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Election Issues for City Attorneys

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I Election ABC's

- ABBM:** **Application for ballot by mail.**
- DRE:** **Direct Recording Electronic** voting machine that records votes by means of a ballot display provided with mechanical or electro-optical components that can be activated by the voter (typically buttons or a touchscreen); that processes data by means of a computer program; and that records voting data and ballot images in memory components.
- EAC:** **Election Assistance Commission**, an independent agency of the United States Government created by the Help America Vote Act of 2002. The Commission is charged with serving as a national resource for administering Federal elections and establishing standards for state and local governments.
- EVBB:** **Early Voting Ballot Board**
- FPCA:** **Federal Post Card Application:** a method of voting by a person living outside the United States who is eligible to vote in a federal or local election.
- HAVA:** **Help America Vote Act of 2002:** a federal law adopted (at least in part) in reaction to the controversy surrounding the 2000 U.S. presidential election.
- S List:** **Suspense List:** a list of voters whose registration status is in suspense because the voting certificate mailed to them was returned as undeliverable. The letter S appears by their names on the voter registration list.
- SOS:** **Texas Secretary of State**
- TEAM:** **Texas Election Administration Management System**
- TEC:** **Texas Ethics Commission**

II HAVA (Help America Vote Act of 2002)

On October 29, 2002, President Bush signed HR 3295, the Help America Vote Act ("HAVA"). This federal legislation creates new mandates for state and local government, and provided approximately 3.9 billion dollars in federal funding with roughly \$190 million going to Texas.

(A) State HAVA Requirements. HAVA actually applies only to elections in which there is a federal office on the ballot. In its implementation, the Texas Legislature applied the standards to all elections in the state. The main requirements of HAVA are:

- (1) By January 1, 2006, the state and counties were required to work from a single, centralized, statewide voter registration list. The system deployed in Texas is known as the **Texas Election Administration Management System ("TEAM")**.
- (2) As of January 1, 2006, each polling place in the state must have at least one **accessible voting system** per polling place.
- (3) Instead of using the challenge voter process, voters whose names do not appear on the voter registration roll, may vote a **provisional ballot**, which is not counted until the voter's eligibility is verified after the election.
- (4) A free and confidential system was developed for provisional voters to check to determine if their provisional ballot was counted.
- (5) As of January 2006, new requirements for electronic voting systems, and new voter educational requirements for counties using paper ballot, central count optical scan voting systems were required.
- (6) FPCA's are now effective for a period of two general federal elections, instead of the calendar year.
- (7) The state filed a "State Plan" explaining how the state and counties will meet the new requirements.
- (8) The state established and maintained a state-based administrative complaint process for voters who file a sworn complaint that their voting rights have been violated.

(B) Federal Implementation. At the federal level, a new independent agency was created, the Election Assistance Commission. The Commission advises election authorities and distributes federal requirements payments to the states and has audit authority over the funding. An Election Standards Board was also created which advises the Commission and is comprised of 55 state election officials and 55 local election officials. The two members of the Standards Board from each state or territory must be members of different political parties.

(C) TEAM.

- (1) The TEAM System is a statewide database of every registered voter in the state. The program includes:
 - (i) Voter Registration, Election Management, and Jury Selection Management functionality
 - (ii) Web based user interface
 - (iii) Centralized security
 - (iv) Near real time message queue architecture
 - (v) Validation/verification of voter information
 - (vi) Data analysis and reporting capabilities
 - (vii) Local/Mass printing capabilities
 - (viii) Imaging capabilities
 - (ix) Basic GIS capabilities
- (2) **Online Counties.** Counties registered with the TEAM System (called Online Counties) are able to access TEAM's Voter Registration handling functions, including:
 - (i) Validation of voter registration and information

- (ii) Statewide search capability for all county officials
- (iii) State-of-the-art reporting and query tools
- (iv) Additional functions for Election Management include:
 - Early voting management
 - Automated ballot certification and ballot definition process
 - Reduced paperwork for counties and the state
 - Interface for Election Night Returns
 - Polling location and poll worker management And, since counties build jury pools from their registered voters list, additional Jury Wheel support includes:
 - Creating jury summons, jury lists, and notices
 - Juror Tracking
 - Tracking jury payments and making donations of jury service payments to charities

(3) **Availability to Cities.** Through cooperation with the counties, cities have access to this system.

(D) Accessible Voting System Requirements

(1) **What is an accessible voting system?** A voting system that provides a practical and effective means for voters with physical disabilities to cast a **secret ballot** [EC §61.012].

(2) **Not exclusive method.** The secretary of state has provided that a city may use more than one type of voting system in a single polling place for the purpose of providing a person with physical disabilities a method of casting a secret ballot [1 TAC §81.55]. Under this provision, if the city has only one voting system at a polling place, that system must be an accessible voting system in accordance with the federal requirements, but the city is not prevented from having a non-accessible system as the primary system so long as there is at least one voting station at each polling place that is accessible.

(3) **Accessibility requirements .**

(i) The secretary of state has ruled that a new voting system must be accessible to voters with physical disabilities including no vision, low vision, no hearing, low hearing, limited manual dexterity, limited reach, limited strength, no mobility, low mobility, or any combination of these. except the combination of no hearing and no vision. The system must provide for tactile-input or speech-input, or both. A list of specifications for the system is furnished by the secretary of state at 1 TAC §81.57.

(ii) The federal HAVA requirements are mandatory for voting systems used in an election for federal office, but the same requirements have been adopted by the Texas Legislature for all elections in the state with just a few exceptions for small political subdivisions.

