



ELECTION LAW UPDATE 2019

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INTRODUCTION

The Election Law Update is a guide for election officials on topics related to election administration. This Update is based upon reported as well as unreported cases the State Board is a party to or made aware of.

The Update is not an exhaustive review of every election law case. It is simply a starting point. It does not replace the need to seek the advice of counsel.

Please feel free to contact our office if you are aware of any cases that should be listed or if you require any additional information.

REGISTRATION AND ENROLLMENT

To vote in an election in New York State, a person must be registered to vote (NY Const. Art II § 5; Election Law § 5-100). Registration with the County Board of Elections entitles a person to vote in all contests for public office that occur relating to the political jurisdictions wherein the person resides (NY Const. Art II § 6).

Residency

Residency is rarely challenged at the time a person registers to vote. Typically, residency issues arise in the absentee and affidavit ballot canvassing process, the petitioning process or when a candidate's residency or duration of residency is challenged. A voter's residence and duration of residence determines where the person may register to vote and sometimes whether a person can be a candidate for a public office. When and how residency may be challenged depends on the specific context.

Voter Residency

In determining residency, the Board may consider the voter applicant's financial independence, business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse and children, if any, leaseholds, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration and such other factors that it may reasonably deem necessary to determine the qualification of an applicant to vote within the Board's jurisdiction (Election Law § 5-104 [2]). "The crucial factor in determining if an individual is qualified to register and vote from a particular residence is whether he or she has manifested an intent to adopt that residence as a permanent and principal home coupled by his or her physical presence there 'without any aura of sham'" (*Matter of Thompson v Karben*, 295 AD2d 438, 439 [2d Dept 2002], citing *People v O'Hara*, 96 NY2d 378, 385 [2001], quoting *Matter of Gallagher v Dinkins*, 41 AD2d 946, 947 [2d Dept 1973]; *aff'd* 32 NY2d 839 [1973]).

Dual Residency

A person with two residences "may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law" (*Ferguson v McNab*, 60 NY2d 598, 600 [1983]; *Matter of Willkie v Delaware County Board of Elections*, 55 AD3d 1088 [3d Dept 2008] [authorizes a choice of voting place for those who own or maintain dual residences and rejecting a limited interpretation that voting rights may only be premised upon "domicile"]).

In *Matter of Shafer v Dorsey* (43 AD3d 621 [3d Dept 2007], *lv denied* 9 NY3d 804 [2007]), in the context of a candidate challenge under Election Law § 16-102, the Court denied the challenge on grounds of dual residency affording the candidate the right to choose from which of his residences he would run, “with emphasis on Dorsey’s ‘expressed intent and conduct’... and finding no fraudulent or deceptive motive in Dorsey’s choice of residence” (*Shafer* at 623 [quoting *People v O’Hara* at 384]; see also *Matter of Johnson v Simpson*, 43 AD3d 478 [2d Dept 2007] *lv denied* 9 NY3d 804 [2007]; *Maas v Gaebel*, 129 AD3d 178 [2d Dept 2015] [holding “fact that one’s position on a specific political issue may serve as a motivating factor to register to vote in a place where he or she has established a *bona fide* residence does not render such a residence a ‘sham’”]).

The Second Circuit Court of Appeals observed in *Wit v Berman* (306 F3d 1256 [2d Cir. 2002]) that "New York has responded to this administrative difficulty [persons with multiple homes] in a pragmatic way. New York courts have held that, rather than compel persons in appellants' circumstances to establish to the satisfaction of a registrar of voters or a court that one home or the other is their principal, permanent residence, they can choose between them" (*Wit* at 263; see also *People v O’Hara*, 96 NY2d 378, 385 [2001] [“[a]n individual having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law”] quoting *Matter of Ferguson v McNab*, 60 NY2d 598, 600 [1983]). “This pragmatic approach lessens the burdens on registrars, who in most cases need only verify an address, and on people like appellants, who otherwise might be turned down at both places and have to go to court in order to be able to vote anywhere” (*Wit* at 1262).

Residency of Absentee Voter

Generally, in a proceeding pursuant to Election Law § 16-106 for judicial review of the canvass of votes in a general election, the courts lack authority to render a determination as to whether a voter was ‘lawfully registered and eligible to vote’ (*Matter of Johnson v Martins*, 79 AD3d 913, 920 [2d Dept 2010] quoting *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 20-21 [2d Dept 2004]). However, “[w]ithin the limited authority afforded under article 16, Supreme Court has jurisdiction over allegations of certain serious irregularities in the conduct of a general election including...challenges to absentee ballots based on **nonresidency**.” (*Matter of Delgado v Sunderland* (97 NY2d 420, 423 [2002] [emphasis added]; *Mondello* at 21; *Matter of Amedore v Peterson*, 102 AD3d 995, 998 [3d Dept 2013], *lv denied* 20 NY3d 1006 [2013]).

