

## **Texas Election Code Regarding Consecutive Ballot Numbering for Elections**

- **Item 1 – Texas Attorney General Opinion Status Letter, Nov. 1, 2021, p. 2**
- **Item 2 – Election Law Trial and Appellate Attorney letter, July 29, 2021, p. 3**
- **Item 3 – Hood County Tex. AG Opinion Request on ballot numbering, May 3, 2021, p. 10**



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 1, 2021

The Honorable Matthew A. Mills  
Hood County Attorney  
1200 West Pearl Street  
Granbury, Texas 76048

**Via E-Mail**

Re: Procedure for numbering election ballots and which officials are authorized to select the method for numbering ballots (RQ-0405-KP)

Dear Mr. Mills:

Thank you for requesting a written opinion from this office.

Section 402.042 of the Government Code requires this office to issue an opinion within 180 days of receiving a request for one unless we explain to the requestor in writing before the deadline why the opinion will be delayed.

Accordingly, we are notifying you that we will not issue an opinion on your request within 180 days of the date received because we need more time to review the law, complete the analysis that your request requires, and finalize the formal opinion. We will make every effort to issue this opinion as soon as possible.

Sincerely,

Virginia K. Hoelscher  
Chair, Opinion Committee

VKH/som

Attachment: Request No. 0405-KP

ROGER B. BORGELT, ATTORNEY AT LAW  
BORGELT LAW

614 S. CAPITAL OF TEXAS HIGHWAY  
SUITE A  
AUSTIN, TEXAS 78746  
www.borgeltlaw.com

WRITER'S PHONE & EMAIL:  
TELEPHONE: (512) 600-3467  
DIRECT DIAL: (512) 870-7533  
roger@borgeltlaw.com

ROGER B. BORGELT  
PRINCIPAL

July 29, 2021

Office of the Attorney General of Texas  
Attention: Lesley French, Deputy Attorney General  
Lesley.French@OAG.Texas.Gov  
P.O. Box 12548  
Austin, TX 78711-2548

**VIA ELECTRONIC MAIL AND REGULAR MAIL**

Re: Request for Attorney General Opinion RQ-405-KP<sup>1</sup>

Dear General Paxton,

We are in receipt of the Hood County Attorney's May 3, 2021 request for opinion on the proper procedure for numbering ballots and a commissioners' court's authority to mandate a voting system to an elections administrator. The Hood County Attorney raised three specific questions. We respectfully submit this letter to provide feedback on the questions relating to ballot numbering – Question 1 and Question 3.

**Question 1: Are pre-numbered ballots the only way to comply with Tex. Elec. Code § 52.062 or do machine-generated numbers comply with the numbering requirement?**

For the following reasons, we submit that pre-printed, consecutively numbered ballots are the only way to comply with Section 52.062.

Since 1891, the Legislature has been constitutionally required to provide for ballot numbering in Texas. Article 6, Sec. 4 states:

**Sec. 4. ELECTIONS BY BALLOT; PURITY OF ELECTIONS; REGISTRATION OF VOTERS.**

In all elections by the people...the *Legislature shall provide for the numbering of tickets* and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box... *Emphasis added.*

The Legislature carried out this constitutional mandate by passing the consecutive ballot numbering statute, Tex. Elec. Code § 52.062, which has been in effect for over 35 years.

**Sec. 52.062. NUMBERING OF BALLOTS.**

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<sup>1</sup> [Appendix A](#) – Hood County request for AG opinion related to ballot numbering for ballot marking device, RQ-405-KP.

The ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number "1."

This statute is a longstanding cornerstone of election integrity that ensures the detection of counterfeited, missing, and/or duplicate ballots. At least six other Election Code provisions reference Section 52.062's consecutive numbering requirement in establishing mandatory procedures for election officials:

**Sec. 51.006. PREPARING BALLOTS FOR DISTRIBUTION.**

The authority responsible for distributing election supplies shall package and seal each set of ballots before their distribution and shall mark the package with the number of ballots enclosed and *the range of the ballot serial numbers*. If the authority is the early voting clerk, the ballots allocated for early voting need not be packaged and sealed." (Emphasis added.)

**Sec. 51.007. RECORD OF BALLOT DISTRIBUTION.**

(a) As soon as practicable after the ballots are packaged for distribution, the authority responsible for distributing election supplies *shall prepare a record of the number of ballots and the range of serial numbers on the ballots* to be distributed to each presiding judge and the early voting clerk. (Emphasis added.)