(4) **Exceptions are limited to small political subdivisions.** The Election Code provides limited exceptions for elections that are:

- (i) held in small political subdivisions; and
- (ii) not held jointly with another election in which a federal office appears on the ballot [EC §61.013(a)].

Eligibility for an exception depends on the size of the county in which the political subdivision is located. Regardless of the population of a city, it will be eligible only for the type of exception that applies to the county [EC §61.013(a)(5)]. The following table describes the exceptions applicable in different size counties and their requirements.

**Exceptions to Accessibility for Small Political Subdivisions
When No Federal Office is on the Ballot**

| County Pop. | Accessibility to Be Provided | Required Showing | Required Notice |
|-------------------------------------|---|--|---|
| Less than 2000 | None required [EC §61.013(a)(1)] | None required | Written notice to the Secretary of State by the 90 th day before election day of intent to use the exception [EC §61.013(d)(1)] |
| 2000 or more, less than 5000 | At least one accessible voting station on election day | None required | Written notice to the Secretary of State by the 90 th day before election day of intent to use the exception and |
| 5000 or more, less than 10,000 | At least one accessible voting station on election day and during early voting [EC §61.013(a)(3)] | None required | |
| 10,000 or more, less than 20,000 | At least one accessible voting station on election day and during early voting and a mobile voting station used at least once during early voting at each early voting polling place [EC §61.013(a)(4)] | Must make a showing of undue burden by the 90 th day before election day [EC §61.013(a)(4)] | Notice published in a newspaper of general circulation, of the location of each accessible voting station by the 15 th day before the start of early voting [EC §61.013(d)(1) & (2)] |

(5) **City located in more than one county.** For purposes of eligibility for a small subdivision exception, a city that is located in more than one county may choose:

- (i) to be considered located in the county that contains the greatest number of registered voters of the city; or
- (ii) for each portion of the city located in a different county, to be considered a separate political subdivision.

The second choice would seem to present undue complications. The notice and accessibility requirements could be different for each part of the city, and it could be confusing to voters. Such an arrangement might be necessary, however, if the counties offer different accessibility equipment to the city based on their use of the exceptions. If the city owns its own voting system, this would not be a problem.

(6) **Undue burden.** If a city in a county with a population of 10,000 or more, but less than 20,000, wants to use the exception applicable to that county, the city must make a showing that providing an accessible voting station at every polling place will cause an undue burden on the city.

- (i) **Application.** The city must file an application with the secretary of state showing an undue burden not later than the 90th day before the date of the election. The secretary of state has created the [Application of Undue Burden Status](#) (PDF, 111k) and instructions for counties and other political subdivisions which can be accessed on the SOS website: www.sos.state.tx.us.
- (ii) **Showing.** The application must show proof that the election costs of compliance constitute a significant expense for the city and reflect an increase of at least 25 percent in the costs of holding an election as compared to the costs of the last general election held by the city before January 1, 2006.
- (iii) **Determination of undue burden.** Within 20 days of receiving an application, the secretary of state is required to make a determination of whether compliance by the city would constitute an undue burden. No appeal is provided from a determination by the secretary of state. Without this approval, a city may not use the exception in this category.
- (iv) **Uncodified provision.** The Legislature added an uncodified section to the legislation authorizing these exceptions. This section reads as follows:

It is the intent of the legislature that in creating the formula for the finding of an undue burden in Section 61.013(c), Election Code, as added by this Act, the legislature took into account the size of the political subdivision holding the election, which affects the amount of available funds and election workforce, and the costs of voting machine systems compared to previous accommodations for voters with disabilities. [Acts 2007, 80th Leg., ch. 1182, §6]

- (7) **Voter in county with population less than 2000.** A voter with a disability in a county with a population less than 2000, where the city is using the applicable exception, must be given a reasonable accommodation to cast a vote if the voter makes a request for the accommodation with the early voting clerk not later than the 21st day before the date of the election. The accommodation could be made for the voter on election day or during the early voting period.
- (8) **A very special exception.** In its wisdom, the Legislature made a complete exception from the accessibility requirements for one particular political subdivision, the Hickory Underground Water Conservation District. [See Ch. 8818, Special District Local Laws Code]

(E) Provisional Voting

- (1) The introduction of provisional voting has dramatically increased the complexity of the voting process. The object of provisional voting is to allow every person who enters the polling place to vote a ballot even if the voter is not eligible to vote and even if the ballot will not be counted in the election. Briefly, the process includes the following:
- (i) When a voter arrives at a polling place and is unable to demonstrate eligibility to vote at that polling place (not on the list, did not bring voter registration card, registered in some other precinct, registration cannot be verified, does not have identification, or applied for a ballot by mail, or a combination of these) an election worker must offer the voter a provisional ballot.
 - (ii) Provisional ballots are sealed and sent to the county voter registrar after the election. Within 3 business days after the election, the registrar determines the registration status of each provisional voter, makes a note of the status, and returns the ballots to the city.
 - (iii) The Early Voting Ballot Board (EVBB) reviews the affidavits, registration status, and other information provided by the precinct election judge and determines whether a ballot should be counted.
- (2) The following chart illustrates some of the complexities of the process:

(SEE NEXT PAGE)

| Qualifying a Problem Voter at a Polling Place | | |
|---|----------------------------------|--|
| | Must show identification | Must sign statement of residence |
| Correct precinct # on certificate, address matches precinct #; voter not on precinct list. | No | Yes, if moved & still resident of the county and city. |
| Voter has moved within the city & county or is on S list. | No | Yes |
| Voter has moved to another county. | No | No |
| Correct precinct # on certificate, registered address not in precinct; not on list. | No | Yes, if moved & still resident of the county and city. |
| Wrong precinct # on certificate; registered address is in precinct. | No | Yes, if moved & still resident of the county and city. |
| No certificate; name is on precinct list. | Yes, otherwise votes provisional | Yes, if moved & still resident of the county and city. |
| No certificate; name is not on precinct list, official cannot verify voter is registered. | Yes, if voter has it | Yes, if moved & still resident of the county and city. |
| No certificate; name is not on precinct list, official <u>verifies</u> with registrar that voter is registered. | Yes, otherwise votes provisional | Yes, if moved & still resident of the county and city. |

- (3) During the voting process, the provisional voter is given a written notice that a determination of whether the ballot will be counted will be made by the EVBB, and the voter will receive a notice by mail of that decision.

| Qualifying a Problem Voter at a Polling Place (Cont.) | | |
|--|---|--|
| Registration omissions list | Other action | May vote full regular ballot |
| Yes, enter accepted under §63.006. | Usual process. | Yes, if voter still resides in county and city.* |
| No | Usual process. | Yes, if voter still resides in county & city.* |
| No | None | No. May be eligible for limited ballot. |
| Yes, enter accepted under §63.007. | Complete §63.007 affidavit of voter with incorrect certificate. | Yes, must receive ballot for precinct of residence.** |
| Yes, enter accepted under §63.007. | Complete §63.007 affidavit of voter with incorrect certificate. | Yes |
| No | Complete §63.008 affidavit of voter without certificate who is on list. | Yes, only if identification is presented, otherwise provisional. |
| Yes, enter accepted under §63.009. | Complete §63.011 affidavit as provisional voter. | No, must vote provisional ballot. |
| Yes, enter accepted under §63.009. | Complete §63.007 & §63.008 affidavits | Yes, if identification is presented, otherwise provisional. |

III Election Dates, Deadlines, and Other Election Code Oddities

(A) Uniform election dates.

- (1) The Election Code prescribes two uniform dates in each year for holding general and special elections and requires that every general or special election be held on one of those dates, with certain enumerated exceptions [EC §41.001]. The two dates are:
 - (i) the second Saturday in May; and
 - (ii) the first Tuesday after the first Monday in November.
- (2) **Elections held under the Constitution.** The limitation on election dates prevents cities from filling vacancies except on the May and November election dates. If a city has offices with more than two-year terms, it must comply with Article XI, Section 11 of the Texas Constitution in filling vacancies. In this case, if the May or November uniform election date is not within 120 days of the vacancy, the Constitution will require the election be held on a different date [EC §41.004(b)].
- (3) **Changing the date of a general election.** After December 31, 2005, the governing body of a political subdivision may not change the date on which it holds its general election for officers to another authorized uniform election date [EC §41.0052(a)].
- (4) **Exceptions to uniform election dates.** There are exceptions to the requirement that elections be held on one of the uniform election dates [EC §41.001(b)]. The exceptions which apply to cities are:
 - (i) runoff election;
 - (ii) election to resolve a tie vote;
 - (iii) election held by order of a court or other tribunal;
 - (iv) emergency election with permission of the governor [EC §41.0011];
 - (v) election held under a statute that expressly provides that EC §41.001(a) does not apply;
 - (vi) Corpus Christi general election in odd-numbered years and an independent school district located wholly or partly within Corpus Christi [EC §41.0051]; and
 - (vii) election for which the Texas Constitution requires a special election to be held within a specified period after the occurrence of an event [EC §41.004(b)].
- (5) **Emergency exception to uniform election date.** The power of the governor to determine that an emergency exists which allows holding a special election on a non-uniform date [EC §41.0011] is very broad. There are no standards stated in the law for determining what qualifies as an emergency. Any non-uniform date would need to be precleared under the federal Voting Rights Act.
- (6) **Prohibited election dates.** An election may not be held within 30 days before or after the date of the general election for state and county officers, general primary election or runoff primary election, except for:
 - (i) an election on a uniform election date; or
 - (ii) an emergency election with permission of the governor [EC §41.001(c)].
- (7) **Required spring elections in certain cities.** A city with a population of more than 450,000 in which all members of the city's governing body are elected at large must hold all of its general and special elections of officers on the spring uniform election date [EC §41.0053].
- (8) **Statutory periods between elections.** Except for a local option liquor election, if there is an election on a measure that cannot be held for a specified number of years after an earlier

election on the same measure, a few days shortfall will not prohibit a subsequent election on the same or similar measure if the earlier election was held on the corresponding uniform election date, and the statutory number of years has passed since the first election [EC §41.0041].

- (9) **Runoff elections.** Runoff elections are held within a period measured from the date of the canvass of the general election. As a general rule, the runoff election may be held not earlier than the 20th day after the canvass nor any later than the 45th day after the canvass. The date has to be precleared under the federal Voting Rights Act if the time period is any different from the date used in the previous year. A runoff election can be held on a date later than the 45th day after the canvass if the later date is prescribed by a home-rule charter [EC §2.025].

