities of a county recorder. Section 27201 provides:

“(a) The recorder shall, upon payment of proper fees and taxes, accept for recordation any instrument, paper, or notice that is authorized or required by statute or court order to be recorded, if the instrument, paper, or notice contains sufficient information to be indexed as provided by statute, meets recording requirements of state statutes and local ordinances, and is photographically reproducible. The county recorder shall not refuse to record any instrument, paper, or notice that is authorized or required by statute or court order to be recorded on the basis of its lack of legal sufficiency.

“ ‘Photographically reproducible,’ for purposes of this division, means all instruments, papers, or notices that comply with standards as recommended by the American National Standards Institute or the Association for Information and Image Management for recording of records.

“(b)(1) Each instrument, paper, or notice shall contain an original signature or signatures, except as otherwise provided by law, or be a certified copy of the original.

“(2) A facsimile signature shall be accepted on a lien recorded by a governmental agency when that facsimile signature has been officially adopted by that agency. The lien shall have noted on its face a statement to that effect. A copy of the agency’s resolution or action adopting the signature for facsimile

¹ All further statutory references are to the Government Code unless otherwise indicated.

transmission purposes or a certified copy of the agency's adopted signature shall be provided to the county recorder when the signature is officially adopted by the agency, or at the beginning of each calendar year."

Section 27279 states with respect to the recording of "instruments":

"(a) 'Instrument,' as used in this chapter, means a written paper signed by a person or persons transferring the title to, or giving a lien on real property, or giving a right to a debt or duty.

"(b) The recorder of any county may, in lieu of a written paper, accept for recording digitized images of recordable instruments if both of the following conditions are met:

"(1) The image conforms to all other applicable statutes that prescribe recordability, except the requirement of original signatures in subdivision (b) of Section 27201.

"(2) The requester and addressee for delivery of the recorded images are the same and can be readily identified as a local or state government entity, or an agency, branch, or instrumentality of the federal government."

Section 27279.1 grants two counties, San Bernardino County and Orange County, authority to record digitized images:

"(a) The recorders of San Bernardino County and Orange County may accept, in lieu of a written paper document, a digitized image of a recordable instrument if both of the following conditions are met:

"(1) The requester and addressee for delivery of the recorded image meets the criteria set forth in either Section 27279.2 or 27279.3.

"(2) The county recorder determines that accepting electronically recorded documents from the requester is in the best interest of the county and the public. Factors the county recorder shall consider include, but are not limited to, both of the following:

"(A) Whether or not the volume and quality of digitized instruments submitted by the requester will be sufficient to warrant electronic recordation.

“(B) Whether, in order to protect the county and the public, the requester has effective security precautions addressing potential fraud and forging of documents in the electronic recordation process.

“(b) The Legislature finds and declares that, because of the unique circumstances applicable to the counties referenced in subdivision (a), as regards the present ability of these counties to process digitized images for electronic recordation, a statute of general applicability cannot be enacted within the meaning of subdivision (b) of Section 16 of Article IV of the California Constitution.”

Section 27279.2 provides in turn:

“For purposes of Section 27279.1, the requester and addressee for delivery of a recorded image may record a digitized image of a recordable instrument if it is an entity, agency, branch, or instrumentality of the state or federal government qualifying under either Section 27279 of this code or Section 2106.5 of the Code of Civil Procedure.”²

Section 27279.3 additionally states:

“(a) A requester and addressee for delivery of a recorded image may record a digitized image of a recordable instrument if the requester meets the conditions set forth in paragraph (2) of subdivision (a) of Section 27279.1.

“(b) This section shall become operative on January 1, 2000.”

Finally, section 27279.4 authorizes the appointment of an Electronic Recordation Task Force as follows:

“(a) The California Attorney General shall appoint an Electronic Recordation Task Force consisting of voluntary representatives from governmental agencies and industry groups specified in subdivision (b) who shall meet on a regular basis to address the technical, legal, security and economic issues associated with electronic recordation. The task force shall make recommendations regarding all of the following:

² Code of Civil Procedure section 2106.5 concerns the recordation of federal tax liens and related documents.

“(1) In addition to requesters qualifying under Section 27279.2, which persons and entities should be authorized to digitize and record documents electronically after January 1, 2000, in order to limit real property fraud, forgery, and consumer risks associated with electronic recordation and provide a cost benefit to the county.

“(2) Guidelines for the standardization of both software and hardware used by counties to ensure maximum efficiency, cost-effectiveness, and maximum use of the electronic recordation process by requesters qualifying under Sections 27279.2 and 27279.3.

“(3) Appropriate recording fees and other assessments to cover increased costs to both county recorders and requesters.