(b) The authority shall preserve the record for the period for preserving the precinct election records.

**Sec. 51.008. SUPPLEMENTING DISTRIBUTED BALLOTS.**

(a) The authority responsible for distributing election supplies shall retain a reserve of ballots to supplement the distributed ballots and on election day may reallocate previously distributed ballots among the polling places.

(b) The authority shall enter on the record of ballot distribution the number of ballots reserved and the number of ballots distributed from the reserve to each polling place. *The range of serial numbers on the ballots shall be included in the record.* (Emphasis added.)

(c) If distributed ballots are reallocated, the authority shall indicate the reallocation on the record of ballot distribution and shall issue a receipt to each presiding election judge *showing the number of ballots and the range of serial numbers on the ballots* taken from the judge's polling place for redistribution. Each presiding judge shall indicate on the ballot register any reallocation of ballots affecting that polling place. (Emphasis added.)

(d) The authority shall retain the undistributed reserve for the period for preserving the precinct election records.

**Sec. 51.010. FAILURE TO DISTRIBUTE OR DELIVER SUPPLIES.**

(a) A person commits an offense if the person is responsible for distributing election supplies for an election and intentionally fails to distribute any of the supplies by the deadline prescribed by Section 51.004(b).

(b) A person commits an offense if the person is entrusted with the delivery of election supplies for use at polling places and *intentionally fails to deliver any of the*

*supplies* within the time specified by the person who entrusted the delivery to the person. (Emphasis added.)

(c) An offense under this section is a Class C misdemeanor.

**Sec. 62.007. EXAMINING BALLOTS.**

(a) An election officer shall unseal the ballot package, remove the ballots, and examine them to *determine whether they are properly numbered and printed*. (Emphasis added.)

(b) *An unnumbered* or otherwise defectively printed ballot *shall be placed in ballot box no. 4*. (Emphasis added.)

**Sec. 62.009. DISARRANGING BALLOTS FOR VOTERS' SELECTION.**

(a) As needed for voting, an election officer *shall disarrange a supply of the ballots so that they are in random numerical order*. (Emphasis added.)

(b) *The disarranged ballots shall be placed face down on a table* in a manner preventing an election officer or other person from ascertaining the number of a ballot selected by a voter. (Emphasis added.)

(c) The provisional ballots shall be placed separately from the regular ballots.

The Texas Secretary of State (“Secretary”) has certified the Hart InterCivic ballot marking device Verity 2.4 hybrid voting systems for use in Texas.<sup>2</sup> Appendix A contains the Secretary’s recommendations for ballot numbering procedures for the Hart InterCivic system.<sup>3</sup> The Secretary correctly notes that Tex. Elec. Code § 52.062 requires ballots to be prepared with consecutive numbers, beginning with the number “1.” The Secretary then provides counties with two options for meeting this requirement.

The first option, ordering blank ballot stock with pre-printed numbers, complies with Section 52.062, as the ballots can be numbered consecutively beginning with “1.” This plainly satisfies both the letter and spirit of Section 52.062 and thus ensures counties’ adherence to other election laws, such as those cited *supra*, that relate to ballot numbering.

The second option purports to provide an alternative to Section 52.062 for counties using the ES&S and Hart InterCivic systems. According to the Secretary, the Hart InterCivic “ballot is assigned a unique identifier when printed.” However, the Secretary acknowledges in Appendix A that the lack of consecutively-numbered ballots renders it impossible for election officials to fully comply with portions of the Election Code:

“The ballots shall be tracked, distributed, and retained just as you would with a traditional pre-printed full ballot in accordance with Sections 51.006, 51.007, 51.008 with the *exception of notating the serial number of the ballot ranges.*”<sup>4</sup> (Emphasis added.)

The alternative randomized ballot numbering procedure will cause counties to violate, at a minimum, Tex. Elec. Code §§ 52.062, 51.006, 51.007, and 51.008. Furthermore, the Secretary

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<sup>2</sup> [Appendix B](#) – Texas Secretary of State Certification of the Hart InterCivic Verity 2.4 Voting System used by Hood County.

<sup>3</sup> [Appendix A](#) – See page 6, paragraph c.

