

**AMERICAN BAR ASSOCIATION
ELECTION ADMINISTRATION GUIDELINES AND COMMENTARY
August 2009**

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APPENDIX A - *Model Statutory Language on Provisional Balloting and Commentary*, dated August 2009

1.0 Voter Education, Rights and Responsibilities

1.1 Voter Rights and Responsibilities

State and local election authorities and civic and political organizations should ensure that voters are informed of their rights and responsibilities in participating in the electoral process through dissemination of information prior to election day and at polling places on election day.

At a minimum, voters should be informed that they have the following rights and responsibilities.

- a. The Right to:
 - 1. Inspect a sample ballot
 - 2. Ask a poll worker for demonstration or further instruction of the voting mechanism
 - 3. Receive voting assistance at the polls
 - 4. Ask to cast a provisional ballot if your status as a qualified voter is in question
 - 5. Request a replacement ballot if you make a mistake or if your ballot is damaged
 - 6. Vote if you are in line by the time the polls close
 - 7. Vote for the candidate or issue of your choice on the ballot

- b. The Responsibility to:
 - 1. Know your local voter registration requirements and register to vote
 - 2. Notify the registrar of any change of address or circumstance that might affect your registration status
 - 3. Know the rules and options for absentee ballots and early voting
 - 4. Know the hours and location of your polling place
 - 5. Know if any identification is required and bring it to the polls
 - 6. Ask for help if you need it
 - 7. Vote

1.2 Voter Education Programs

Voter education programs should be created to teach all citizens that voting is a responsibility as well as a right of citizenship. State and local election officials, working with schools, civic and political organizations, should have primary responsibility for creating and implementing these programs. Such programs should include instruction on voter registration, maintenance of registration, operation of the particular voting mechanism in that locality, and information on when and where to vote, including the options of early and absentee voting.

1.3 Provision of Sample Ballots and Voting Instructions

- a. In each jurisdiction the local election authority should send a sample ballot and voting instructions to each registered voter within a reasonable period of time before the election.
- b. Sample ballots and voting instructions should be made available at places easily accessible to the general public. Copies should also be made available to civic organizations for dissemination.
- c. Sample ballots and voting instructions should be visibly posted at each polling place.

2.0 Voter Registration

2.1 Lists

- a. State and local election authorities should maintain a current and accurate roll of registered voters, including a centralized list maintained by the state government and readily accessible to all election officials at each polling place. States should authorize and encourage the use of modern technologies for this purpose. The public should have broad access to voter registration lists, with appropriate limitations for privacy and security concerns.
- b. Pre-Election Day Challenges to Voter Lists

States should develop specific procedures related to pre-election day challenges to voter lists.

1. Any registered voter who resides within the jurisdiction of the applicable challenge should be allowed to challenge the registration of a registered voter.
2. The challenge should be made in writing to the chief election officer. The challenge must also be signed and affirmed by the challenger.
3. The challenge should be made no later than 5 days after the close of registration.
4. The challenge should be resolved in a hearing that is open to the public. The individual whose registration is being challenged and the individual who initiated the challenge should receive notice of the hearing and the disposition of said challenge.

2.2 Registration Procedure

- a. Voter registration applications should require the signature of the applicant. Alternative methods of verification should be used with respect to those unable to sign their name.
- b. Each election authority should take the following steps to encourage and increase voter registration: improve and simplify state and local voter registration procedures; support voter registration by mail; authorize and support voter registration efforts by civic and political organizations, including allowing such organizations to distribute and return to election officials voter registration applications and materials; provide for same-day voter registration or in as near a proximity as practical to an election day; explore new technology; extend the hours and time frame for voter registration; provide additional registration facilities at locations that are easily accessible and open during convenient times to the public; and increase voter registration through state and local agencies that have direct contact with the public.
- c. Voter Registration Drives

States should develop specific procedures related to the administration of voter registration drives conducted by non-governmental entities and individuals who submit voter registration forms for prospective voters. These procedures should be broadly disseminated and made readily available to the public.

1. Individuals or organizations submitting voter registration forms, on behalf of more than a *de minimis* amount of voters (*i.e.*, 25), should be required to register with the state voter registration authority as volunteer registrars. Organizations who register should be required to submit a list in writing of individuals who shall be acting as volunteer registrars. All volunteer registrars should be required to satisfactorily complete a training on voter registration drives and sign an oath or affidavit of good faith.
2. Volunteer registrars should be required to provide a receipt to each voter from whom they accept completed registration forms. The receipt should include the name and address of the voter, date and location of acceptance of the form, as well as the name of the volunteer registrar and if applicable, the name of the organization sponsoring the voter registration drive. The volunteer registrar and applicable organization should also maintain a record of such information.
3. Volunteer registrars should not duplicate, copy, or otherwise make use of information provided on the completed voter registration form.
4. Volunteer registrars should be required to adhere to a strict code of conduct during all aspects of the voter registration procedure.

- i. Volunteer registrars should not engage in any discriminatory practices in the dissemination, acceptance and submission of registration forms (*e.g.*, refusal to disseminate, accept and submit registration forms on the basis of race or partisan affiliation).
 - ii. Volunteer registrars should not attempt to influence, through force or intimidation, the decisions of applicants.
5. Voter registration forms that are returned by a volunteer registrar must be postmarked or returned within 3 days of receipt of the completed voter registration form. All voter registration forms must be postmarked or delivered by the close of registration day in order to be valid for the election for which the deadline exists.
6. Intentional violations of voter registration drive requirements should be considered to be criminal offenses and punishable as provided by applicable state laws.

