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**RQ-0165-GA**

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JAN 16 2004

January 13, 2004

The Honorable Gregg Abbott  
Attorney General of the State of Texas  
P. O. Box 12548  
Austin, TX 78711-2548

OPINION COMMITTEE  
FILE # ML-43430-04  
I.D. # 43430

RE: Request for Attorney General Opinion regarding the procedure for the appointment of a District Clerk to fill a vacancy in that position

Dear General Abbott:

This is to request an opinion on the proper procedure to fill a vacancy in the position of District Clerk. Specifically, your opinion is sought on whether the appointment of a person to that position requires the unanimous consent of all the District Judges served by the District Clerk, or whether that appointment may be made by a majority of the District Judges.

The District Clerk of Galveston County has announced she will retire on or about March 31, 2004. Her term would have expired on or about January 1, 2006 upon qualification or her successor; her retirement would occur just after mid-term.

The District Clerk of Galveston County serves six District Courts: the 10<sup>th</sup>, the 56<sup>th</sup>, the 122<sup>nd</sup>, the 212<sup>th</sup>, the 306<sup>th</sup> and the 405<sup>th</sup>. When a vacancy occurs in the position of District Clerk, *Tx. Gov't Code §51.301(b)* sets forth the procedure to fill the vacancy as follows:

If a vacancy in the office of district clerk occurs in a county that has two or more district courts, the vacancy shall be filled *by agreement of the judges* of the courts. If the judges cannot agree on an appointee, they shall certify that fact to the governor, who shall order a special election to fill the vacancy. (Emphasis added).

It is unclear whether the phrase "agreement of the judges" requires a unanimous vote of the district judges, or whether a majority of the judges may select the new district clerk. The statute itself gives no guidance, nor is there any Texas case law on that point.

Phone:	Felony Section (409) 766-2355	Family Law Section (409) 766-2364	Grand Jury Section (409) 766-2379	Worthless Check Section (409) 766-2429	Misdemeanor Section (409) 766-2373
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	Felony Victim's Ass't. (409) 770-5124			Misdemeanor Victim's Ass't. (409) 766-2365	

The District Judges are the appointing body for the positions of County Auditor and the Director of the Community Supervision and Corrections Department, commonly known as Adult Probation.

The County Auditor is appointed pursuant to the provisions of *Tx.Loc.Gov't Code Ch. 84*. That chapter includes provisions that establish the Auditor may be appointed by a majority vote of the district judges, of *Tx.Loc.Gov't Code §84.001(b)*.<sup>1</sup> In the event a majority of the judges cannot agree on the appointment, one of the judges is to certify that fact to the governor, who in turn appoints another district judge to act and vote with the district judges in the selection process. *Tx.Loc.Gov't Code §84.003(a)*.

The District Judges appoint the Director of the Community Supervision and Corrections Department pursuant to the authority granted them under *Gov't Code § 76.004 (a)* which states:

The district judge of judges shall appoint a department director who must meet, at a minimum, the eligibility requirements for officers established under Section 76.005.

There is neither case law nor an Attorney General Opinion on whether this statute requires the Director to be appointed by consent of the majority of judges or whether unanimity is required; notably absent however is the language the appointment be made "by agreement" as appears in the District Clerk statute.

Case law from without the state supports the proposition that the appointment of the District Clerk requires the unanimous agreement of the District Judges.

In *Boyer v. Thurston*, 231 A.2d 50, 247 Md. 279 (Md. Ct. App. 1967) the issue of whether an appointment to the office of Clerk should be made by all the Judges of the Circuit, or just by the judges in the County in which the vacancy occurred was at issue. The office of Clerk of Washington County became vacant when the officeholder died some six days post his re-election. The procedure for filling such a vacancy was set in the Md. Const. Art. IV § 25 which provided...

There shall be a clerk of the Circuit Court for each County in which it may be held. \* \* \* In case of a vacancy in the office of Clerk of a Circuit Court, the Judges of said Court shall have power to fill such vacancy until the general election for the Delegates to the General Assembly, to be held next thereafter, when a successor shall be elected for the term of four years.

In Maryland a Circuit can be larger than a single county; in *Thurston* the circuit judges appointed a replacement in the absence of one of the two resident judges in Washington County. The appointment was declared void, and in so doing the court observed the "appointment of a clerk is not judicial business in the ordinary use of those

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<sup>1</sup> *Tx.Loc.Gov't Code §84.005* provides for a vote of 2/3 of the district judges in populations in excess of 3.3 million.

words, but is in the nature of an executive act in which all the judges having the appointing power must participate and a majority concur". *Id* at 59. The Court further observed ...

It has also been generally held that provisions which vest the appointing power of clerks in 'judges' of a particular court, if there is more than one judge in that court, require the concurrence of a majority of the judges for a valid appointment. See *In re Pringle*, 22 Haw. 557, 565 (1915); *State ex rel Goodin v. Este*, 7 Ohio 134 (1835), *Donahue v. Cambbell* 98 NJL 755, 121 A. 700 (1923).

While these cases would support the proposition that the District Clerk in Galveston may be appointed by a majority vote of the judges they are distinguishable; in none of the cases cited is there language akin to the Texas statute that requires the appointment to be made "by agreement of the judges of the courts".

In construing a statute, the ultimate purpose is to discover and follow the intent of the Legislature. *Marcus Cable Associates, L.P. v. Krohn*, 90 S.W.3d 697, 707 (Tex. 2002). In enacting a statute, it is to be presumed that the entire statute is to be effective. *Tx. Gov't Code §311.021 (2)*. *Tx. Gov't Code §51.301(b)* provides in part..."[I]f the judges cannot agree on an appointee, they shall certify that fact to the governor, who shall order a special election to fill the vacancy".

If the Legislature contemplated the appointment of District Clerk would be made by simple majority, it would not have been necessary to include the words "by agreement" in the statute. Further, had a simple majority been contemplated, the forgoing portion of the statute would come into play only in instances where there were an even number of judges evenly divided over a prospective appointee.

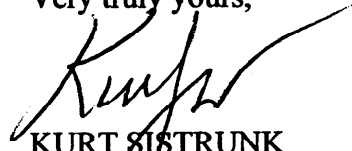
When possible, each sentence, phrase, clause and word is given effect, so that the statute makes sense as a cohesive whole. *Meritor Automotive, Inc. v. Ruan Leasing*, 44 S.W.3d 86, 90 (Tex. 2001). The first examination is to look to the common and plain meaning of the statute's words. *Texas Dept. of Public Safety v. Kreipe*, 29 S.W.3d 334, 337 (Tex.App. Houston [14<sup>th</sup> Dist.] 2000, *rev. den'd*). The term "agreement" has been construed to mean the "harmonious understanding or an arrangement as between two or more parties, as to a course of action". See *Gonzalez v. State*, 954 S.W.2d 98, 104 (Tex. App.- San Antonio 1997, no writ), *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989).

Using these rules of construction it appears that *Tx. Gov't Code §51.301* requires a vacancy in the position of District Clerk of Galveston County be filled by the unanimous consent of the District Judges of Galveston County, and that in the absence of unanimity they must certify this fact to the governor.

Given the importance of this position, and the desire of the Judges to be sure they correctly follow the law, your opinion on this matter is respectfully requested.

Should require further information, please contact me. Thanking you for your prompt attention in this matter, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kurt Sistrunk', with a long, sweeping flourish extending to the right.

KURT SISTRUNK  
Criminal District Attorney  
Galveston County, Texas