<sup>4</sup> [Appendix A](#) – See highlighted section on page 6, paragraph c.

does not provide sufficient instructions for how officials may comply with Tex. Elec. Code §§ 51.010 (how will officials deliver serial number range records to polls), 62.007 (how will officials at polls determine if ballots are properly numbered) and 62.009 (how will election judges place numbered ballots face down for voters to choose their ballot). In short, the Secretary's permission to ignore Section 52.062 causes a chain reaction in which counties may violate at least six other laws.

Should General Paxton determine that Tex. Elec. Code § 52.062 is discretionary and that computerized machines are permitted to generate random text values onto ballots in lieu of consecutive numbering starting with "1," Texas election law will be plunged into confusion and uncertainty because violations of several of these ballot numbering statutes are not only illegal, but punishable criminally:

- a) To not deliver or distribute the required ballot numbering election records to a polling place is a Class C misdemeanor. *See* Tex. Elec. Code § 51.010(c).
- b) To not preserve precinct election records for ballot serial number ranges distributed to polling locations can result in criminal penalties (*see* Tex. Elec. Code §§ 51.007(b), 51.008(d)), and 13 TAC § 7.125(a)(10)), and Tex. Penal Code § 37.10(3)).

The Secretary is the Chief Election Officer of the State of Texas.<sup>5</sup> Among other duties, the Secretary has been tasked by the Legislature with "obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of [the Election] code."<sup>6</sup> As part of performing this duty, the Secretary is required to "prepare detailed and comprehensive written directives and instructions relating to and based on [the Election] code and the election laws outside this code."<sup>7</sup> The Secretary must "distribute these materials to the appropriate state and local authorities having duties in the administration of these laws."<sup>8</sup>

While the Secretary claims that Tex. Elec. Code 122.001(c) provides authority for the Secretary to prescribe "operating procedures" related to voting systems,<sup>9</sup> nothing in the Election Code grants the Secretary the authority to provide advice to ignore specific sections of the Election Code – laws and procedures are not equal.

There is no necessity, or authority, for the Secretary to interpret Tex. Elec. Code § 52.062 in a manner that

- a) grants the Secretary authority to provide advice to counties to ignore election laws (or advise counties to do so), violating Art. 1, Sec. 28 of the Texas Constitution;
- b) empowers the Secretary to "provide for numbering of tickets," a power that is specifically reserved for the Legislative Branch, violating Tex. Const. Art. 6, Sec. 4; and

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<sup>5</sup> *See* Tex. Elec. Code § 31.001.

<sup>6</sup> *See* Tex. Elec. Code § 31.003.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Appendix A – See highlighted section on page 6, paragraph 2.

c) impedes election officials' ability to "detect and punish fraud and preserve the purity of the ballot box" because randomized ballot numbers prevent election judges from recording, validating, and tracking the official ballot serial number ranges they were in possession of, personally distributed, and retained at their polling locations, again violating Tex. Const. Art. 6, Sec. 4.

Section 31.003 of the Election Code clearly and specifically assigns duties to the Secretary. While the Secretary may have discretion as it relates to the development of procedures that ensure uniform compliance with the Election Code, he does NOT have discretion to advise counties to simply refuse to comply with the Election Code, specifically with the numbering requirement of Section 52.062 and the many other statutes that reference that numbering.

Providing election administrators with the guidance necessary to conduct elections in accordance with the law gives the Secretary a vital role in ensuring election integrity in Texas. With 254 counties, it is essential that election authorities conduct local, state, and federal elections in a legal and uniform manner based on a consistent interpretation of the Election Code. The Legislature believed this was important enough to give the Secretary a very specific and clear mandate: prepare and distribute detailed and comprehensive written directives and instructions that comply with the Election Code to state and local election authorities.<sup>10</sup>

The Secretary's deficient guidance to counties violates the Separation of Powers clause of Art. 2, Sec. 1 of the Texas Constitution. Further, because the Secretary is providing counsel to counties to ignore Tex. Elec. Code §§ 52.062, 51.006, 51.007, and 51.008, this is a violation of the Suspension of Laws provision in Art. 1, Sec. 28 of the Texas Constitution. The Constitution provides that only the Legislature can suspend laws – not the Secretary, a member of the Executive Branch. These actions by the Secretary are contrary to the Legislature's intent that the Election Code be interpreted and applied uniformly across this State for voting systems. *See* Tex. Elec. Code §122.032. By suspending laws and authorizing exceptions to Tex. Elec. Code § 52.062, and other statutes, the Secretary is failing to perform his ministerial duty. Surely the Legislature did not intend for any of these provisions to be waived, ignored, or violated.