2.3 *Voter Verification*

Current and correct registration lists of eligible voters should be maintained by the election authority through periodic and on-going voter verification programs.

- a. Upon receipt of a registration, the election authority should mail to the voter a non-forwardable, return postage guaranteed mail notice verifying that the registration has been filed and requesting the voter to correct any errors.
- b. Election officials should issue registration cards to each registered voter. The card should advise the voter that registration is complete and provide the name and location of the polling place and contact information for the local election authority. Voters should not be required to present their voter registration card at the polling place as a prerequisite to voting but the card may be used by the voter as an acceptable means of identification at the polls, if necessary.
- c. A voter whose mail from the election authority is returned as undeliverable as addressed should have his or her registration suspended only if the voter has not voted or appeared to vote in an election for the last two general elections for Federal office, that occur after the returned notice.

- d. A minimum on-going verification program should seek to identify unqualified voters from: death lists; transfer of address records at the post office; reports of building demolitions; residential public utility user changes; and, any other official source that reliably identifies a registered voter who is no longer residing at the address from which registered.
- e. Whenever an election authority receives reliable information that a voter has moved or died, a non-forwardable return postage guaranteed mail verification notice should be sent to the voter at the address at which he is registered and if returned undeliverable as addressed, the registration should be suspended.

2.4 Notice of Suspension

If a voter's registration is suspended, a notice, with forwarding instructions to the post office, should be sent to the address of registration. The notice should advise the voter of the suspension, state the reason for the suspension, and list the steps the voter can take to remedy that suspension. A postage prepaid postcard pre-addressed to the election authority should be included with the notice. It may be used by the voter to reinstate the registration at the same address if an error was made or to request a transfer of address if the voter has moved to a new address within the jurisdiction. A voter who has not moved may appear at the office of the election jurisdiction to have the registration reinstated or may return the postcard and the registration will be reinstated; if the voter has moved to a location outside the election jurisdiction, the voter should register in the new jurisdiction.

2.5 Reinstatement

A voter who has not been reinstated under Section 2.4 and who has not moved to a new address should be given an opportunity to be reinstated at the polling place on election day by attesting, in writing, that the voter does reside and has resided since the day of registration at the address of registration or currently resides at another address within the same voting jurisdiction.

2.6 Cancellation

A voter's suspended registration should be maintained for two years from the date of suspension. If the voter is not reinstated during that period, then the registration should be cancelled.

2.7 Prior Registration

Applications for voter registration should request the last address at which the voter was registered. Upon recording the new registration the election authority should cancel the prior registration if within the same jurisdiction. If outside the jurisdiction, the election authority should notify the prior jurisdiction that the voter has registered as a voter in the new jurisdiction so the prior registration may be cancelled. States should work cooperatively to achieve this goal.

3.0 Absentee Voting

3.1 Absentee Voting Procedures

- a. All registered voters should be allowed to vote by absentee ballot regardless of cause.
- b. Absentee voting procedures and instruction materials should be as simple as possible for those authorized to vote absentee. Absentee ballots should be distributed early enough to accommodate the deadline for return of the ballot.
- c. Each election authority should authorize and support requests for an absentee ballot or early voting application by civic and political organizations, including allowing such organizations to distribute and return the applications to election officials.
- d. Signature comparisons between the registration application, ballot requests and returned ballot should be required by the election authority. The approving clerk should indicate that the signature has been checked.
- e. Lists of absentee ballots issued by the election authority should be available to the public prior to the elections and to the precinct officials by election day. A voter who has requested an absentee ballot may vote in person on election day, through a provisional ballot instead, if the voter subscribes in writing that that person did not return an absentee ballot to the election jurisdiction.
- f. The return envelope should indicate whether the voter had assistance and, if so, the assisting party should be required to certify in writing that no coercion or influence was involved and that the ballot was cast secretly.
- g. As a standard practice, election authorities should require that absentee ballots be received by the close of polling hours on election day in order to be counted.

3.2 Counting Absentee Ballots

Poll watchers should be permitted to observe the counting of absentee ballots and be empowered to challenge individual absentee ballots. Challenged ballots should remain segregated until the validity of the challenge is determined.

4.0 Alternative Voting Methods

As innovations in voting and emerging technology create opportunities for improved voter participation and voting systems, election officials should periodically review and upgrade voting procedures and equipment as necessary.

4.1 Early Voting

States and localities that allow early voting should create specific guidelines in order to ensure that:

- a. an adequate number and location of polling places is assigned to each jurisdiction;
- b. adequate notice of polling hours and location of polling places is given;
- c. an appropriate time frame for early voting is allowed, and an appropriate end period to voting is determined in order to ensure that the rolls may be adjusted for voters who have voted by election day;
- d. there is no announcement of results or tallying of early voting ballots until after the close of polls on election day, and
- e. laws and regulations that govern activity at polling places are applied and enforced during the early voting process.

5.0 Election Day

5.1 Election Day Officials

- a. Election day officials should be representative of diverse political parties. The official responsible for appointing election day personnel should solicit recommendations of civic and political organizations for the appointment of election day officials.
- b. Election day officials should conduct themselves impartially in the execution of their election responsibilities.

5.2 Training

All states should provide election day officials with formal training. Provisions also should be made to provide formal training for poll watchers as well.

