WSSFC 2024

Substantive Law Track – Session 5

Election Law: How to Get Involved in Protecting Democracy

Presenter:
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About the Presenter...

A skilled litigator and courtroom advocate, **Eduardo Castro** maintains a robust and diverse practice. As a political and election law attorney, Eduardo represented the Senate Democrats in the 2024 Wisconsin redistricting litigation, represented litigants protecting the right to vote, and was floor manager for the Biden for President Campaign at the 2020 Milwaukee County Presidential Recount. Eduardo assists clients to successful outcomes in numerous areas, including in criminal defense, civil and constitutional rights, political and election law, health law, environmental law, civil litigation, and immigration law. He represents and advises clients at all stages of civil and criminal proceedings in state and federal court, arbitration and mediation, and in front of federal and state administrative bodies.

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Election Law: How to Get Involved in Protecting Democracy
Attorney Eduardo E. Castro, Pines Bach, LLP

October 18, 2024

I.   Constitutional and Statutory Framework

- **Wis. Const. Art. III-Suffrage**
  - Section 1: Electors.
    - "Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."
  - Section 2: Implementation. Laws may be enacted regarding:
    - Residency
    - Registration
    - Absentee voting
    - Withdrawing voting rights for:
      - Felony conviction, unless restored to civil rights. incompetency
      - Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.

  - Section 3: Secret ballot.
    - "All votes shall be made by secret ballot."

  - Section 7: Private donations and grants; designated election officials.
    - (1) No state agency or officer or employee in state government and no political subdivision of the state or officer or employee of a political subdivision may apply for, accept, expend, or use any moneys or equipment in connection with the conduct of any primary, election, or referendum if the moneys or equipment are donated or granted by an individual or nongovernmental entity.

    - (2) No individual other than an election official designated by law may perform any task in the conduct of any primary, election, or referendum. [2021 J.R. 17, 2023 J.R. 10, vote April 2024]

- **Wisconsin Statutes:**

  - **Wis. Stat. Ch. 5.01(1)   Construction of chs. 5 to 12.** Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.

- o Wisconsin Chapters Regarding Elections:
    5. Elections – generally
    6. The electors
    7. Election officials
    8. Nominations, primaries, elections
    9. Post-election actions; direct legislature
    10. Election notices
    11. Campaign financing
    12. Prohibited election practices

- **Recounts:**

    o *Exclusive* judicial remedy for post-election challenges. Wis. Stat. 9.01(11).

    o Wis. Stat. 9.01(1)(5): "aggrieved party" means any of the following:
        - **a.** For an election at which 4,000 or fewer votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 40 votes, as determined under par. (ag) 5.
        - **b.** For an election at which more than 4,000 votes are cast for the office that the candidate seeks, a candidate who trails the leading candidate, as defined under par. (ag) 5., by no more than 1 percent of the total votes cast for that office, as determined under par. (ag) 5.

    o Wis. Stat. 9.01(1)(ag):
        - **1.** If the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question is less than 10 if 4,000 or fewer votes are cast or not more than 0.25 percent of the total votes cast for the office or on the question if more than 4,000 votes are cast following canvassing of all valid provisional and absentee ballots, the petitioner is not required to pay a fee.

        - **2.** If subd. 1 does not apply to the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question following canvassing of all valid provisional and absentee ballots, the petitioner shall pay a fee equal to the actual cost of performing the recount in each ward for which the petition requests a recount, or in each municipality for which the petition requests a recount where no wards exist, plus the actual cost incurred by the commission to provide services for performing the recount.

2-Castro

- Resources for Wisconsin Election Law and Administration
  - WEC Election Day Manual
    - https://elections.wi.gov/sites/default/files/documents/ED%20Manual-August%202024_0.pdf.

  - WEC Election Administration Manual:
    - https://elections.wi.gov/sites/default/files/documents/EA%20Manual-August%202024.pdf.

II.   Recent Constitutional Amendments

- **Procedure for Amending Wis. Const:**
  - **Constitutional amendments. Art. XXII; Section 1:** Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published for three months previous to the time of holding such election; and if, in the legislature so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

  - **Interpretation of Art. III, Section 7.**
    - **6/25/24 Attorney General Opinion:** https://www.doj.state.wi.us/sites/default/files/OAG-01-24.pdf.

  - **Text of Proposed Constitutional Amendment in November 2024 Election.**
    - ~~Every~~ Only a United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district who may vote in an election for national, state, or local office or at a statewide or local referendum.
      - ~~Strikethrough~~=Omitted.
      - Highlighted=Added.

III.   Ongoing Cases and Trends

1. *Priorities USA v. Wisconsin Elections Commission*, 2024 WI 32
   o Issue: Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.
   Oral arguments were held 5/13/24; Decision on July 5, 2024.

