

**DO'S AND DON'TS
OF
COUNTING
WRITE-IN VOTES
ON
PAPER BALLOTS**

**ELECTION COMMISSIONERS ASSOCIATION
WINTER CONFERENCE
JANUARY 18, 2012**

**RALPH M. MOHR and DENNIS E. WARD
COMMISSIONERS OF ELECTIONS
ERIE COUNTY BOARD OF ELECTONS
134 W. Eagle Street
Buffalo, New York 14202**

I. WRITE-IN ELECTION OPPORTUNITIES:

1) General Election:

Regardless of whether there is no nominated candidate, only one candidate or more than one candidate for a given public office, there is always an opportunity to vote by write-in at the general election. [EL 7-106(9)]. (This also includes special elections).

2) Primary Election:

There are three (3) ways by which a political party member voting at a primary election has the opportunity to vote by a write-in vote (for a candidate whose name does not appear on the ballot):

- 1) Opportunity to Ballot petitions are filed, thereby opening up the political party's ballot line for a given office (EL 6-164).
- 2) Court ordered Opportunity to Ballot usually resulting from a technical invalidation of the only party candidate's designating petition, which would then result in that political party having no nominated candidate for the general election.
Landry v. Mansion, 87 A.D. 3d. 806 (3rd Dept. – 2009)
- 3) Any time there are more designated candidates than existing vacancies, thus resulting in a contested primary – for which there is always the opportunity afforded party member voters to “write-in” the name of a candidate whose name is not on the ballot. [EL 7-106 (9)]

II. COUNTING THE PAPER BALLOT WRITE-IN VOTES

1. Candidate Name Printed in Wrong Column/Row:

The statute provides generally that a write-in vote must be cast in the correct column:
EL 8-308(3):

“ A write-in ballot must be cast in its appropriate place on the machine, or it shall be void and not counted”.

1). Regardless of voter intent, the section of the statute for manual counting requires that the candidate's name be written :

“in a space that appears at the bottom of the column (for horizontal ballots) or at the end of the new row (for vertical ballots), containing the title of office” [EL. 7-122 (1) (d) (3)].

2). Similarly, for optical scan ballots, the direction is made to use the space labeled “write-in” (at the bottom or end) – with additional directions to fill in the oval/square in the write-in voting square. [EL 7-122 (2) (c) (3)].

Note: The ES&S scanner does require the marking of the oval or the scanner won’t include it in the scanner count as a write-in. The Sequoia Dominion scanner will read any marking within the square – which does not have an oval to be marked by the voter.

3). It has long been the strict law of the New York State courts that, regardless of any claims of voter intent, the placement of the name of a write-in candidate in the wrong column (i.e. a column that is not for the office that the write-in candidate is seeking), the write-in vote is invalid. Haynie v. Mahoney, 48 N.Y. 2d. 718 (1979).

4). The rule has been strictly enforced – even when the name is written in an adjoining column that was unused for any office. If it’s not in the correct column, it’s invalid. Brownson v. Andrews, 90 N. Y. 2d 949 (1997)

2. Name Placed in Correct Column for the Public Office – But in Wrong Voting Square

Instead of printing the name of the “write in” candidate in the voting square (with the words “write-in”), what if the voter places the candidate’s name in another (blank) voting square – but still within the correct column, for the public office for which the write-in candidate is running?

Since doing so does not violate the prohibition against being placed in the wrong column, and because the voter’s intent is clear, such a write-in vote has been held valid.

Hosley v. Valder, 160 A. D. 2d 1094 (3rd Dept.1990)

Carpinello v. Tutunjian, 154 A.D. 2d 734 (3rd Dept. 1989)

(Note: The State Court of Appeals has not ruled directly on this issue yet but for now, this appears to be the law.)

3. Last Names/Other Names:

1). The use of the candidate’s last name alone – when it is easy to identify him/her as the only one seeking the office, has been held to be valid.

Guilianelle v. Conway, 265 A.D. 2d 594 (3rd Dept.- 1999)

Pauly v. Mahoney, 49 A.D. 2d 1014 (4th Dept. - 1975)

Hanney v. Commissioners of Elections of Westchester County
59 A.D. 2d 707 (2nd Dept. - 1977)

2). Use of a name recognizable in the community will also be validated. Candidate was M. John Hosley with a vote for “Hoss John” was sufficient, when he was known by such a name in the community. Hosley v. Valder, 160 A. D. 2d 1094 (3rd Dept. - 1990)

3). Some courts have gone to great lengths to decipher what appears to be illegible write-in votes. For example, one court concluded that a “D” and “e”, then two vertical marks. (could be Delia); and a “p”, then several more undecipherable letters followed by “mbo”(could be Palombo) - it was sufficient to constitute a valid, write-in vote. (Some weight was given to Board of Elections determination of validity). Francis v. Palombo, 2 A. D. 3d 1148 (3rd Dept. - 2003)

4. Write-In Vote for Candidate on Ballot:

The law specifically prohibits the counting of any write-in vote cast for a candidate who is already on the ballot. [EL 8-308 (2)].