5.3 Compensation

Election day officials should be adequately compensated. Extra compensation should be provided for the time actually spent in training.

5.4 *Poll Watchers*

Qualified political parties and candidates should be authorized to designate poll watchers at each polling place and central counting station. If poll watchers have not been designated by qualified political parties or candidates, then stakeholders of referenda or ballot initiatives should be authorized to designate poll watchers at each polling place and central counting station. The numbers of poll watchers at each location should be limited to avoid undue crowding. Parties or candidates designating poll watchers should certify in writing that each designee has been instructed as to the responsibilities of the position. Poll watchers should not be limited to those who reside in the precinct or election jurisdiction.

5.5 *Observation by Poll Watchers*

Poll watchers should be permitted to observe all official acts and records used at the polling places, to challenge unqualified voters, and to challenge improper voting practices. Poll watchers should present all objections and challenges directly to the election day officials, and should not confront or harass voters. Methods should be developed to minimize the disruption and delay of challenge procedures. Election day officials should keep a record of all challenges by poll watchers, including the names of the challenging poll watchers. States and the federal government should ensure that voters are not challenged in contravention of the Civil Rights Act and Voting Rights Act.

5.6 *Provisional Ballots*

In situations where a voter's registration is in dispute, a voter has applied for an absentee ballot and then seeks to vote at the polling place, or a voter has been denied the opportunity to vote by an election official on the grounds of any other ineligibility, the voter must be offered a provisional ballot. The provisional ballots should be segregated and secured until a determination of validity is made. Where mechanical or electronic voting machines are used, an alternative method for segregating the provisional ballots should be established. Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot in question.

States and localities should not vest poll workers with duties that allow them the capacity to invalidate a provisional ballot; including, but not limited to, procedures requiring a poll worker to sign a provisional ballot application or affidavit in order for the ballot to be counted. The information relating to the decision whether to count or reject provisional ballots must be publicly available, so that administrative errors can be identified and poll worker training can be improved.

Poll workers should be required to direct the voter to the correct precinct. Election administrators, candidates and campaign organizations are strongly encouraged to educate and encourage electors to vote at their assigned precincts.

See Appendix A, *Model Statutory Language on Provisional Balloting and Commentary*, dated August 2009, for specific details and model language.

5.7 *Challenged Ballot*

Challenged ballots should be counted and segregated and marked as such for purposes of appeal. Where mechanical or electronic voting machines are used, an alternative method for segregating the challenged ballots should be established. Election officials should provide assurance that eligibility issues will be dealt with promptly and that voters will be notified of the disposition of the ballot in question.

5.8 *Voting Assistance*

- a. Any voter who requires assistance to vote for reason of disability or due to an inability to read or write should be given assistance by a person of the voter's choice.
- b. All voting places should be accessible. Any disabled or elderly voter assigned to an inaccessible polling place, should, upon advance notice by the voter, be assigned to an accessible polling place or provided alternative means of casting a ballot.
- c. Voting materials should be provided, by States or political subdivisions, in the language of the applicable minority language groups residing in voting precincts where a substantial share of the voting age population speak languages other than English.

5.9 *Polling Hours*

States should undertake appropriate measures to ensure that polls are open to the public and that all registered voters are able to go through the voting process with minimal delay.

Jurisdictions should be provided with appropriate funding to ensure that:

- a. polling hours are sufficiently extensive to allow all registered voters an opportunity to vote at a time convenient to their work schedules;
- b. adequate polling equipment, locations, and personnel are provided; and
- c. registered voters who are in line by the time the polls close are allowed to vote.

6.0 *Voter Verification*

States should take necessary steps to ensure that the voter is the person registered to vote.

- a. In jurisdictions where a signature is required voters unable to sign because of disability or illiteracy should be verified by other reliable means, such as a registered voter in the same precinct signing a verification on the individual's

behalf or by producing acceptable identification of the voter.

- b. In jurisdictions where some sort of voter identification is required, states should require the presentation of only one piece of identification. A variety of forms of identification should be accepted in order to meet this requirement. In the event that the voter is unable to produce a piece of identification, then the voter should be allowed to sign an affidavit of identity.

7.0 Ballots

7.1 Ballot Design

- a. **Simplicity of Ballot**
Ballots should be designed to be as simple and clear as possible in order to avoid voter confusion. Ballot designs that have been shown to have a high error rate should be eliminated.
- b. **Uniform Ballot Design**
Jurisdictions should strive to present a uniform ballot design to the electorate. For each voting mechanism used the ballot design for that mechanism should be the same throughout the jurisdiction.
- c. **Testing and Publication of Ballots**
The ballots should be tested for usability by the appropriate election authority and made available for public inspection prior to approval of the ballots.
- d. **Approval of Ballots**
The ballot designs should be approved by the state election officer.
- e. **Translation Issues**
In jurisdictions where a significant percentage of the voting population is non-English speaking, translated ballots and assistance should be provided, as necessary, during the voting process.

7.2 Ballot Machinery

- a. Voting machinery should identify an invalid vote or a non-vote prior to the voter's final submission of the ballot; once identified, however, the voting machinery should allow a non-vote and the non-vote should be reflected in the final tally. If the voting system is technologically unable to do that, the system should have a ballot design that allows the voter to see the actual votes cast.
- b. Electronic voting machines should be required to have a voter verified paper record, of each vote or non-vote cast by the voter, that will be used for audit purposes. The voter verified paper record should not contain any personally

identifiable information.