(B) Time Periods for May and November Elections

| COMPARISON OF SELECTED REQUIREMENTS FOR MAY & NOVEMBER CITY ELECTIONS | | | | |
|---|---------------------|---|--|---|
| Subject | EC Sec. | May | Nov - Even | Nov - Odd |
| First day for filing for place on the ballot in general election | 143.007 | 92 nd day before election | 100 th day before election | 92 nd day before election |
| Last day for ordering general election | 3.005 | 62 nd day before election | 70 th day before election | 62 nd day before election |
| Last day for filing for place on the ballot in general election | 143.007 | 62 nd day before election | 70 th day before election | 62 nd day before election |
| Extended deadline for filing for office w/4-year term if no one files by 62 nd day | 143.007 143.008 | 57 th day before election | No extension 70 th day before election | 57 th day before election |
| Last day for write-in candidate to declare in general election | 146.054 | 57 th day before election (5 th day after ballot deadline) | 67 th day before election | 57 th day before election (5 th day after ballot deadline) |
| Last day for ballot candidate to withdraw from general election | 145.092 | 53 rd day before election | 67 th day before election | 53 rd day before election |
| Last day for write-in candidate to withdraw from general election | 146.0301 146.055 | 67 th day before election | 67 th day before election | 67 th day before election |
| Last day to order a special election to fill a vacancy | 201.052 | 30 th day before election, in most circumstances | 70 th day before election | 30 th day before election |
| Last day for filing for place on the ballot in a special election | 201.054 | 67 th day before election if election is ordered by the 70 th day - 31 st day before if ordered after 70 th but before 35 th day - Day set by city council if ordered after 35 th day before election day | 67 th day before election | 67 th day before election if election is ordered by the 70 th day - 31 st day before if ordered after 70 th but before 35 th day - Day set by city council if ordered after 35 th day before election day |
| Last day for write-in candidate to declare in special election | 146.054 | 5 th day after ballot candidate deadline | 67 th day before election | 5 th day after ballot candidate deadline |
| Last day for ballot candidate to withdraw in special election | 145.092 | 2 nd day before early voting by personal appearance begins (14 th day before) | 67 th day before election | 2 nd day before early voting by personal appearance begins (19 th day before) |

| COMPARISON OF SELECTED REQUIREMENTS FOR MAY & NOVEMBER CITY ELECTIONS | | | | |
|--|-----------------------------|---|---|---|
| Subject | EC Sec. | May | Nov - Even | Nov - Odd |
| Early voting begins | 85.001 | Begins 12 th day before election day | Begins 17 th day before election day | Begins 17 th day before election day |
| Time period for canvass | 67.003 | Not earlier than 3 rd nor later than 11 th day after election | Not earlier than 8 th nor later than 11 th day after election | Not earlier than 8 th nor later than 11 th day after election |
| Precincts & polling places | 42.002 42.0621 43.004 | City designates precincts & polling places | City uses county precincts & polling places | City uses county precincts & polling places |

(C) Candidate Filing Deadlines in Special Elections to Fill a Vacancy

| Days Before Election | Candidate Filing Deadlines in Special Elections |
|----------------------|---|
| 70 | If the election is ordered on or before this day, the deadline for filing is 5 p.m. of the 67 th day before election day. |
| 67 | 5 p.m. of this day is the deadline for filing if the election was ordered: (1) on or before the 70 th day before election day; or (2) if the election is scheduled on the November uniform election date in even-numbered years. |
| 36 | If the election is ordered on or before this day but after the 70 th day before election day, the deadline for filing is 5 p.m. of the 31 st day before election day. |
| 35 | If the election is ordered on or after this day, the deadline for filing is 5 p.m. of a day fixed by the city council. |
| 31 | 5 p.m. of this day is the deadline for filing if the election was ordered on or before the 36 th day but after the 70 th day before election day. |
| 25 | Last day the election can be ordered which will allow a five-day filing period ending on the 20 th day before election day. |
| 20 | Last possible day for filing if election was ordered after the 36 th day before election day. |

(D) Candidates in the Polling Place

- (1) **Bystanders prohibited; limitation on candidates.** Only limited categories of persons are allowed to be present in a polling place, either on election day or during early voting. It is even an offense for a candidate to be in a polling place during this time unless the candidate:
- (i) is voting; **or**
 - (ii) is conducting official business in the building in which the polling place is located; **or**
 - (iii) is not within plain view or hearing of persons in the voting area or the area in which voters are being accepted for voting; **and**
 - (iv) is not engaged in campaign activity [EC §61.001].
- (2) **Secretary of State Ruling on an Exception.** The secretary of state has ruled that if a voter who is eligible for voting assistance chooses a candidate to assist the voter in marking the ballot, the candidate may enter the polling place to assist the voter, but must leave once the voter has voted. There is no limit on the number of eligible voters a person may assist.

- (3) **Eligibility for Assistance.** To be eligible for assistance, a voter must be unable to read the ballot or physically unable to mark the ballot.

IV Political Advertising and Public Funds

(A) The Texas Ethics Commission (TEC), among other duties, has the responsibility to administer Title 15 of the Election Code, concerning political contributions and expenditures and political advertising.

(B) The Election Code prohibits the use of political subdivision resources to produce or distribute political advertising in connection with an election. Section 255.003 of the Election Code provides as follows:

(a) An officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising.

(b) This section does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure.

(c) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

(C) For the purposes of Section 255.003, the TEC has described political advertising as follows:

"Political advertising" is a communication that advocates a particular outcome in an election. It can be a communication in almost any written or broadcast form, such as a billboard, a flier, a newsletter, a poster, a television or radio ad, or an Internet site.