There is no leeway granted on this absolute prohibition. Frances v. Palomba, 2 A. D 3d 1148.

5. Writing/Marking in Write-In Square: Effect on Vote Also Cast for Candidate Already on Ballot:

Voter marks the oval for a candidate whose name is on the ballot – then marks the write-in box voting oval.

- 1) Voter then writes in the same name as above.
- 2) Voter then just puts an X in the write-in voting square
- 3) Voter doesn't write-in anything in write-in voting square
- 4) Voter writes in the name of another candidate.

1). One Court allowed the counting of the vote for the candidate whose name was on the ballot – even with the “extrinsic mark” in the write-in voting square.(but with a strong dissent). Murphy v Wade, 208 A. D. 2d 1039(3rd Dept.- 1994)

2).and 3). Since the placing of an X in the write-in voting square (without a name) or leaving it blank does not count as a vote, then the vote above for a candidate on the ballot would be valid (although the scanner would read an overvote and wouldn't count it).

4). Since the write-in vote would be valid and the vote for the candidate already on the ballot would also be good, neither are counted since it's an overvote.

6. Alternatives to Use of Pen to Print Name :

1. Name Stamp:

1). Statute was specifically amended in 1994 to permit the use of “name stamps” [EL 8-308 (4)]. [See also, Instruction for Paper Ballots 7-106 (5) (3) and Instructions for Absentee Ballots 7-122].

2). Common understanding of a stamp is:

- 1) Stamp w/ ink pad
- 2) Self-inking stamps

[See definition in EL 1-104 (36)] Similar to those used by notaries public or by commissioners of deeds.

3). Considerations:

Candidate’s campaign workers at polling place with “stamps” available for use:

- 1) may be handed out as permitted for any political materials, outside the 100 foot marker. (See EL 8-104)
- 2) may not be handed out within 100 foot radius of polling site entrance.
- 3) may not be in possession of candidate’s watchers (or challengers) or handed out by them to voters or others within the 100 foot area.

4). Question:

What if voter uses “stamp” and leaves it in polling site – on table or in voting privacy booth?

- (1) Treat it as campaign material and remove it from area. It is not to be given to any voter by an inspector or a candidates’s watcher, within the polling place. Inspector could decide to return it to a campaign worker outside the 100 foot area.
- (2) NOTE: A stamp for a write- in candidate is “campaign material”. It cannot be handed out or made available to voters anywhere within the 100 foot radius – by anyone!

2. Stickers (with adhesive back):

- 1) sticker with candidates name which can be “stuck” to paper ballot.
- 2) no consensus on whether their use is legal [specifically not mentioned in 8-308 (4) nor in the ballot instructions under 7-106 (5) (3)].
- 3) does it possibly pose a problem of coming “un-stuck” and creating problems inside the optical scanner machine?

[If the Legislature had intended to permit their use, wouldn't they have included the permitted use of "pasters" when EL 8-308(4) was added? Compare to their use by the Board under EL 7-126]

7. Retrieving and Counting Write-In Ballots ("Dumpster Diving")

Once ballots with write-in votes on them are retrieved from the ballot container:

- 1) Do the standards for manual counting now apply just to those ballots?
(versus the scanner counting standards)
- 2) Should the manual counting standards then be applied to all ballots in any box containing write-ins?
- 3) Should the manual standards be applied to all ballots in the entire contest, in any ballot box whether or not there are any write-in votes in such ballot box?
- 4) Is it fair (constitutional?) to apply the manual standards (i.e. voter intent) which Commissioners use in hand-counting of write-in ballots but to rely upon the optical scanner results for all other ballots?
- 5) Can candidates in other close (not write-in) races observe and use information gleaned from the differences in counts (between scanner and manual) to convince a court to order a manual count of some other close unrelated (scanner) race, based upon the observed differences?

[For another discussion, is it fair/constitutional to use the optical scan standards for ballots cast in the machine but to use the different standard for manual counting, which is used on affidavit ballots, unscanned ballots and (in many counties) absentee ballots?]

§ 8-308. Voting; voting machine write-in

1. Ballots voted for any person whose name does not appear on the machine as a nominated or designated candidate for public office or party position are referred to in this article as write-in ballots.
2. No write-in ballot shall be voted for any person for any office whose name appears on the machine as a nominated or designated candidate for the office or position in question; any write-in ballot so voted shall not be counted.
3. A write-in ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.
4. A write-in ballot may also be cast by the use of a name stamp.

§ 1-104. Definitions

The terms used in this chapter shall have the significance herein defined unless another meaning is clearly apparent in language or context.