- c. Election officials should eliminate voting mechanisms that have been shown to have a high error rate (*e.g.*, undervote, overvote).
- d. States and the federal government should provide appropriate funding to upgrade voting machinery and personnel to assist voters in understanding such machinery.
- e. Voting machinery should be appropriately maintained and tested for accuracy prior to an election.
- f. States should be encouraged to adopt and apply appropriate voluntary minimum standards for voting machinery and software.

7.3 *Pre-Vote Checking*

- a. Precinct election day officials should certify that ballot receptacles are empty prior to voting.
- b. Precinct election day officials should certify that all mechanical and electronic vote counters are set at "0" prior to voting.
- c. All vote counting equipment should be certified as to its accuracy in counting and reporting votes cast for all offices, candidates and issues.

7.4 *Observers*

- a. Observers should be allowed to observe all official tests and certifications.
- b. Poll watchers should be permitted to observe ballot counts and canvass of vote at the polling place or central counting location.
- c. The vote count should be publicly posted at the place of counting for at least 24 hours after the count is completed. A permanent record must be maintained

7.5 *Ballot Collection and Count*

- a. Paper ballots should be placed in the ballot box in the presence of the election day official.
- b. The number of voters applying for ballots and the number of ballots cast should be recorded before counting the votes.

7.6 *Computerized Vote Counting*

- a. Blank ballots and test decks should be available to qualified observers who should

be allowed to run accuracy tests. Verification of the computer accuracy of vote counting should be allowed before and after the official count.

- b. Where contract programmers are employed, they should be required to certify under oath to the accuracy of the program they have written or are operating. The election authority should certify the accuracy of any vote counting program both before and after the election.
- c. Where a computer counting error is discovered, a complete report should be given to the public, political parties and candidates.
- d. A random sample manual recount of the computer count should be a part of the canvass of votes cast.

7.7 Ballot Audit

A system of ballot audit for each polling place should be established. The audit should account for all ballots or punch cards issued, the number of spoiled ballots, the number of ballots counted, and the number of ballots returned unused. Entries should be recorded in the poll book to account for spoiled ballots or voting machine failures. All voted ballots, unused ballots, spoiled ballots and poll books should be returned to the election authority under seal with a copy of the results for canvass.

7.8 Physical Security of Ballots and Voting Equipment

Election officials should ensure ballot security. In particular, voting equipment, ballots, and other election materials should be kept secured during the counting process and until the time for contesting the election has passed.

7.9 Availability of Election Day Remedies

Courts of competent jurisdiction and review should sit on election day to handle expedited actions relating to election day activities.

8.0 Recounts

8.1 Availability of Recounts

- a. States should establish a threshold for a mandatory recount based on statistically sound data that would likely affect the outcome of the election. States should permit a defeated candidate to request that a recount be suspended.
- b. Candidates not meeting the threshold for a mandatory recount should be allowed to request a recount within a certain period of time after election results are announced. Such candidates should bear the cost of funding the recount, unless

the result is changed.

- c. State statutes should make clear the circumstances under which candidates may request a recount and, at a minimum, should explain the timing, form of filing, venue and procedural steps required for the request and recount.

8.2 *Methods of Recounts*

- a. States should permit sufficient time to complete the recount. In setting the time frame, consideration should be given to the total number of votes to be counted, the method in which the votes were cast, and the manner in which the recount will be conducted.
- b. States should establish uniform recount standards for each separate voting technology.
- c. States should mandate that, generally, recounts should be performed for the entire jurisdiction affected by the race. If a recount is ordered as a remedy to an election challenge, then only those jurisdictions named in the order must participate in the recount.
- d. States should permit each candidate affected by the recount to have observers present throughout the entire process.
- e. States should specify the circumstances that would warrant a manual recount.

9.0 *Challenges*

State statutes should make clear under what circumstances candidates may challenge an election result. At a minimum, the language should contain reference to the timing, form of filing, venue, procedural steps, and available remedies.

10.0 *Election Administration*

- a. Members of canvassing commissions should be prohibited from being active in partisan political activity in any particular election in which they may be called upon to exercise their duties as a member of such an entity.
- b. Any officials supervising or certifying elections, recounts or challenges should not be involved in any particular election in which they may be called upon to exercise their duties.

11.0 *Penalties and Notices*

- a. Appropriate sanctions should be established and enforced for violations of voter registration, balloting, and election procedures.
- b. Election officials should post notice of the penalties for violation of election laws and procedures at all polling places. Such notice should be placed on all voter registration forms, applications for ballot, and absentee ballots and envelopes. The notices should be coordinated for uniformity within the state.
- c. All election officials, deputies, employees (including contract employees) should be advised as to the penalties that exist for violating election rules, laws and procedures and should subscribe in writing under oath to perform their duties.

12.0 Bar Associations

- a. Bar Associations should assign qualified attorneys on a voluntary basis to assist in development of local programs to ensure the integrity of the electoral process.
- b. Bar Associations should encourage attorneys to serve as election day officials.

13.0 Definitions

13.1 Ballot

A presentation by paper or other method (*e.g.*, touch screen) that lists the candidates or issues to be voted on in an election.

13.2 Challenge

A motion made in dispute of the certified election results on the basis of alleged irregularities during the voting process.

13.3 Challenged Ballot

A voted ballot which is questioned by a poll watcher on the basis of an improper voting practice on the part of the voter.

13.4 Election Authority

A clerk or a Board of Elections appointed and charged with the duty of conducting elections.

