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Elector Intent Defined by Wisconsin Supreme Court

A ballot cast by an elector sometimes does not clearly reveal the intent of the elector. As a result, it is often left to others to determine whether the elector's intent can be ascertained. If the elector's intent cannot be determined, the ballot may not be counted. In a close election, such determinations may affect the outcome of the election. Certainly, the 2000 United States Presidential election revealed the difficulty often involved in determining elector intent and the importance of having every vote counted in such elections. In Wisconsin, if a ballot does not clearly indicate the intent of the elector, statutory law and case law dictate how elector intent is determined. Recently, the Wisconsin Supreme Court reviewed a case where an elector's intent was unclear on a deciding ballot in a school referendum, requiring the Court to interpret Wis. Stat. § 7.50, the statute governing elector intent. The Court's decision revealed that the discretion of those responsible for ascertaining such intent is limited by statute.

On February 4, 2004, the Wisconsin Supreme Court released its decision in *Roth v. LaFarge School District Board of Canvassers*. This case involved a November 7, 2000, referendum that presented the question of whether the LaFarge School District should issue \$2.25 million in general obligation bonds for the purpose of making various school improvements. The ballot required each voter to make a cross (X) either in a "yes" box if in favor of school funding or in a "no" box if opposed to school

funding. After the polls closed, the ballots were counted. According to the returns, 392 votes were cast in favor of school funding, and 392 votes were cast against school funding. By law, because the voting resulted in a tie, the question for funding for school improvements was defeated.

A recount was conducted on November 11, 2000. The recount again resulted in a tie, as 389 votes were cast in favor of school funding and 389 votes were cast against school funding. During the recount, the LaFarge School District Board of Canvassers (Board), the entity responsible for reporting the referendum election returns, disqualified three "yes" votes and three "no" votes.

After the recount, an elector appealed the Board's decision to disqualify one of the "yes" votes. The "yes" vote was disqualified because the initials of only one poll worker were on the ballot. Two sets of initials are required by law. On appeal, it was determined that the "yes" vote should have been counted, despite the fact that this procedural requirement was not followed. Because this "yes" vote counted, the referendum would pass unless a "no" vote was incorrectly disqualified by the Board. Another elector appealed the Board's decision to disqualify one of the three "no" votes. The "no" vote was disqualified because, despite a slash (/) mark appearing next to the word "no" on the ballot, the Board concluded that the mark

appeared to have been erased. As a result, the Board set aside the ballot, concluding that it could not determine the elector's intent with reasonable certainty. The Board based its decision on Wis. Stat § 7.50(2)(c).

The Wisconsin Supreme Court reviewed whether the “no” vote was correctly disqualified. The Court focused on Wis. Stat. § 7.50(2)(c), which states that a vote must be counted “[i]f an elector marks a ballot with a cross (X), or any other marks, as I, A, V, O, /, v, +, within the square to the right of the candidate's name, or any place within the space where the name appears, indicating an intent to vote for that candidate.”

In this case, there was a slash mark present in the “no” box on the ballot. Based on this mark, the elector argued that the ballot should be counted as a “no” vote. The elector also challenged the Board's discretionary decision that the visible mark was an erasure, noting that nothing in Wis. Stat. § 7.50(2)(c) permitted the Board to declare that a visible mark is an erasure. Further, the statute did not include any qualifying language, such as “unless [the mark] is light or looks erased.”

The Wisconsin Supreme Court concluded that the Board of Canvassers erred in its application of Wis. Stat. § 7.50(2)(c). The Court held that, pursuant to Wis. Stat. § 7.50(2)(c), a vote must be counted if a mark similar to the eight examples listed in the statute is present in a

“qualifying place” on the ballot. Because a “qualifying mark” was made in a “qualifying place,” the vote counted. The Court determined that there was no indication that the voter attempted to erase or remove his or her vote from consideration. Further, the Court stated that there were no other marks on the ballot that would require the Board to compare the mark to another mark. As a result, the November 2000 referendum resulted in a tie vote, and the question of funding for school improvements was defeated. The Court noted that its conclusion was consistent with its long-standing policy of giving full effect to the will of the voter.

This case illustrates that discretion by officials in determining elector intent is limited. According to the *Roth* decision, the Board can use its discretion to make findings, but only when the standards of a statute do not apply to limit this discretion. In this case, because there was a “qualifying mark [a slash mark] in a qualifying place [in the box next to the word “no”] on the ballot at issue,” the standards of Wis. Stat. § 7.50(2)(c) applied and required the Board to count the vote. The Court held that, by enacting Wis. Stat. § 7.50(2)(c), the legislature attempted to minimize the Board's discretion. It is important to note that this case did not involve a situation where the elector intended to conceal, erase, or remove the mark or where the elector made other marks on the page that may indicate an alternative intent. Under such facts, the holding may be different.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.
Michael J. Julka (608) 286-7238 Joanne Harmon Curry (608) 286-7248
David E. Rohrer (608) 286-7249 Shana R. Lewis (608) 286-7202
Frank C. Sutherland (608) 286-7243 Richard F. Verstegen (608) 286-7233

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