(D) **The following is an excerpt from the TEC's "A Short Guide To the Prohibition Against Using Political Subdivision Resources For Political Advertising in Connection with an Election", found on their website.**

(1) The prohibition applies to any **"officer or employee of a political subdivision."** Thus, if an officer or employee of a political subdivision makes a decision to use political subdivision resources in violation of the prohibition, the employee could be fined by the Ethics Commission or held criminally liable.

(2) The prohibition applies to **"spending or authorizing the spending of public funds"** for political advertising. Not only does this mean that the political subdivision may not purchase or authorize the purchase of new materials for use in creating political advertising, it also means that an officer or employee of a political subdivision would violate the prohibition by using existing paper and machinery to generate, display, or distribute political advertising.

(3) Also, it is not permissible to use or authorize the use of the paid time of an employee of a political subdivision to create or distribute political advertising.

(4) The prohibition does not apply to **"a communication that factually describes the purposes"** of a measure to be voted on at an election. Thus, it is permissible to use the resources of a political subdivision to produce explanatory material about what is at stake in an election on a measure. Violations of the law often occur, however, because someone finds it irresistible to wrap up a factual explanation with a motivational slogan such as:

IT PAYS TO INVEST IN THE FUTURE.

or

IT'S TIME TO MOVE AHEAD.

Another common misstep is to include "calls to action" such as:

LET'S BUILD A BETTER CITY.
or
SHOW THAT YOU CARE ABOUT OUR FUTURE.

- (5) **Remember:** No matter how much factual information about the purposes of a measure election is in a communication, *any amount* of advocacy is impermissible.
- (6) A violation of the prohibition is a **Class A misdemeanor**. This means that a violation could lead to criminal prosecution. Also, the Ethics Commission has authority to impose fines for violations of section 255.003.
- (7) Another provision of the Texas Election Code prohibits an officer or employee of a political subdivision from using or authorizing the use of an internal mail system to distribute political advertising. An internal mail system is a system operated by a political subdivision to deliver written documents to its officers or employees. A violation of this prohibition could also lead to the imposition of fines by the Ethics Commission or to criminal prosecution.

(E) New Regulation on Newsletters. In December, 2007, the TEC adopted a new rule regarding whether public officer newsletters constitute political advertising. The text of the rule reads as follows:

26.2. Newsletter of Public Officer of a Political Subdivision

For purposes of section 255.003 of the Election Code, a newsletter of a public officer of a political subdivision is not political advertising if:

- (1) It includes no more than two pictures of a public officer per page and if the total amount of area covered by the pictures is no more than 20 percent of the page on which the pictures appear;*
- (2) It includes no more than eight personally phrased references (such as the public officer's name, "I", "me", "the city council member") on a page that is 8 ½" x 11" or larger, with a reasonable reduction in the number of such personally phrased references in pages smaller than 8 ½" x 11"; and*
- (3) When viewed as a whole and in the proper context:*
 - (A) is informational rather than self-promotional;*
 - (B) does not advocate passage or defeat of a measure; and*
 - (C) does not support or oppose a candidate for nomination or election to a public office or office of a political party, a political party, or a public officer.*

This rule resulted from an ethics advisory opinion (EAO-476) issued by the TEC in August, 2007.

V Recent Election Litigation

(A) Crawford v. Marion County Election Board, 553 U.S. ____ (2008).

On Monday, April 28, 2008, the US Supreme Court upheld Indiana's voter ID law. The Court found that the law supports legitimate state interests of deterring fraud and protecting voter confidence, and that the procedure for obtaining proper ID "does not qualify as a substantial burden on most voters' right to vote...." The Indiana Democratic Party, the Marion Democratic Central Committee and League of Women Voters ("Plaintiffs"), challenged Indiana's voter identification requirements. Under this law a voter must show valid photographic identification before casting a ballot. When

voters do not have valid identification, they may cast a provisional ballot and have until the second Monday after the election to provide valid identification and sign an affidavit affirming they are the person who cast the provisional vote, or sign an affidavit claiming indigence or religious objection to having their photograph taken.

The Plaintiffs asserted that there are four problems with this system: (1) the cost of the identification, travel and birth certificate required to obtain identification constitute a poll tax; (2) the need to go to the county election board to sign an affidavit constitutes an added unnecessary burden; (3) the regulations do not apply to all voters, namely absentee voters, giving rise to disparate treatment; and, (4) many of the Indiana Bureaus of Motor Vehicles, the only location to obtain valid identification, are difficult to get to, especially in rural counties.

The decision was split, 3-3-2-1. Justices Stevens and Kennedy, and Chief Justice Roberts, issued the "lead" plurality opinion, rejecting the challenge to the law as overbroad in light of the limited evidence in the record on the extent of the law's burdens. Justices Scalia, Thomas, and Alito would have gone much further, granting approval to the law because there was no intentional discrimination or severe widespread impact.

Six Justices recognized that restrictive ID laws might unduly burden some eligible voters, particularly poor and elderly citizens. With enough proof that *certain* voters will be sufficiently burdened, as-applied challenges are available. Justice Stevens seems quite receptive - suggesting that there are as many as six justices who would allow such suits. Indeed, Justice Stevens virtually invites a follow-on lawsuit by one group of voters: those who have a religious objection to being photographed. He makes clear that while it may be an acceptable burden to require provisional voters to make a single trip to the county courthouse to validate their ballots, the burden becomes unreasonable if a voter is required to make the trip election after election, as Indiana law apparently would require of those with a religious objection to being photographed.

(B) Ray v. State of Texas, USDC No. 2:06-CV-385, Eastern District of Texas.