“(b) The task force described in subdivision (a) shall consist of representatives from governmental and industry groups, including county recorders, county district attorneys, the Franchise Tax Board, Fannie Mae, the United States Internal Revenue Service, trustees, mortgage bankers, financial institutions, and the title insurance and real estate industries.”

With these statutory provisions in mind, we note at the outset that a public officer has only such powers as have been conferred by law, expressly or by implication. (*Ward v. Superior Court* (1997) 55 Cal.App.4th 60, 64-66 [county recorder not authorized to record a “Notice of Non-Compliance with Declaration of Restrictions”]; 82 Ops.Cal.Atty.Gen. 107 (1999) [county recorder not authorized to record a “Notice of Disclosure”]; 77 Ops.Cal.Atty.Gen. 242 (1994) [county recorder not authorized to record a “Notice of Intent to Preserve an Interest”]; 65 Ops.Cal.Atty.Gen. 321 (1982) [county recorder not authorized to record an unlicensed declaration of marriage].) A county recorder is a ministerial officer whose duty is to comply with the statutes pertaining to that office. (82 Ops.Cal.Atty.Gen., *supra*, at p. 108); 77 Ops.Cal.Atty.Gen., *supra*, at p. 246; 65 Ops.Cal.Atty.Gen., *supra*, at pp. 324-325.)

We further note that with respect to a statutory grant of authority, there is an implied negative: no power may be exercised which is in excess of the granted authority. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196; 81 Ops.Cal.Atty.Gen 80, 84 (1998).) Moreover, a legislative articulation of specific statutory authorization in one respect indicates the absence of such authority in related respects. (*Safer v. Superior Court* (1975) 15 Cal.3d 230, 238.)

Here, we have express grants of authority to act, which by implication may not

be exceeded, as well as specific exceptions to the implied limitations, which are applicable in certain respects but not others. A county recorder must comply with the prerequisite that each instrument presented for recordation contain an original signature, except as otherwise provided by law. (§ 27201, subd. (b)(1).) A specific exception applies for facsimile signatures on liens recorded by a government agency. (§ 27201, subd. (b)(2).) Section 27279, subdivision (a), refers to certain instruments affecting title to real property as “a written paper signed by a person.” Subdivision (b) of section 27279 contains a specific exception for the recordation of digitized images of specified instruments submitted by a governmental agency in lieu of written paper. Pursuant to another statutory exception, the county recorders of Orange County and San Bernardino County may accept, in lieu of a written paper document, a digitized image of a recordable instrument under prescribed conditions. (§ 27279.1.)

Accordingly, under these statutory provisions, unless a specific exception applies, a county recorder may not record a facsimile signature or a digitized image of a document in counties other than Orange County and San Bernardino County.

2. The Uniform Electronic Transactions Act

The second statutory scheme to be considered is the Uniform Electronic Transactions Act (Civ. Code, §§ 1633.1-1633.17; “Act”) pertaining to contracts. The Act was adopted by the Legislature in 1999 and applies to electronic records and electronic signatures relating to a transaction³ between parties, each of whom has agreed to conduct the transaction electronically. (Civ. Code, §§ 1633.5, subd. (b), 1633.3, subd. (a).) Except as otherwise provided by the Act, the effect of any of its provisions may be varied by agreement. (Civ. Code, § 1633.5, subd. (d).) The Act does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used electronically (Civ. Code, § 1633.5, subd. (a)) and contains no reference to the duty of a county recorder to record documents.⁴ In fact, the only provision of the Civil Code that expressly pertains to the duties of a county recorder has remained unchanged since adoption of the Act: “The duties of county recorders, in respect to recording instruments, are prescribed by the Government Code.” (Civ. Code, § 1172.)

³ “‘Transaction’ means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.” (Civ. Code, § 1633.2, subd. (o).)

⁴ The Act’s only reference to a county recorder is found in Civil Code section 1633.3, subdivision (c): “Nothing in this subdivision shall be construed to *prohibit* the recordation of any document with a county recorder by electronic means.” (Italics added.)

Among the substantive provisions of the Act, Civil Code section 1633.7 provides:

“(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

“(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

“(c) If a law requires a record to be in writing, an electronic record satisfies the law.

“(d) If a law requires a signature, an electronic signature satisfies the law.”

The references in subdivisions (c) and (d) to “a law requir[ing] a record to be in writing” and “a law requir[ing] a signature” must be construed in context as pertaining only to the subject of the Act, i.e., the legal effect and enforceability of the transactions themselves (e.g., Civ. Code, § 1624 [contracts in writing and subscribed by the parties]) and not to the recordation of a document reflecting a transaction between two independent parties.

The Government Code provisions set forth at the outset, on the other hand, pertain specifically to the duties of county recorders and govern the criteria for the recordation of instruments and related papers. We do not deem the Government Code provisions to be concerned with the same subject matter as the Act. Both statutory schemes may be given independent effect in their entirety.