There is a significant gap in the inconsistent guidance given to counties and other political subdivisions by the Secretary regarding the administration of numbering ballots for ballot marking device systems. This gap leaves counties unprepared to adequately conduct their elections with hybrid voting systems in a manner that ensures compliance with more than seven provisions of the Election Code. These gaps are a direct result of the Secretary's failure to perform his Executive Branch ministerial duties.

Because the method of randomized ballot numbering generated by the Hood County Verity 2.4 voting system results in the violations of multiple election laws, the Texas Constitution, and the Texas Penal Code, the randomized method of ballot numbering is not legal and should not be used in Texas.

### **Question 3: Should ballots begin with the number "1" for each election?**

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<sup>10</sup> *See* Tex. Elec. Code § 31.003.

The Election Code makes clear that each authority preparing the official ballot shall begin the ballot numbers with the number “1.”

**Sec. 52.062. NUMBERING OF BALLOTS.**

The ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number “1.””

The authority responsible for having the official ballot prepared can vary from election to election according to Section 52.002:

**Sec. 52.002. AUTHORITY PREPARING BALLOT.**

Except as otherwise provided by law, the following authority shall have the official ballot prepared:

- (1) for an election ordered by the governor or a county authority, the county clerk;
- (2) for a primary election, the county chair of the political party holding the primary;
- (3) for an election ordered by a city authority, the city secretary; and
- (4) for an election ordered by an authority of a political subdivision other than a county or city, the secretary of the subdivision's governing body or, if the governing body has no secretary, the governing body's presiding officer.

Each authority – the county clerk, the county chairs, the city secretary, or the secretary of a political subdivision’s governing body, etc. – is to have the official ballot prepared starting with the number “1.” Therefore, it is clear that each election must start with “1.”

In Appendix C<sup>11</sup>, the Secretary purports to provide an option to various jurisdictions that contradicts the plain language of Section 52.062:

“The jurisdiction can pre-number the ballots and split them into batches for each election, with each batch beginning with a number that ends in the number “1”. Those batches must be no smaller than units of 100, though a jurisdiction could batch in larger units if needed (1000, 10,000, etc.).

1. **Example:** For the November election, the jurisdiction could use ballots 1-1500, and for the May election that jurisdiction could then use ballots 1501-2400, and for the following November election the jurisdiction could use ballots 2401-4200, etc.
2. To use this batching method the jurisdiction will need to track which batches are assigned to each election through a master log that identifies the range of ballots that were used for each election. The jurisdiction must then track which ballots from that election’s particular range are distributed to each polling place through the normal procedures.”

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<sup>11</sup> Appendix C – Texas Secretary of State Election Advisory 2019-23. See page 14, highlighted section 13(1)(a)(iv).

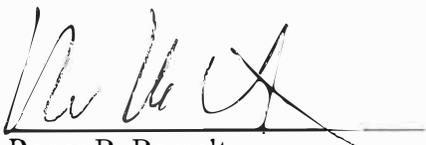
This option is problematic because different elections at different times of the year may be under different jurisdictions. For example, the November general elections are typically under the authority of the county, while the May elections are typically under various municipality authorities and/or other political subdivisions. Various jurisdictions may also call special elections at other times of the year.

Requiring various authorities to keep track of and coordinate on their starting ballot numbers for each election is unreasonable and clearly not prescribed in the Election Code or intended by the Legislature. Again, as noted in the discussion regarding Question 1, the Secretary's interpretation:

- a) grants the Secretary authority to ignore election laws (or advise counties to do so), violating Art. 1, Sec. 28 of the Texas Constitution;
- b) empowers the Secretary to "provide for numbering of tickets," a power that is specifically reserved for the Legislative Branch, violating Tex. Const. Art. 6, Sec. 4; and
- c) impedes election officials' ability to "detect and punish fraud and preserve the purity of the ballot box" because randomized ballot numbers prevent election judges from recording, validating, and tracking the official ballot serial number ranges they were in possession of, personally distributed, and retained at their polling locations, again violating Tex. Const. Art. 6, Sec. 4.

Because numbering ballots beginning with the number "1" for each election is clear required by the Election Code, the method of ballot numbering starting with numbers greater than "1" is not legal, opens the door for confusion and fraud, and should not be used in Texas.

