



POST-ELECTION LAW AND PROCEDURE IN NEVADA: RECOUNTS AND ELECTION CONTESTS

BY BRADLEY SCOTT SCHRAGER, ESQ.

In a democracy where voting rights are fundamental, there is no more pressing task than getting elections right: counting votes accurately, declaring winners and installing elected officials in their rightful offices. While Nevada has a great reputation for well-run elections and top-notch registrars, elections are sometimes messy.

There are no perfect elections. Voters go to the wrong precincts. They show up to vote even though they have asked for absentee ballots. Scanning machines sometimes misread hand-marked ballots. A hundred other things go wrong every cycle. Because many of the thousands of election workers are volunteers, and human, completely accurate vote counts are not always possible. This is why every county clerk everywhere likely utters a silent prayer on Election Day morning: “Please Lord, whoever wins, don’t let it be too close....”

When it is “too close,” Nevada has procedures in place for recounting, declaring victors and mounting court challenges to official results. Nevada’s laws covering each phase are not perfect and there is room for improvement and greater efficiency, but overall Nevada has avoided the kind of post-election crises that have struck in states such as Florida in 2000, (*Bush v. Gore, Presidency*), Washington in 2004, (*Gregoire v. Rossi, Governorship*) and Minnesota in 2008, (*Franken v. Coleman, U.S. Senate seat*), and recent recounts have proceeded smoothly.

Recounts (NRS 293.400 - 293.405)

Unlike many other states, Nevada has no provision for automatic recounts, no matter how close the election-night tally. Instead, any defeated candidate may demand a recount of the vote, if he or she files a demand within three days of the canvass of the vote by the appropriate body. The county clerk of each affected county then appoints a recount board to conduct the proceedings. The candidate must also deposit the estimated cost of the recount along with the demand. The cost in a municipal or legislative recount may be nominal; in a statewide or county-wide race, of course, it can be quite high. A successful recount, however, triggers a refund to the candidate.

Nevada does not provide for a full hand recount on demand – at least not initially. Nearly all of the ballots cast in this state are by electronic touch-screen machines, which present certain problems in the recount setting. As everyone who has voted on a touch-screen machine may recall, Nevada requires a voter-verified paper audit trail that is shown to the voter in the machine’s window prior to the casting of the ballot. However, state law does not contain a clear mechanism for using such “receipts” in a recount.

Instead, during a Nevada recount, the cartridges containing the electronic records of the votes on each machine are run through computer counters a second time, and the recounted results are compared to the original tallies. Luckily, Nevada’s touch-screen machines are exact – that is, they record votes accurately as cast, which may make up for the lack of a true method for recreating the vote through a documentary record.

continued on page 18

POST-ELECTION LAW AND PROCEDURE IN NEVADA

continued from page 17

The paper ballots that exist in Nevada are mainly absentee and provisional ballots. These have the greatest potential for possible miscounts, as ballots marked by hand are subject to error by the voter, over- and under-voting, misreading by machine, etc.

A candidate demanding a recount must designate in the demand, the ballots from 5 percent of the precincts, or a minimum of three precincts, which participated in the election. These are the ballots, initially, that the appointed recount board will examine. Touch-screen cartridges from these precincts are re-run and paper ballots are scrutinized, along with any duplicate or rejected ballots from Election Day, and the resulting count is compared to the original tally. If the recount “shows a total combined discrepancy of all precincts selected, equal to or greater than 1 percent or five votes, whichever is greater,” the clerk will order a recount of all the ballots for the office. In other words, the opportunity for a full recount of all ballots only arises if the sampling demonstrates a significant error (NRS 293.404(5)).

Though perhaps effective in most instances, this procedure deserves reconsideration by the Legislature. What happens, for example, if a discrepancy arises that is less than 1 percent or five votes, but still changes the outcome of a razor-close election? Under a strict reading of the law, no full recount could take place. In general, it is time to move away from sampling. If a candidate wishes to demand, and pay for, a full recount of all ballots in a race, that should be his or her prerogative.

Most importantly, a recount is not an opportunity for a candidate to challenge votes cast on Election Day. A recount is just that: a re-counting of the ballots. The time to challenge votes and ballots is in the election contest phase.

Election Contests (NRS 293.407 - 293.433)

Any candidate or registered voter may contest the election of any candidate for office. This is true, at least, for non-legislative offices; Congress and the Nevada Legislature are constitutionally charged with determining the qualifications of their own members, and so have their own procedures for contesting elections to those bodies.

Election contests are court cases. District courts are empowered to hear argument, take evidence, recount ballots and make rulings regarding the legal entitlement of candidates to office. It is in the contest phase that charges of illegal voting, malfeasance, mistakes, malfunctions or ineligibility of a declared winner can affect the election's outcome. Election results can be confirmed, annulled or reversed, depending on the circumstances, which may result in a new winner being declared or even a vacant office necessitating an appointment or a special election.

The case constituting the election contest is a special proceeding, with its own rules. The complaint, or contest statement, must be filed by the contestant within five days of the completion of the recount, or within 14 days of the election if no recount was demanded and conducted. The district court will then set the matter for expedited treatment, and may refer aspects of the case to a special master, depending on the complexity of the case. Investigations may take place, witnesses may be deposed and ballots may be entered into evidence.

During the pendency of an election contest, the previously-declared winner of the election is entitled to take office, and because there is no strict time limit on such cases other than the charge to proceed expeditiously and efficiently, the final result may mean the removal from office of a sitting public official.

Evidence is a particular problem in Nevada's election contest law; however, this is something the Legislature may wish to clarify as well. The thorniest problem in election litigation arises when it comes to light that individual voters may have cast invalid or illegal ballots in sufficient numbers to have affected the outcome of the election. This may have occurred through no fault of the voter, who was perhaps allowed to vote in the wrong precinct due to poll worker error, or inadvertently allowed to cast both an absentee and an in-person ballot. In a tight election, such votes may make the difference.

What do we do in these circumstances? The secrecy of the ballot in America is near-sacred, but do we put such voters under oath in deposition or on the witness stand and demand they reveal their votes? Do we do this weeks or months after the election, when everyone knows the testimony of these few voters will decide the election? Do we satisfy ourselves that any set of identifiable voting errors, greater than or equal to the margin between candidates, ought to set aside the result, so that we may preserve the right to cast a private ballot?

Nevada law is presently unclear on this important point. NRS 293.410 seems to point in both directions, attempting to distinguish between an "illegal vote,"

which must be proven to have benefitted one or another candidate, and an "error" by election workers, which need not be revealed. But is a ballot unwittingly cast in the wrong precinct through poll worker mistake an *illegal vote* or an *error*? The prospect of lawyers questioning voters about their secret ballots is a distasteful one, and the Legislature should make clear the very rare circumstances in which we might allow that to occur.

Conclusion

Nevada post-election law is adequate to its task and, with some study, clear to both the practitioner and candidate. There are holes that need to be filled through legislative action, certainly, but Nevada can be proud that its recounts and challenges are handled with the same respect for fairness, transparency and professionalism as the elections themselves. ■



BRADLEY SCOTT SCHRAGER is of counsel at Fennemore Craig in Las Vegas. He represents candidates, parties and PACs regarding campaign issues, and handles ballot initiative matters and other government affairs litigation at the trial and appellate levels.