In September 2006, persons associated with the Democratic Party and the Texas Democratic Party filed this action against the State of Texas and its Attorney General and Secretary of State, challenging several provisions of the Texas Election Code: §§ 64.036(a)(4), 84.004, 86.0051, and 86.006, as amended in 2003. All the provisions relate to persons who assist voters voting by mail.

In addition to alleging that the provisions unduly burden voting, free-speech, and associational rights in violation of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, Plaintiffs also alleged racially selective law enforcement of Texas election laws by the Texas Attorney General Greg Abbott. The district court granted a limited preliminary injunction which enjoined the State from prosecuting a narrow class of persons who possess, with consent, the mail-in ballot of another voter. That injunction was stayed by the Fifth Circuit Court of Appeals just before the November 2006 general election. Earlier this year, in an unpublished opinion, the Fifth Circuit vacated the injunction and remanded the case to the trial court for further proceedings. The trial court has set the case for trial on May 29-30, 2008.

On February 1, 2008, the court, with the consent of the parties, ordered two counts alleging racial discrimination by defendants severed from the case, with those claims to proceed sometime after the November 2008 elections.

VI Election Petitions Texas Secretary of State's Outline

- I. **TEXAS ELECTION CODE CHAPTER 277 PETITIONS.** Chapter 277 of the Election Code applies to all election petitions filed under a law outside the Election Code except for a local option liquor election petition and candidates' petitions.

(A) Signature Requirements [Sec. 277.002]

- (1) Signer's signature (the only requirement that must be in the signer's handwriting);

- (2) Signer's printed name;
- (3) Signer's residence address; AND
- (4) Signer's date of birth OR voter registration number.
 - (a) Note on date of birth: In a recent case In Re Withers v. Commissioner Court of Bandera County; No. 04-01-00322-W (Tex. App.--San Antonio 2002), the appellate court held that the lack of the signer's date of birth did not invalidate the signer's signature on a rollback petition since the voter's registration number and additional information indicated that the signer is a registered voter.
 - (b) Note on residence address: Signer's residence address must include:
 - (i) Street address OR address at which mail is received, if residence has no address;
 - (ii) City;
 - (iii) State (not required if territory is wholly contained within Texas; and
 - (iv) Zip code (the omission of the zip code does not invalidate a signature).
 - (c) The residence address is required on all Chapter 277 petitions and the signer must provide either their date of birth or voter registration number.
- (5) If the territory from which signatures must be obtained is situated in more than one county, the county of registration.
- (6) Date of signing.
- (7) Comply with any other applicable requirements prescribed by law.

(B) "Qualified Voter" [Sec. 277.0021] Reference to "qualified voter" outside the Election Code means "registered voter" as to the eligibility to sign a petition. "Registered voter" is defined as a person registered to vote in Texas whose registration is effective. A registration is effective 30 days after it has been submitted to the county voter registrar. [Secs. 1.005(16) and 13.143]

(C) Miscellaneous

- (1) The signer's signature is the ONLY information that is required to appear on the petition in the signer's own handwriting. All other required information may be filled in by another person. [Sec. 277.002(b)]
- (2) The use of ditto marks or abbreviations on a petition does not invalidate a signature if the required information is reasonably ascertainable. [Sec. 277.002(c)]
- (3) A petition signature is invalid if the signer signed the petition earlier than the 180th day before the date the petition is filed. [Sec. 277.002(e)]

(D) Computing the number of signatures. "S-list" or "Suspense list" voters are not included in calculating the number of signatures needed. [Sec. 277.0024] However, an S-list voter who meets the requirements voting in the territory could sign the petition if he or she still lives in the affected territory.

(E) Withdrawal of Signature. [Section 277.0022]

- (1) A signer may not withdraw the signature from a petition after the date the petition is filed. Before that date, a signer may withdraw the signature by filing an affidavit with the receiving authority requesting that the signature be withdrawn or deleting the signature from the petition.
- (2) A withdrawal affidavit filed by mail is considered filed at the time of its receipt. If the affidavit is received after the petition is filed, then the affidavit has no effect and the signature remains on the petition.
- (3) An effective withdrawal acts as if the signer never signed the petition.

(F) Supplementing a Petition. [Section 277.0023]

- (1) Generally, a petition may not be supplemented, modified, or amended after the date it is filed.
- (2) If a petition is required to be filed by a specified deadline, the petitioner may file one supplementary petition BY THAT DEADLINE if (1) the original petition contains a number of signatures that EXCEEDS the required minimum number by 10% or more AND (2) the original petition is received NOT LATER THAN THE 10TH DAY BEFORE the deadline. The receiving authority must notify the petitioner of the sufficiency of the original petition not later than the 5th regular business day after its receipt.
- (3) When calculating the number of signatures for purposes of deciding if the petitioners may supplement the petition, remember that the signatures need not be "perfect" signatures, i.e.,

complying completely with the law. (The reasoning is that if the petitioners did file a "110%" perfect petition, the petition would not need supplementation and this procedure would be meaningless.)

NOTE: An example of a petition which must be filed by a specified deadline is a petition for a tax rollback election. [Sec. 26.08, Tax Code]. If the petition is not filed by a statutory date, there is no election on that date that year. This is in contrast to a petition which may be filed at any time, and if granted, the election is called for the next uniform election date or other election date allowing enough time for the election to be conducted in accordance with law.