   Holding: Wis. Stat. 6.87(4)(b)(1) **allows** for the use of ballot drop boxes. 2024 WI 32, para. 5.

   Reasoning:
   • Language at issue: Wis. Stat. 6.87(4)(b)(1): "The envelope shall be mailed by the elector, or delivered in person, to the **municipal clerk issuing the ballot or ballots."**
   • Election statutes distinguish between "municipal clerk" and "municipal clerk's *office*."
   • Delivering your ballot to a "dropbox" is consistent with delivering your ballot to the "municipal clerk" within the meaning of the statute.

2. *Disability Rights Wisconsin et al v. Wisconsin Elections Commission*, Dane County Case No. 2024CV001141
   o Temporary injunction granted: Election officials must allow people with print disabilities to electronically request and fill out absentee ballots in November. (6/25/24).
   o Legal basis: Right to secret ballot (Wis. Const. Art. III s. 3).
   o On June 25, Dane County Judge Everett Mitchell granted DRW's temporary injunction requiring election officials to make accessible electronic ballots available to voters in November. Dane County Case No. 2024CV001141.
   o On August 19, 2024, Court of Appeals granted Legislature's motion for a stay and the TI is stayed pending disposition of appeal.

3. *League of Women Voters v. Wisconsin Elections Commission*, 2024AP000166
   o Circuit court ruled in favor of plaintiffs, holding that certain technical address errors do not invalidate the ballot. Order in effect.
   o Pending at Court of Appeals

4. *Rise, Inc. v. Wisconsin Election Commission*, 2024 WI App 48.
   o Circuit court ruled in favor of plaintiffs, adopting a common-sense definition of address.
   Affirms in part and reverses in part.

- Affirmed: Address means "a place where the witness may be communicated with." 2024 WI App 48, para. 59.

- Reversed in Part, para. 60.
    - "The face of the certificate contains sufficient information to allow **a reasonable person in the community** to identify a location where the witness may be communicated with."

    - COA definition: "[W]hether the face of the certificate contains sufficient information to enable a municipal clerk to reasonably identify a place where the witness may be communicated with."

5. ***Kormanik v. Wisconsin Election Commission***, 2024AP0408
    o *Issue:* Does Wis. Stat. 6.86(5), which authorizes a clerk to issue a new ballot to an elector if the AB is "spoiled or damaged," permit ballots that are otherwise complete, undamaged, to be spoiled?

    o *Holding*: No. Statute does not provide the statutory basis for do so.

    o *Implications*: EA Manual provides that the following scenarios must be followed if the "returned" ballot is spoiled.
    o If the voter returns an absentee ballot that is already spoiled or damaged to the municipal clerk, the voter's request for a replacement ballot under § 6.86(5) must be made within the applicable statutory timeframe for requesting an absentee ballot. Wis. Stat. § 6.86(5) (cross-referencing § 6.86(1) and (3)(c)). The elector may vote the replacement ballot at the clerk's office during in-person absentee voting under those procedures, or may vote the ballot under the usual absentee return procedures in § 6.87(4)(b)1.

        - The municipal clerk ensures that each absentee ballot is delivered to the correct polling place or alternate ballot site on Election Day no later than 8:00 p.m. Wis. Stat. § 6.87(6).
        - If the clerk receives an absentee ballot from an elector who is recorded as voting on Election Day, the clerk should mark the ballot "To Be Rejected" and set the ballot aside for processing by the Municipal Board of Canvassers. The clerk should also contact law enforcement immediately.
        - If an elector with a calendar year request does not return a ballot for an election, the absentee request is cancelled and the absentee elector should be notified by mail within 5 days, if possible. Wis. Stat. § 6.86(2)(b).

- COA Decision is Still Pending.

6. *Liebert v. Wisconsin Election Commission*, 23CV672-JDP
   - Federal District Court found for Defendant. Held: Wisconsin witness requirement for absentee voting (Wis. Stat. § 6.87(2) and (4)(b)(1)) did not violate the Voting Rights Act prohibition on vouching for voter qualifications or Civil Rights Act materiality provision (52 USC § 10101(a)(2)(B))
   - No appeal filed at the 7th Circuit (yet)

IV.   How to Get Involved.

- **Become a Poll Worker!**
  - MyVote.Wisconsin has an interest form that can be filled out to connect you with your local clerk: https://myvote.wi.gov/en-us/Become-PollWorker.

- **Join networks/groups dedicated to helping clerks.**
  - Organizations like Election Official Legal Defense Network need attorneys to assist local election officials.
  - Get involved here: https://eoldn.org/get-involved/

- **Become a poll observer/hotline worker:**
  - Each campaign will have partisan poll observing opportunities.