13.5 Election Day Official

A person appointed by election officials and assigned election day duties.

13.6 Election Official

A person assigned any official duty or function in the electoral process.

13.7 Jurisdiction

A political boundary of precincts which encompasses the entire scope of an election (*e.g.*, the entire state for an election for the U.S. Senate, the district for an election for the U.S. House of Representatives).

13.8 Poll Watcher

An observer of all official actions and records at the polling place and challenger of unqualified voters and improper voting practices at the polling place.

13.9 Provisional Ballot

A voted ballot that is kept segregated and sealed and not counted until a voter's qualifications to vote have been determined. If the voter is determined qualified, the ballot is unsealed and counted on Canvas day.

13.10 Recount

A process to verify the vote count in an election. A recount is ordered prior to the certification of election results.

Commentary to Election Administration Guidelines

Commentary - 1.0 Voter Education

It is every citizen's civic responsibility and right to vote for the candidate or issue of their choice. State and local election officials have an obligation to make sure that all voters are informed of their rights and responsibilities as voters. Voter education should encompass all aspects of the voting process, including voter registration; all methods available for voting; time, location and deadlines for registration and voting; and a basic understanding of the rights and responsibilities associated with voting.

The provision of voter education need not be limited to election officials. Schools, civic and political organizations should also be involved the process. Voter education drives could be held in conjunction with voter registration and get out the vote drives. Additionally, a voter's rights and responsibilities card could be distributed during the registration process, at get out the vote drives and polling places. Although specific rights and responsibilities may vary slightly by jurisdiction, the American Bar Association believes that, a minimum, voters should be informed of the basic rights and responsibilities outlined in Section 1.1 of these Guidelines.

Commentary - 2.0 Voter Registration

Available modern technologies permit rapid addition, deletion, or cancellation of names from voter registration lists. Copies of the registration lists should be available to the public at reasonable or no cost, depending on the format of the list. The cost, if any, should be sufficient to cover reproduction and should not be used to discourage availability. Certainly the Internet age allows for many cost-efficient methods that can be used to make such lists available to the public. These methods must be balanced, however, against legitimate privacy and security concerns of registered voters and must be limited to non-commercial usage. States should also be encouraged to develop standards for pre-election day challenges to voter lists.

Voter registration drives conducted by political parties, non profit organizations, and other interested individuals and organizations have served to increase the number of voters registering to vote. In some instances, federal and state laws already govern the conduct of third party voter registration drives, on issues such as permissible conduct and procedures. In the instance where a volunteer registrar submits the voter registration form for the prospective voter states should adopt more stringent guidelines in order to ensure that there is some measure of accountability and safeguard that the registration forms will in fact be delivered and submitted in the appropriate manner. Voters who register through voter registration drives should also check with the appropriate election authority to verify their registration.

As more steps are being taken to increase voter registration, there must be an increasing responsibility of local election officials to verify the identification of people registering to vote. Verification of the legitimacy of the registrant is necessary to protect the integrity of the election system. There are numerous suggested methods of verifying registration including requiring the applicant to sign at registration. Difficulties in verification procedures arise partly because of

mail registration, the desire to maintain the privacy of the individual seeking registration and costs. Additional problems occur when voters, either because of social circumstance, illiteracy or disability, do not possess a photo identification or are unable to sign and whose registration must be authenticated by others. In such instances, alternative verification procedures should be devised. States should not create an overly onerous verification process. States may prefer one form of identification over another, but should be understanding of circumstances which may not allow a particular voter to conform with the preferred method. For instance, if a state requires a photo identification and a voter does not possess one, there should be an opportunity to produce two forms of non-photo identification, if those are not available, then a voter should have an opportunity to sign a document attesting to his or her identity. There is a legitimate interest in verifying the identification of voters, but the process should not be one of repeated verification, which could be interpreted as a form of intimidation or harassment.

Election authorities should actively seek access to all public records such as death certificates, driver's license information, and postal data to validate the registration rolls. They should also consider the use of new technologies to ensure the integrity of the registration lists. If there is a discrepancy with an individual's registration, election officials should flag and investigate the registration and require supplemental evidence of residence from that individual. If an election authority contracts with an outside vendor to verify the eligibility of registered voters, standards and safeguards must be adopted to ensure the reliability of such information.

These guidelines do not take the position that registration should be a required procedure. It is recognized that some jurisdictions have not found a need for registration or may adopt an enrollment system in the future.

Commentary - 3.0 Absentee Voting

Absentee voting is an important method of assuring that registered voters who are unable to go to the polls, for whatever reason, on election day are able to exercise their right to vote. This process must be secure and as uncomplicated as possible. States and localities must ensure that applications for absentee voting and ballots are distributed as early as possible, so as not to unduly burden the right of those entitled to vote in that manner.

The nature of absentee voting requires a stringent standard of ballot integrity. Under no circumstances should a third party handle a ballot. Third parties, such as political or civic organizations, may be involved in the absentee voting process to the extent that they facilitate requests for ballots. Localities upon receipt of the absentee application must mail the ballot directly to the registered voter and the completed ballots must be returned by the registered voter.

There must also be consideration given to military and overseas voters whose return of the ballot may be complicated by circumstances beyond their control, such as reliance on foreign mail service. Methods that might be considered to expedite the return of ballots include, but are not limited to, internet voting and a reduction in the time of transmittal of ballots back to the locality administering the election. Specifically, the Department of Defense should examine ways to facilitate the prompt return of ballots cast by servicemembers.