(G) Frequently Asked Questions And Answers

- (1) Is every element of the petition required to be in the voter's handwriting? Generally, no. Section 277.002(b) of the Election Code states that only the signer's signature has to be in the voter's handwriting for any petition included within Chapter 277. Chapter 277 applies to all petitions authorized or required to be filed by a law outside the Election Code in connection with an election, other than a local option liquor election petition and candidates' petitions. Most statutes do not expressly require the voter's handwriting. NOTE: As with each situation, although the verifier is obligated to apply statutory requirements, the verifier should be careful not to impose higher requirements than the law prescribes.
- (2) Can the petition be signed by an agent, as the voter registration card can? No. The Election Code provides specifically for the authorized agents who may apply on behalf of a voter for voter registration. A Texas court noted that there was no similar provision for agents to sign petitions, and concluded that the signing of a petition to place a candidate on the ballot was "personal and not delegable." Sparks v. Busby, 639 S.W.2d 713, 717 (Tex. App. -- Tyler 1982, writ dismissed). Most likely, a Texas court would apply this rationale to petitions calling for elections as well. (For the Witness procedure, See Question 4 below.)
- (3) Does this mean that a wife cannot sign for a husband, or a husband for a wife? Correct. One spouse cannot sign for another.
- (4) What if an elderly or disabled voter wishes to sign a petition, but has difficulty writing? Any voter's signature need not be legible to the verifier, so long as the printed name and other information is legible. That is the purpose of the printed name requirement. As noted above, another person may fill out the rest of the information. In addition, if a voter wishes to sign a petition but cannot do so because of a physical disability or is unable to read and/or write, the petition may be signed by a witness. The voter must affix his or her mark to the petition. If the voter cannot make the mark the witness must state that fact. The witness must affix the witness's own signature, printed name, and residence address next to the witnessed voter's signature. [Sec. 1.001, Election Code]
- (5) Must the signature be in the same form as that on the voter registration card? No -- unless expressly required. The vast majority of petitions do not require this; local option liquor petitions and local option horseracing petitions are examples of petitions having this requirement.
- (6) What if the petition is written partly in ink, partly in pencil? This does not invalidate the petition, unless indelible marking is expressly required by outside law, which is very rare.
- (7) Is the verification process an "open meeting"? No, unless specified by outside law. Most laws name an individual verifier. However, if the governing body, as opposed to an individual, is required to accept or reject the petition, such action must occur in an open meeting.
- (8) While collecting signatures, can the worker have a person who is not a registered voter fill out a voter registration application, then have the person sign and date the petition? Maybe. Virtually all petitions require the signature of a "registered voter," which is defined in the Election Code as someone whose registration has become effective. Therefore, someone who has just applied that day will not be able to legally sign a petition until the effective date of registration, 30 days after submission of the application. The most notable statutory exception is the petition in lieu of filing fee, where the signer may sign if they have been issued a registration certificate for a registration which will become effective in the territory on or before the date of the election. [Secs. 1.005(16), 13.143, and 141.063(1)]
- (9) I've heard there have been legal challenges to the requirement for voter registration numbers, and other signature requirements, such as date of birth and city. What standard should we apply?

Effective September 1, 2005, House Bill 2309 amends Chapter 277.002. The new law applies to petitions filed on or after that date. The petition must have (1) birth date or voter registration number, and (2) the residence address. (Under previous law, the chapter 277 petition was required to have (1) residence address and birth date, or (2) voter registration number.)

Effective September 1, 2005, House Bill 1509 amends Section 141.063 to require birth date OR voter registration number, instead of birth date and voter registration number. This change codifies the following case history.

NOTE: We recommend continuing to apply the case law (striking the VR number down) to any petitions you receive before the statutes become effective on September 1, 2005. We are including the case law history for that reason.

A District Court ruled on September 12, 1997, that the requirement of a voter registration number for a Chapter 277 petition for an election on a measure (proposition) is unconstitutional. (*Austinites for a Little Less Corruption! v. City of Austin*, United States District Court, Western District, Austin Division, Civil Action No. A 97-CA-120 SS.) Therefore, voter registration numbers are no longer required on local measure petitions. The voter registration requirement has also been declared unconstitutional for petitions for minor party access and for independent candidates seeking ballot access to the November general election ballot, and recently in *Fjetland v. Weddington*, No. A-02-CA-045-SS (W.D. Tex. Jan. 30, 2002), the U.S. District Court, Western Division struck down the voter registration number requirement for petitions in lieu of filing fee for primary elections.

Also in *In re Kevin Bell*, No. 02-0034 (Tex. 2002), the Texas Supreme Court held that the inclusion of the city as part of the signer's residence address was unnecessary on the petition in lieu of filing fee, as long as the rest of the information on the petition establishes that the signer is eligible to sign the petition. In *Re Withers v. Commissioners court of Bandera County*, No. 04-01-00322-W (Tex. App.-San Antonio 2002), the court held that the exclusion of the signer's date of birth on a rollback petition did not invalidate the signature. Even though the above mentioned cases are fact specific, there seems to be a movement in various courts having jurisdiction in Texas to move away from a strict conformity review process that our office has always in the past advised petition reviewers to follow, and to move towards a less stringent review process to determine whether a signer is a qualified voter and eligible to sign the petition. In conclusion, you may wish to contact our office for additional information/advice if one of the above petitions is filed with your county.