  - Nonpartisan:
    - **ACLU of Wisconsin: https://secure.ngpvan.com/GtGr5jF7cEWKh8XO-YqxRg2**
    - **League of Women Voters of Wisconsin: https://my.lwv.org/wisconsin/league-action/election-observation-program**.

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October 18, 2024

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Agenda

Welcome

Constitutional and Statutory Framework

Recent Constitutional Amendments

Ongoing Cases & Trends

How can you get involved?

Q&A

Eduardo E. Castro

- From Elkhorn, Wisconsin.

- Political and Election Law attorney at Pines Bach, LLP in Madison, Wisconsin.

- Regional Voter Protection Director for Southeast Wisconsin on 2020 Biden for President Campaign.

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My favorite Culver's®
Flavor of the Day is
Cookies and Cream.

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Constitutional & Statutory Framework

Constitutional Framework
Article III: Suffrage

SECTION 1: Electors

SECTION 2: Implementation

SECTION 3: Secret ballot

(SECTIONS 4-6 Repealed)

SECTION 7: Private donations and grants; designated election officials

Statutes Chapters 5–12 Elections

5. Elections – generally
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"Elections in Wisconsin are conducted at the local level."

"Each municipal clerk has charge and supervision of elections and registration in the municipality." Wis. Stat. 7.15(1).

585 city and villages; 1,265 towns.

The Wisconsin Elections Day Manual is the best resource for understanding Wisconsin election law and administration.

Election Day Manual

for
Wisconsin Election Officials

Wisconsin Elections Commission
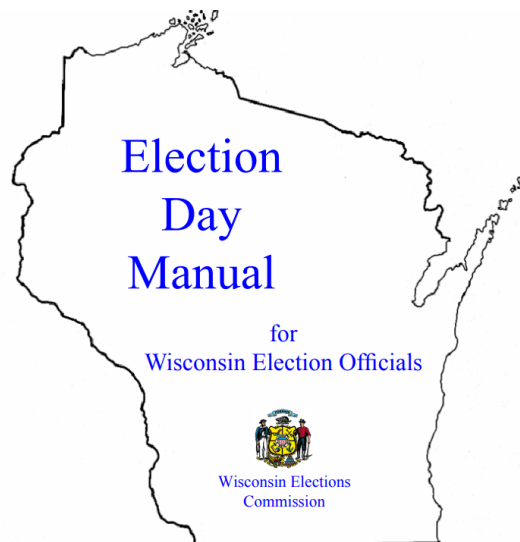
Recount

- Wis. Stat. Chap. 9.

- When can a recount be triggered?
  - In an election with fewer than 4,000 votes=40 votes.

  - In an election with more than 4,000 votes=1% of votes cast.

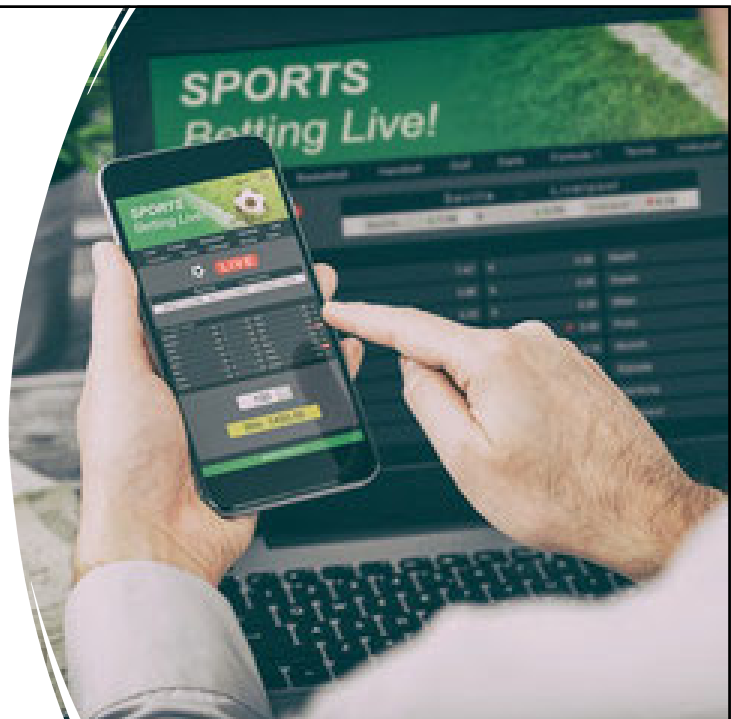- Petitioner must cover fees if difference is more than 10 votes or more than .25 percent.