Commentary - 4.0 Alternative Voting Methods

Alternative voting methods which serve to increase citizen access and participation should be supported provided that issues of technology and funding can be adequately addressed. Authorities should also take care to assure that voting procedures and systems are reliable and do not increase opportunities for voter fraud. We recognize that efforts are already being undertaken in this area, such as early voting, mail voting, telephone voting, and Internet voting and would encourage further study and testing of these and other such innovations.

As instances of early voting have become a more popular alternative to in person voting on election day, states should develop guidelines in order to assure that the same laws and regulations that govern election day voting are applied to early voting. In order for early voting to become a fair and successful method of voting, guidelines should be developed that ensure adequate notice, number of polling places, and time to vote. Additionally, the laws governing conduct at early voting locations should be the same as those that govern election day polling places (*e.g.*, prohibitions on campaigning inside a polling place).

Commentary - 5.0 Election Day

Election day encompasses the merging of different individuals and machines with often differing roles. Voters, election officials and election observers each play a different role in the election although they all share the same goal: ensuring and participating in an election that allows each registered voter to vote in an environment that is secure and free from intimidation and harassment.

The processes involved with election day should be as seamless as possible. Training should be provided to election day officials and poll watchers in order to facilitate their understanding of their appropriate role and duties at the polling place. Adequate funding of the electoral process is a key aspect of successful elections. States and localities must provide adequate polling hours, equipment and personnel as a necessary component of any election. Specifically, jurisdictions, with a history of excessive delay in the voting process, should provide additional equipment and personnel in order to better facilitate the process. Additionally, a study on factors contributing to delays in the voting process should be conducted. There are concerns that advances in technology have created more delays in the process. There is some anecdotal evidence that it takes the average voter longer to vote on direct recording electronic voting machinery (DRE) than on optical scan voting machinery. For instance, states should undertake studies to see if a per capita standard of voters per type of voting machinery can be established.

Another important aspect of an election is the security of the ballots being cast. Poll watchers are tasked with the important role of challenging unqualified voter and improper voting practices. This role is an integral part of ensuring the integrity of the polling place, but most importantly these duties must be carried out in a manner that is consistent with the Voting Rights Act and the Civil Rights Act. In no instance should selective challenges and minority voter intimidation be allowed to occur.

Commentary - 6.0 Voter Verification

To prevent multiple voting and voting by those not qualified to do so, methods should be devised to verify that the person voting is the same person registered. One method is to obtain the voter's signature at the voting place. Other methods must also be developed so that the right of the disabled and the illiterate to vote will not be abridged. Election officials should develop procedures to minimize disruption at the polls created by verification and challenge procedures and to reduce the delay, intimidation and adverse impact such procedures may have on others waiting to vote. The maintenance of a centralized list of registered voters within a state that is broadly accessible by the public would improve the process. For example, voters would know if they were properly registered prior to appearing at the polling place and if a voter appears at the improper polling place the voter could be directed to the proper polling location. (See 2.1(a) of the Guidelines)

Some states have begun to provide a voter registration card, which should be able to be used as a method of voter verification, although a voter should not be required to present the card in order to vote. Other methods of verifying the identity of the voter at the polls may be considered as well. (See 2.3 of the Guidelines and Paragraph 3, of Commentary - 2.0 Voter Registration)

Commentary - 7.0 Ballots

Like election day, there are many components that make up the ballot that will be cast, such as the actual design of the ballot, individual ballot machinery, and the counting of the ballots. The successful integration of these components should result in a polling place where a voter casts a ballot with certainty as to the candidates or issues for which the voter intended to vote.

One important method of minimizing voter confusion is the development of uniform voting mechanisms, both ballots and machinery, within a jurisdiction. Standards should be developed to provide a sense of uniformity, and thus less confusion, within the voting system. The Federal Election Commission and various other entities have developed and continue to update voting system standards that should be adopted by the states. At a minimum, an adequate number of poll workers must be available to provide assistance regarding voting machinery. States and localities must provide adequate funding to improve voting machinery and personnel at the polls. Certainly there must be careful consideration of potential confusion on the part of the voter with respect to designing the ballot. For instance, punchcards should be generally discouraged and ballots should be designed to ensure that all candidates running for the same office are included on the same page. The selection of voting mechanism should be made with an eye toward changes and improvements in technology.

Voter education is another key element to a successful ballot. Voters must receive assistance in operating voting machinery if necessary and voters must also be informed that they are not required to vote for all issues or all candidates on the ballots.

In situations that require a judicial review on election day, the reviewing body must be adequately prepared to deal with such matters.

Commentary - 8.0 Recounts

Recounts are ordered prior to the certification of election results. The “trigger” that determines the threshold for establishing a mandatory recount should be based on whether or not a recount would likely affect the outcome of the election. Examples of situations which could trigger a recount include, but are not limited to an election where more than ten percent (10%) of the vote was not counted, different results are found during the auditing process, or the difference between the votes cast for each candidate is one half (1/2) of one percentage point or less than the total number of votes cast. A recount of the entire jurisdiction should not be required if the candidate requesting the recount or on whose behalf a recount agrees to limit the recount to selected precincts.

Commentary - 9.0 Challenges

Challenges are made post-election. A challenge is made to the certified election results on the basis of alleged irregularities during the voting process. States and localities must establish clear and uniform standards within the jurisdiction regarding challenges.