- (10) The verifier checks a voter's name and the name is on the "suspense list." Also, the voter has signed the petition, but has written down a different residence address. The new address is in the same political subdivision, and still in the same county. Accept or reject? Accept. Chapter 277 is silent with regard to the matter of different addresses. The opinion of the Elections Division is that this voter could vote on election day in the affected territory. Because the voter is a qualified voter of the territory, the voter is considered a qualified voter for petition purposes.
- (11) Does one "bad" signature invalidate the petition? No. This is a common, but mistaken belief. Most laws require the reviewer to certify that there are either enough signatures or not enough signatures. For example, if there are 100 "good" signatures, and 100 is enough to require the election, it is irrelevant if there are 500 additional "bad" signatures. Most reviewers find it helpful to go through the petition first to count the total "perfect" signatures before spending time on "borderline" signatures.

II. PETITIONS FILED IN CONNECTION WITH CANDIDATE'S APPLICATION FOR A PLACE ON THE BALLOT

- (A) A candidate's application for a place on the primary ballot or declaration of write-in candidacy must be accompanied by a filing fee or a petition in lieu of the filing fee. (Sec. 172.021(b)). Independent candidates must file a supporting petition, along with their independent applications.

(B) Candidates for the State Supreme Court and Court of Criminal Appeals, who file for office and choose to pay the filing fee must file a petition with at least 50 signatures from each Court of Appeals District in the state. (Sec. 172.021(g)).

(C) Candidates for Court of Appeals in the 1st, 2nd, 4th, 5th, and 14th Districts, and all candidates running for judicial offices in Harris, Dallas, Bexar, and Tarrant, for a place on the primary election ballot must file a supporting petition of 250 signatures, in addition to either the filing fee or petition in lieu of filing fee. (Sec. 172.021 (e) & 172.024(a)(8), (10) , (12)) NEW LAW: Effective September 1, 2005, House Bill 964 amends Section 172.024(a) of the Election Code by essentially adding 3rd Court of Appeals (Travis County) to the higher filing fee bracket of \$2,500 from \$1,875 for the court of appeals positions. Note: because the population bracket of 850,000 was not modified in Section 172.021 of the Texas Election Code, the additional 250 signature judicial petition normally required of candidates in this higher filing fee bracket, does not apply to the 3rd Court of Appeals candidates.

(D) **Validity of Petition Signatures** (Sec. 141.063) For a signature to be valid, the signer must be a registered voter of territory from which the office sought is elected, or has a registration certification that will be effective by election day.

(1) **Signature Requirements:**

- (a) signer's signature (the only requirement that must be in the signer's handwriting);
- (b) the signer's printed name;
- (c) the signer's residence address; **Note:** In re Kevin Bell, No. 02-0034 (Tex. 2002), the Texas Supreme Court held that the inclusion of the city as part of the signer's residence address was unnecessary on the petition in lieu of filing fee, as long as the rest of the information on the petition establishes that the signer is eligible to sign the petition.
- (d) the signer's date of birth OR the signer's voter registration number and, if the territory from which signatures must be obtained is situated in more than one county, the county of registration;
Effective September 1, 2005, House Bill 1509 amends Section 141.063 to require birth date OR voter registration number, instead of birth date AND voter registration number.
- (e) signer's voter registration number; **Note:** the voter registration requirement has also been declared unconstitutional for petitions for minor party access and for independent candidates seeking ballot access to the November general election ballot, and recently in Fjetland v. Weddington, No. A-02-CA-045-SS (W.D. Tex. Jan. 30, 2002), the U.S. District Court, Western Division struck down the voter registration number requirement for petitions in lieu of filing fee for primary elections.
- (f) the county of voter registration, if the territory from which the signatures are obtained from is located in more than one county; and
- (g) the date of signing.
- (h) The use of ditto marks or abbreviations does not invalidate a signature if the required information is reasonably ascertainable.
- (i) The omission of the state from the signer's residence address does not invalidate a signature unless the political subdivision from which the signature is obtained is situated in more than one state. The omission of the zip code from the address does not invalidate a signature.

Note: Even though the above mentioned eases are fact specific, there seems to be a movement in various courts having jurisdiction in Texas to move away from a strict conformity review process that our office has always in the past advised petition reviewers to follow, and to a move towards a less stringent review process to determine whether a signer is a qualified voter and eligible to sign the petition. You may wish to contact our office for additional information/advice if one of the above petitions is filed with your county.

(E) **Restrictions on Petition Signer** (Sec. 141.066)

- (1) A person may not sign the petition of more than one candidate for the same office in the same election.

- (2) A signature on a candidate's petition is invalid if the signer signed the petition subsequent to his or her signing a petition of another candidate for the same office in the same election. **Exception:** A person who has signed a petition for a candidate in the primary election may also sign a petition for a write-in candidate for the same office in the November election.
- (3) On signing a petition to be filed by a candidate affiliated with one party, the signer becomes ineligible to vote in a primary election or participate in a convention of another political party during the voting year in which the primary election is held. A voting year is the 12-month period beginning January 1 of each year. (Secs. 1.005(23) and 172.026)

Local Option Liquor Petitions – The Texas Secretary of State has an excellent question and answer outline on local option liquor elections on their website.

VII Internet Resources

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| Texas Secretary of State: | http://www.sos.state.tx.us/elections/ |
| Texas Ethics Commission: | http://www.ethics.state.tx.us/ |
| Election Law @ Moritz: | http://moritzlaw.osu.edu/electionlaw/ |
| Election Updates: | http://electionupdates.caltech.edu/ |
| Electionline: | http://www.pewcenteronthestates.org/electionline |
| Election Law Journal: | http://www.liebertpub.com/papers.aspx?PUB_ID=101 |
| VerifiedVoting.Org: | http://www.verifiedvoting.org/ |
| Election Legislation: | http://www.verifiedvoting.org/index.php |