POP QUIZ!

- **Your friend who lives outside of Wisconsin says he can bet on the outcome of the Wisconsin presidential election. He asks you if you want to place a bet.**

Should you do it?

Answer: No.

Wis. Stat. 6.03(2): No person shall be allowed to vote in any election in which the person has made or become interested, directly or indirectly, in any bet or wager depending upon the result of the election.

Violation of Wis. Stat. 12.13(1)(a) is a Class I Felony.

Constitutional Amendments:
How To?

1. Legislature Votes (Twice)

2. Legislature Writes Ballot Question

3. Citizens Vote

- NO Involvement by Governor

- NO Grassroots Leadership

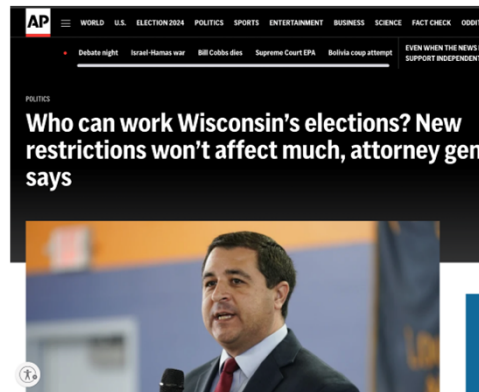## Constitutional Amendment: Funding Election Administration

No use of money or equipment donated or granted by an individual or nongovernmental entity for election administration

Constitutional Amendment: Who Can Perform Election Tasks?

"No individual other than an election official designated by law may perform any task in the conduct of any primary, election, or referendum."

Proposed Constitutional Amendment: Prohibiting Noncitizens from Voting

~~Every~~ Only a United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district who may vote in an election for national, state, or local office or at a statewide or local referendum.

Photo credit: REUTERS/Eduardo Munoz/

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Ongoing Cases & Trends

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Priorities USA v. WI Elections Commission: Drop Boxes
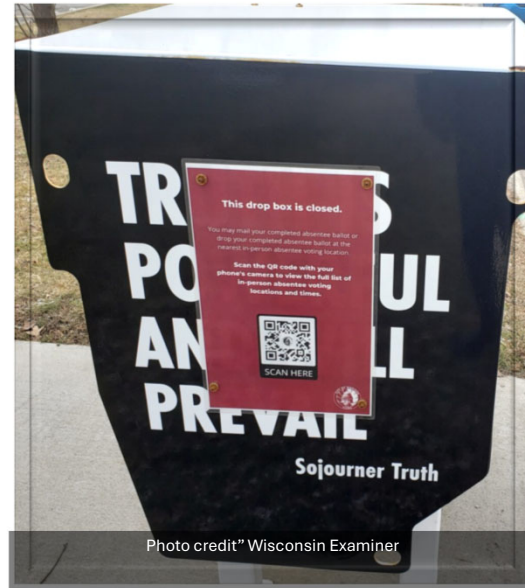

Photo credit" Wisconsin Examiner

Disability Rights Wisconsin et al vs WEC

People with Print Disabilities Can Vote with Electronic Ballots

Don Natzke (Photo Credit: Will Cioci / Wisconsin Watch)

League of Women Voters v. WEC & Rise, Inc. v. WEC

Missing witness address info does not always invalidate a ballot (*The League*)

"Address" has a common-sense definition (*Rise*)

222
Apt 250
Madison, WI
53703

Kormanik v. WEC

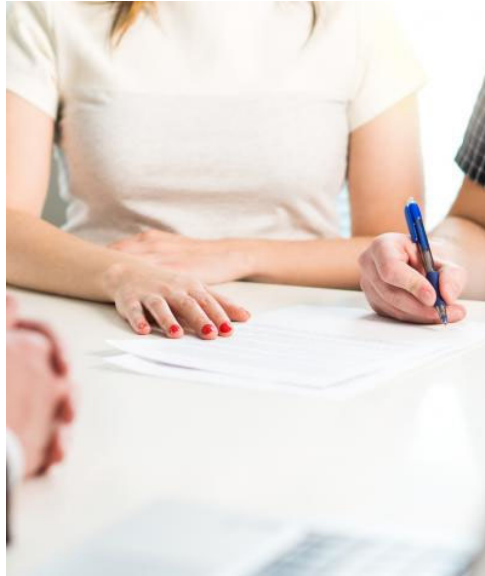Clerks can spoil already-submitted ballots (when voters ask)

Liebert v. WEC
Federal law does *not* prohibit WI witness requirement

How can you get involved?

- Be extra kind to your local election officials!

- Become a poll worker!

- Help your local clerks!

- Become a poll observer or hotline worker!

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