Clearly, the Legislature has not considered the two statutory schemes to be in conflict. Since the adoption of the Act, the Legislature has amended several of the Government Code provisions in question, including providing a limited authorization to record certain government liens having facsimile signatures. (Stats. 2000, ch. 924, § 5.) Section 27279.4, providing for an Electronic Recordation Task Force, was amended in 2001 (Stats. 2001, ch. 745, § 101), which amendment is plainly inconsistent with the notion that the Act’s provisions are to be applicable to county recorders. Hence, the Legislature has not intended for the Act to have any applicability to the duties of county recorders in derogation of the requirements of sections 27201-27388.

3. The Electronic Signatures in Global and National Commerce Act

The final statutory scheme requiring examination is the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001-7031; “E-Sign”), which provides in part:

“(a) In general

“Notwithstanding any statute, regulation or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

“(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

“(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

“(b) Preservation of rights and obligations

“This subchapter does not—

“(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

“(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

“(c)

“(d) Retention of contracts and records

“(1) Accuracy and accessibility

“If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign

commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that -

“(A) accurately reflects the information set forth in the contract or other record; and

“(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

“.....”
(15 U.S.C. § 7001.)

With respect to the applicability of state laws, E-sign provides:

“(a) In general

“A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law—

“(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

“(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

“(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

“(ii) such alternative procedures or requirements do not require, or

accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

“(B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.” (15 U.S.C. § 7002(a).)

As in the case of the Act which preceded it, E-sign concerns the legal effect, validity and enforceability of electronic records and electronic signatures relating to transactions between private parties. E-sign refers throughout to “a contract or other record relating to a transaction in or affecting interstate or foreign commerce.” Also similarly defined, the term “transaction” means “an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons. . . .” (15 U.S.C. § 7006(13).) E-sign contains no reference to the legal duty of a county recorder to record documents.

Accordingly, E-sign does not preempt the provisions of Government Code sections 27201-27388 specifying the duties of county recorders. (See *California v. ARC America Corp.* (1989) 490 U.S. 93, 101; *Gorrie v. Bowen* (8th Cir. 1987) 809 F.2d 508, 521.) Nothing in E-sign may be construed as a direct enactment positively impairing the public policy of this state relating to the recordation of documents.

Indeed, we find persuasive evidence in E-sign to the contrary. Regarding the applicability of its provisions to federal and state governments, E-sign provides:

“(a) Filing and access requirements

“. . . [N]othing in this subchapter limits or supersedes any requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.

“.....

“(B) Paper or printed form

“Notwithstanding subsection (c)(1), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to require

retention of a record in a tangible printed or paper form if—

“(i) there is a compelling governmental interest relating to law enforcement or national security for imposing such requirement; and

“(ii) imposing such requirement is essential to attaining such interest.

“.....”

“(c) Additional limitations

“(1) Reimposing paper prohibited

“Nothing in subsection (b) (other than paragraph 3(B) thereof) shall be construed to grant any Federal regulatory agency or State regulatory agency authority to impose or reimpose any requirement that a record be in a tangible printed or paper form.

“.....”

(15 U.S.C. § 7004.)

Consequently, a state regulatory agency⁵ may require retention of a record in a tangible printed or paper form if there is a compelling governmental interest relating to law enforcement for imposing such requirement and the imposition of such requirement is essential to attaining that interest. (15 U.S.C. § 7004(b)(3)(B).) In this regard, we note that the avoidance of real estate fraud would be a compelling governmental interest relating to law enforcement.⁶

Finally, E-sign expressly allows a state statute to modify, limit, or supersede its substantive provisions if the state statute “constitutes an enactment or adoption of the

⁵ Although not expressly defined by Congress, the term “state regulatory agency,” we believe, would include the office of county recorder due to the status of counties as legal subdivisions of the state (Cal. Const., art. XI, § 1) and the broad regulatory powers of recorders (§§ 27201-27388) in administering the state’s recording laws. (See 15 U.S.C. § 7006(6) [“federal regulatory agency”].)

⁶ Several proposals to expand electronic recordation to counties other than Orange County and San Bernardino County have not received the Legislature’s approval in part because of concerns expressed by district attorneys throughout the state that electronic recordation of documents without proper security safeguards might increase real estate fraud conducted by organized crime operations.

Uniform Electronic Transactions Act as approved . . . by the National Conference of Commissioners . . .” (15 U.S.C. § 7002(a)(1).) Subdivision (c) of section 18 of the latter model act specifies that its provisions do not require a governmental agency “to use or permit the use of electronic records or electronic signatures.” It would be incongruous to construe E-sign itself in a manner inconsistent with the model act to which it refers.

We conclude that county recorders may not implement electronic recordation of documents in their respective jurisdictions other than in the Counties of Orange and San Bernardino.