Respectfully submitted,



Roger B. Borgelt  
State Bar No. 02667960  
BORGELT LAW  
614 S. Capital of Texas Hwy.  
Austin, TX 78746  
Office: 512.600.3467  
Mobile: 512.870.7533  
Roger@BorgeltLaw.com



Anna Eby

State Bar No. 24059707  
EBY LAW FIRM, PLLC  
P.O. Box 1703  
Round Rock, Texas 78680  
(512) 410-0302 (Telephone)  
(512) 477-0154 (Facsimile)  
Eby@EbyLawFirm.com



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Frank Dobrovolny  
State Bar No. 24054914  
THE DOBROVOLNY LAW FIRM, PC  
217 South Ragsdale  
Jacksonville, Texas 75766  
(903) 586-7555 (Telephone)  
(903) 586-6973 (Facsimile)  
DobrovolnyLawFirm@gmail.com

**Enclosures**

Appendix A – Hood County request for AG opinion, RQ-405-KP  
Appendix B – Texas Secretary of State Certification of the Hart InterCivic Verity 2.4 Voting System  
Appendix C – Texas Secretary of State Election Advisory 2019-23

**cc:** Brent.Webster, First Assistant Attorney General of Texas  
Brent.Webster@OAG.Texas.Gov

Michelle Smith, Senior Advisor to Attorney General Paxton  
Michelle.Smith@OAG.Texas.Gov

**ASSISTANT COUNTY  
ATTORNEYS**Venisa McLaughlin  
Katy Spraberry**PARALEGAL**  
Justin Stobaugh**ADMINISTRATIVE  
ASSISTANT**  
Roberta Stringer**HOOD COUNTY ATTORNEY'S OFFICE**HOOD COUNTY  
JUSTICE CENTER1200 W. PEARL STREET  
GRANBURY, TEXAS 76048

WWW.CO.HOOD.TX.US

**PHONE**  
(817) 579-3215  
(817) 579-3216**FAX**  
(817) 579-3218  
(817) 579-3257**VICTIM ASSISTANCE**  
Maria Bustamante**CRIMINAL DIVISION**  
Marsha Dickens**MATTHEW A. MILLS, COUNTY ATTORNEY**

May 3, 2021

**RQ-0405-KP****FILE# ML-48949-21****I.D.# 48949**The Honorable Ken Paxton  
Office of the Attorney General of Texas  
Attention: Opinion Committee  
P.O. Box 12548  
Austin, TX 78711-2548Re: Proper procedure for numbering ballots and a commissioners  
court's authority to mandate a voting system to an elections  
administrator

Dear Attorney General Paxton,

With this letter, I respectfully ask that you provide a formal written opinion regarding the  
aforementioned issue.BackgroundHood County currently employs an elections administrator, as authorized under Election  
Code § 31.031. Since 2004, the county has used electronic voting machines with no paper  
ballots, aside from mail-in ballots. During that time, Election Code § 52.062 regarding numbered  
ballots has not applied to Hood County, since we have used strictly electronic voting machines.  
Under Election Code §121.001, ballot numbering could not feasibly be applied to that voting  
system.On February 9, 2021, the Hood County Commissioners Court voted to purchase new  
voting equipment from Hart InterCivic, Inc, costing the county approximately \$549,476. This  
new equipment is a hybrid voting system, whereby voters scan a paper ballot, and votes are then  
registered electronically. This is essentially the same system discussed in Tex. Att'y Gen. Op.  
No. KP-0170 (2017). The purpose of this system is to prevent fraud by ensuring a more secure,  
auditable election. Questions now arise about compliance with Election Code § 52.062 and who  
has authority to select the method for numbering ballots.

## Question #1

According to an e-mail sent by the legal director of the elections division for the Texas Secretary of State, elections administrators have two ways to comply with the requirement to number ballots beginning with the number “1.” (See Appendix A.) The first method is pre-printed numbers on blank ballot stock, which the e-mail deems as the “simplest and easiest way.” The other method is for the machines to generate random numbers on blank ballots. A memorandum from a staff attorney in the elections division to their director, dated May 18, 2020, addresses machine-generated numbering on the Hart Verity 2.4 system. This memo may be found at the following web address: <https://www.sos.state.tx.us/elections/forms/sysexam/chuck-pinney-hart-2.4.pdf>. The staff attorney’s conclusion is that this system, which Hood County has purchased, complies with Texas ballot numbering requirements.