36. "Name stamp" means any device which, when applied with ink or other permanent dye, can be used to imprint a person's name to a write-in ballot permanently.

5. The following ballot instructions shall be printed in heavy black type :

INSTRUCTIONS

- (1) Mark only with a writing instrument provided by the board of elections.
- (2) To vote for a candidate whose name is printed on this ballot fill in the (insert oval or square, as applicable) above or next to the name of the candidate.
- (3) To vote for a person whose name is not printed on this ballot write or stamp his or her name in the space labeled "write-in" that appears (insert at the bottom of the column, the end of the row or at the bottom of the candidate names, as applicable) for such office (and, if required by the voting system in use at such election, the instructions shall also include "and fill in the (insert oval or square, as applicable) corresponding with the write-in space in which you have written in a name").

§ 7-122. Ballots; absentee voters

(d) On the front of the ballot prepared for counting by hand, shall be printed in heavy black type the following instructions:

INSTRUCTIONS

1. Mark in pen or pencil.
2. To vote for a candidate whose name is printed on this ballot, make a single cross X mark or a single check, V mark in the voting square above the name of the candidate.
3. To vote for a person whose name is not printed on this ballot write or stamp his or her name in the space that appears at the bottom of the column or the end of the row (indicate where on the ballot the write-in space appears) containing the title of the office.

2. The following provisions shall apply to all absentee ballots prepared for counting by a ballot scanner and all other provisions of this chapter not inconsistent with this subdivision shall be applicable to such ballots:

- (a) The party emblem need not be printed next to the name of each candidate.
- (b) The ballot proposals may be on the back of the ballot, or on a separate ballot.
- (c) The printed instructions to the voter shall read as follows:

INSTRUCTIONS

1. Mark only with a pen or pencil.
2. To vote for a candidate whose name is printed on this ballot, fill in the (insert oval or square, as applicable) above or next to the name of the candidate.
3. To vote for a person whose name is not printed on this ballot, write or stamp his or her name in the space labeled "write-in" that appears (insert at the bottom of the column or the end of the row, as applicable) containing the title of the office and, if required by the voting system in use at such election, the instructions shall also include "and fill in the (insert oval or square, as applicable) corresponding with the write-in space in which the voter has written a name."

**RULES AND REGULATIONS
of the
STATE BOARD OF ELECTIONS**

Current with amendments issued through January 1, 2011

**TITLE 9 — EXECUTIVE DEPARTMENT
SUBTITLE V — STATE BOARD OF ELECTIONS**

§ 6210.13. Standards for determining valid votes

The State Board hereby adopts the following regulations to provide for uniform, non discriminatory standards for establishing what constitutes a vote and what shall be counted as a vote for all categories of voting systems and voting procedures used in New York.

The following standards shall apply in determining whether a ballot has been properly voted and whether a vote should be counted for any office or ballot question.

(a) The following general standards shall apply in the counting of all ballots and votes, regardless of the voting system used:

(12) Write-in votes are votes cast for a person or persons whose name(s) do not appear on the official ballot.

(a) Write-in votes for persons who names appear on the official ballot for that office or party position shall not be counted.

(b) A write-in vote may be cast by the use of a name stamp.

(c) A write-in vote must be cast in the appropriate place on the machine, or it shall be void and not counted.

(d) A voter need not write in the first and last name of a candidate in every situation; the standard is whether the election inspectors can reasonably determine the intent of the voter when they cast their ballot.

§ 6210.15. Standards for determining valid votes on optical scan voting systems and/or paper ballots

(a) Standards indicating a valid vote. A vote cast on a paper ballot shall be the choice made by a voter, not to exceed the maximum allowable votes per race or question than the number for which the voter is eligible to vote, by: (the examples below in this section apply to all types of voting position target areas on ballots, regardless of what form they may take *e.g.* rectangle, oval, circle, square, open arrow):

(1) voter indicates vote choice by consistently filling inside the entire voting position target;

(2) voter indicates choice by consistently filling in less than the entire voting position target for all vote choices on the ballot and the ballot is processed in a manner consistent with the use procedures provided and approved for the voting system;

(3) voter indicates vote choice by consistently placing a distinctive mark, such as properly filled in voting position targets, a cross mark "X", a checkmark "√", a circle, or complete an open arrow "<--" inside the associated voting position target area for a candidate choice or ballot question;

(4) voter marks vote choices by circling the entire voting position target area for a candidate or ballot question;

(5) voter writes in or stamps the name of a candidate in the designated write-in space for that race, even if the write-in square, oval or arrow is not marked;

(6) a write-in vote in addition to a vote for another candidate for the office, with a greater number of choices of different candidates than the number for which he or she is lawfully entitled to vote, the vote shall not be counted for that contest, but shall be counted in all other contests in which there are not overvotes and the voter's choices can be clearly determined;