Commentary - 10.0 Election Administration

In order to protect the integrity of the electoral process, there must be no appearance of bias on the part of those involved in the administration of elections. Any election official who will be involved in an election dispute or recount must avoid any apparent conflict of interest.

State wide standards should be established that clearly delineate the forms of partisan activity, if any, in which election administration officials may participate. If an official is unsure of whether or not a particular activity is permitted under the standards of the state, that official should consult the appropriate governing body.

Commentary - 11.0 Penalties and Notices

The vigorous enforcement of election laws is necessary to ensure the efficacy of any voting system. Prosecution, even in isolated cases, is necessary to create an environment in which norms of election conduct are established and to guarantee civil liberties.

Commentary - 12.0 Bar Associations

The American Bar Association has long been on record in urging all lawyers to register and vote and that all lawyers should encourage and assist employees in their offices and firms to participate in the electoral process by registering and voting in federal, state, local, and territorial elections. These Guidelines seek to take that commitment a step further and encourages state, local and territorial bar associations to assist in the development of programs that will ensure the integrity of the electoral process. Lawyers understand the need for due process and equal protection as a part of the electoral process and thus are well suited to serve as election day officials.

**MODEL STATUTORY LANGUAGE ON
PROVISIONAL BALLOTING AND COMMENTARY**
(August 2009)

SECTION I
PROVISIONAL BALLOTS AND ENVELOPES

- 1) At all elections, the following individuals shall be permitted to cast a provisional ballot:
 - a) an individual who claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the general register and whose registration cannot be determined by the inspectors of elections; or
 - b) an individual voting for the first time at the election district, but who is unable to produce required identification; or
 - c) an individual who has applied for an absentee ballot, but who has not returned the absentee ballot; or
 - d) an individual who presents a judicial order to vote; or
 - e) an individual whom an election official asserts is not eligible to vote.

- 2) Prior to casting the provisional ballot, the elector shall be required to sign a uniform affidavit, that shall be used by all jurisdictions within the state, on the provisional ballot envelope.
 - a) Each jurisdiction shall provide to each provisional voter printed information on the provisional ballot envelope notifying the voter that in order for the provisional ballot to be evaluated by the canvassing board, the elector must print his/her name and address and sign and date the affidavit.
 - b) A jurisdiction may place notice of penalties for violations of election laws and procedures on the provisional ballot envelope.
 - c) A jurisdiction may allow an elector to provide additional information, such as date, location or means of registration, on the provisional ballot envelope in order to facilitate the evaluation by the canvassing board, so long as the provision of such information is voluntary.

- 3) After the provisional ballot has been cast,
 - a) the elector shall
 - i) place the provisional ballot in a secrecy envelope, and
 - ii) place the secrecy envelope in a sealed provisional ballot envelope;

- b) the election official shall
 - i) provide written information to the elector explaining the system for verifying ballots as well as a provisional ballot envelope number,
 - ii) ensure that all provisional ballots shall remain sealed in their provisional ballot envelopes for return to the canvassing board, and
 - iii) certify the number of provisional ballots delivered to the polling place and the number of sealed provisional ballot envelopes containing voted ballots.

- 4) Prior to the certification of the election, the canvassing board shall examine each provisional ballot envelope to determine if the individual voting that ballot was entitled to vote at the election district in the election. One authorized representative of each candidate in a primary or election, who is an elector in the county, shall be permitted to remain in the room in which the determination is being made if he does not impede the orderly conduct of the determination. Uniform standards shall be developed and applied for the purposes of verifying provisional ballots within a state.

- 5) If it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast,
 - a) the ballot should be placed with other ballots that are eligible to be counted,
 - b) the tabulation of eligible ballots should not occur until a determination of eligibility has been made for all provisional ballots submitted, and
 - c) such tabulation should be made in accordance with the rules governing normal ballot tabulation.

- 6) If it is determined that the elector voting the provisional ballot was not registered or otherwise failed to establish his or her qualifications to vote under applicable state law,
 - a) the provisional ballot shall not be counted and the ballot shall remain in the provisional ballot envelope and shall be reflected as rejected as ineligible and
 - b) the photocopy of the provisional ballot envelope shall be used by the election authority as a voter registration form if the information is properly submitted in accordance with state voter registration requirements.

- 8) If it is determined that the elector voting the provisional ballot was eligible to vote but not at

the election district where the ballot was cast, the canvassing board shall open the envelope, with due regard to secrecy of the ballot, and only count the portion of the ballot that the elector would have been eligible to vote in the proper election district and at the election district where the vote was cast.

- 9) The election authority shall establish a World Wide Web site and a toll-free telephone number to permit an elector who cast a provisional ballot to determine, by means of a unique, non-public personal identification number, whether the vote was counted and, if the vote was not counted, the reason that it was not counted.

SECTION II

DETERMINING ELIGIBILITY OF PROVISIONAL BALLOTS

- 1) Prior to accepting any provisional ballot, the election official shall determine that the information provided on the provisional ballot envelope by the elector is properly completed.
- 2) When ballots are transferred from polling places to the election authority for tabulation, provisional ballot envelopes
 - a) should be segregated from other ballots and placed in separate containers; and
 - b) should be photocopied, upon delivery to the canvassing board, by teams of election officials, with a representative from each major political party, for purposes of determining the eligibility of the elector; and
 - c) should then be placed in a sealed container until tabulation.
- 3) The counting of provisional ballots shall not begin until the canvassing board has determined the eligibility of all provisional voters according to applicable state laws.
- 4) Determinations as to whether provisional ballots will be counted should be based on
 - a) the statewide voter registration database, or
 - b) other state and local voter registration records, or
 - c) where an elector has registered through an agency authorized to conduct voter registration pursuant to the National Voter Registration Act of 1993, the election authority should make an inquiry of the registration agency.