The relevant language in § 52.062 is the following: “[t]he ballots prepared by each authority responsible for having the official ballot prepared.” Does this indicate that using pre-printed numbers on blank ballot stock is the only legal way to comply with the statute? Or does the machine generation method also comply with the numbering requirement?

## Question #2

If the answer to the previous question is that both methods of numbering ballots are legal, is the decision regarding which method to employ solely the elections administrator’s? Under § 31.032, the election commission has the authority to appoint an elections administrator. They may also suspend or terminate the administrator under § 31.037. The commissioners court maintains authority over various budgetary issues, such as salary and staffing, under § 31.039.

In 1988, your office opined that the elections administrator should be “largely independent of both the commissioners court and election commission.” Tex. Att’y Gen. Op. No. LO-88-62 (1988). However, this opinion may have been rendered partially moot by Senate Bill 1233 in 2011, which amended § 31.037 to give new authority to election commissions to suspend elections administrators. (The question presented in that opinion was whether the election commission may suspend the elections administrator. Prior to the change in the law, your office wrote that election commissions do not possess that authority.)

In 1997, the San Antonio Court of Appeals came to a somewhat different conclusion regarding an elections administrator’s independence in *Krier v. Navarro*, 952 S.W.2d 25 (Tex. App.--San Antonio 1997, writ denied). This opinion was also cited by your office in 2005, albeit in an opinion dealing with other matters. Tex. Att’y Gen. Op. No. GA-0361 (2017). In *Krier*, the election commission lacked the requisite four votes to remove the elections administrator. *Krier*, 952 S.W.2d at 26. So they instead deemed him a “public official,” rather than a “public employee.” *Id.* In doing so, the commission declared that Navarro had already completed his two-year term, they declared the position vacant, and then they appointed a new administrator by majority vote. *Id.* The ousted administrator successfully sued, arguing that he was an employee without the ability to act independently. *Id.* at 30. The following is the court’s analysis of that issue:

“The testimony of Navarro indicates, however, that he was greatly restricted in the exercise of his duties. While an elections administrator generally has authority to contract with political subdivisions and political parties to perform election services

under TEX. ELEC. CODE ANN. §§ 31.093-.094 (Vernon 1988), Navarro testified that he needed approval from Commissioners Court on many basic decisions regarding elections. For example, Navarro stated he needed the approval of Commissioners Court for selecting polling places and early voting sites, issuing orders calling for elections, adopting a voting system, selecting election judges and phone bank clerks and establishing their compensation rates, establishing a central counting station, leasing voting equipment and polling facilities, and selecting a supplemental list of election judges and alternates. The evidence presented establishes that the governmental functions performed by Navarro were not exercised ‘largely independent of the control of others.’” *Id.*

Assuming the reasoning in *Krier* is correct, is the method of ballot numbering akin to “adopting a voting system,” which is controlled by the commissioners court? Or has the commissioners court already determined the voting system by purchasing voting equipment, and the elections administrator may then determine which method of ballot numbering is appropriate?

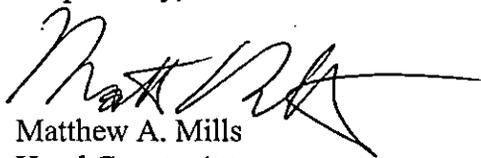
### Question #3

On October 23, 2019, the director of elections for the Texas Secretary of State published Election Advisory 2019-23, which may be found at the following web address: <https://www.sos.texas.gov/elections/laws/advisory2019-23.shtml>. Under Section 13(1)(a)(iv)(1), the director suggests that jurisdictions may start with the number “1” and then start subsequent elections with ballots with much higher starting numbers. The language reads as follows: “For the November election, the jurisdiction could use ballots 1-1500, and for the May election that jurisdiction could then use ballots 1501-2400, and for the following November election the jurisdiction could use ballots 2401-4200, etc.”

Chapter 52 of the Election Code contains various provisions for the preparation of ballots. Under § 52.001, ballots are for the “vote in *an election*.” (emphasis added) Does the suggestion in the director’s advisory that jurisdictions may conduct subsequent elections with ballot numbers starting higher than “1” comply with § 52.062? Or should ballots begin with the number “1” for each election?

Thank you very much for your time and attention to this matter. Should your office require further information to clarify the nature of this request, please do not hesitate to contact me.

Respectfully,

  
Matthew A. Mills  
Hood County Attorney