- 5) Once the canvassing board has made a determination as to whether or not a provisional ballot is eligible to be counted, the canvassing board shall provide documentation on the copy of the provisional ballot envelope verifying the eligibility or ineligibility of the elector. Such documentation should include
 - a) name of elector casting a provisional ballot,
 - b) name of reviewer,
 - c) date and time of review, and
 - d) description of evidence that supports eligibility or ineligibility of elector.

- 6) The canvassing board should record on a provisional ballot disposition list the provisional ballot identification number and notation marking it as accepted or rejected.

- 7) Once a review has been made by the canvassing board, determining eligibility or ineligibility of all provisional ballots, the provisional ballots and copies of provisional ballot envelopes, shall be delivered to bi-partisan counting teams for review and tabulation. A record of such delivery should be kept and shall include a signed receipt from two election officials, one from each major political party.

- 8) Challengers and watchers, as provided by applicable state law, may be present at all times that the bi-partisan counting team is reviewing and/or counting provisional ballots, provisional ballot envelopes and copies of provisional ballot envelopes. The election authority must give proper notification to the county chairs of each major political party in advance of the review and counting of provisional ballot materials.

- 9) If the elector is found to be duly qualified and registered to vote, the ballot envelope should be opened and the ballot placed in a ballot box to be counted with other eligible provisional ballots.

- 10) If the elector is found not to be duly qualified and registered to vote, the ballot envelope should not be opened and the ballot should not be counted.
 - a) The copy of the provisional ballot envelope should be submitted as an application for voter registration for future elections so long as:
 - i) The information serving as an application for voter registration is easily separated from the information requested to cast a provisional ballot (e.g.,

insufficient information on the voter registration application should not disqualify an otherwise sufficiently completed application to cast a provisional ballot); and

- ii) The provisional ballot envelope contains identical information that is required for voter registration in the applicable state
- b) In the event that the voter registration portion of the provisional ballot envelope is not complete, the provisional ballot envelope should be treated as a request for a voter registration application by the prospective voter.

11) Following the determination of eligible provisional ballots:

- a) all eligible provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team, and marked as “voted provisional ballots and ballot envelopes;”
- b) all rejected provisional ballot materials should be sealed in a container, dated and signed by each member of the reviewing team, and marked as, “rejected provisional ballots and ballot envelopes;” and
- c) upon receipt of the returned materials, the election authority should tabulate the eligible provisional vote.

SECTION III DEFINITIONS

- 1) **Canvassing Board** means the entity established by state law that is charged with determining the validity of voter registration for purpose of counting provisional ballots or certifying elections, recounts, or challenges in an election.
- 2) **Election Authority** means the state, local, or territorial entity responsible for the administration of elections (*e.g.*, Department of Elections, Board of Election Commissioners, County Clerk, or Canvassing Board).
- 3) **Election Official** means an official sworn to conduct an election
- 4) **Elector** means an individual who is eligible to vote.
- 5) **Jurisdiction** means a political boundary of election districts in which the election is administered (*e.g.*, the entire state for an election for the U.S. Senate, the congressional district for an election for the U.S. House of Representatives).
- 5) **Provisional Ballot** means a ballot issued by an election official on election day to an individual who claims to be a registered elector when the individual's name does not appear on the general register or the individual's registration cannot be verified or where the

individual is determined to be ineligible.

- 7) **Provisional Ballot Envelope Number** means the number assigned to the provisional ballot envelope.

Commentary

A balance must be struck between encouraging participation in the electoral process and encouraging the orderly and fair administration of elections. When a provisional ballot is cast, an affidavit stating that an individual is registered to vote in the jurisdiction where the individual desires to vote and that the individual is eligible to vote is required by the Help America Vote Act of 2002 (P.L. 107-252, § 302(a)(2)). Accordingly, the affidavit should not require any additional information in order to verify the information contained on the provisional ballot envelope.

By way of example, the affidavit may state the following:

PROVISIONAL BALLOT ENVELOPE NUMBER XXX	
I affirm, that I am:	
and	i) registered to vote in this jurisdiction ii) eligible to vote in this election.
_____ Printed Name	_____ Signature
_____ Street Address	_____ Date
_____ City, State, Zip Code	
<i>The information in this box must be completed in order to process your provisional ballot.</i>	

Jurisdictions should, however, allow individuals to voluntarily provide additional information, such as date, location and method of registration, and/or the precinct in which the voter believes he or she is registered to vote, in order to facilitate the work of the canvassing board. Election officials should post notice of the penalties for violation of election laws and procedures on provisional ballot envelopes. The notices should be coordinated for uniformity within the state.

The presentation of affidavits should be uniform across the state. Uniform standards for verifying provisional ballots should be developed and applied to all ballots within a state in order to facilitate the verification process and prevent confusion within the system.

As in all aspects of the electoral process, the secrecy of the ballot must be maintained during the provisional balloting process. The provisional ballot envelope number should only be associated with the provisional ballot envelope, including the verification of whether or not the ballot was counted, and not the provisional ballot itself.