A challenge to an absentee voter’s residency may be made at the time of canvass. The objector bears the burden of overcoming the presumption that the voter resides where he/she is registered to vote (*Matter of Amedore v Peterson*, 102 AD3d 995, 998 [3d Dept 2013], *lv denied* 20 NY3d 1006 [2013]). An allegation that an

absentee voter simply does not reside where he or she claims to reside falls into the category of “certain serious irregularities” courts will entertain at the time of the canvass. In contrast, a challenge to a person’s selection of a voting address as between dual residences may be in a different category. In *Matter of Fingar v Martin* (68 AD3d 1435 [3d Dept 2009]) the Court held “to the extent that petitioners do, in fact, premise any challenges on voters’ **dual residency**, we note that the law regarding a voter choosing among residences for election purposes is interpreted broadly and a challenge to such residency should be made pursuant to the procedure to challenge the issuing of the absentee ballots and not, as here, after those ballots have been cast” (*Id.* at 1436 [internal citations omitted]). In *Amedore*, the Third Department clarified that “challenges to absentee ballots based on **nonresidency**” were permitted at the time of canvass and “[t]o the extent that *Matter of Fingar v Martin* holds that individuals who are not commissioners of the board of elections must raise such arguments at the time an absentee ballot is issued, it is not to be followed” (*Amedore* at 998, n5 [quoting *Delgado* at 423; see generally *Messina v Albany County Bd. Of Elections*, 66 AD3d 1111, 1114 [3d Dept 2009]). An absentee voter whose ballot is challenged based on nonresidency is not a necessary party to an Election Law § 16-106 challenge to the canvass of the ballot. The Third Department rejected the argument that a challenge to an absentee ballot based on the voter’s nonresidency is in essence a challenge to the voter’s registration (*Meyer v Whitney*, 132 AD3d 1062 [3d Dept 2015]).

Residency of Candidate

There is no *state* law requirement that a candidate for a local office reside in the district in which election is sought at the time the petition is filed (*Clark v McCoy*, 196 AD2d 607 [2d Dept. 1993] *lv denied*, 82 N.Y.2d 653). “Election Law § 6-122 simply prohibits a person from being designated or nominated for public office who cannot meet the statutory or constitutional qualifications at the ‘commencement of the term of such office’. Public Officers Law § 3 (1) adds that candidates satisfy residency requirements as of the time they are elected” (*Weidman v Starkweather*, 80 N.Y.2d 955 [1992]).

Local charters or laws may impose more stringent residency requirements for local offices (*Scavo v Albany County Board of Elections*, 131 AD3d 796 [3d Dept 2015] [holding board properly exercised ministerial powers in finding county legislature candidate did not meet one-year county charter residency requirement when his address on designating petition was not in the district]).

Candidates for Governor or Lieutenant Governor must be a resident of the state for the “five years next preceding the election” (N.Y. Const. Art. IV Section 2). Similarly, candidates for the office of Member of New York State Senate or Assembly must meet two constitutional residency requirements: Five years of residency in the state and residency in the district for “twelve months immediately preceding his or her election.”

The residency period must be continuous, not intermittent (*Bourges v LeBlanc*, 98 NY2d 418 [2002]). For the election immediately following redistricting, a candidate for state legislature is not required to have lived in the district but must have resided within the county in which the district is contained for twelve months immediately before the election (*NY Const, Art. III, Section 7*). The factors for determining voter residency apply equally to candidate residency. A challenge to a candidate's residency will fail unless "clear and convincing evidence" demonstrates the challenged candidate does not meet the constitutional residency requirement (*Weiss v Teachout*, 120 AD3d 701 [2d Dept 2014]; see also *Jones v Blake*, 120 AD3d 415 [2014]).

Courts examine several factors to determine whether a candidate meets a residency requirement. There is no single test. But notably the Court of Appeals held that a candidate fails the Constitutional residency requirement when he or she registers to vote in another jurisdiction during the required residency period. In *Glickman v Laffin* (27 N.Y.3d 810 [2016]), the Court of Appeals held that a candidate's prior voter registration in Washington, D.C. precluded him from establishing the required continuous five-year residency in New York. The court held that the D.C. voter registration broke the chain of his New York electoral residency which did not recommence until he registered again to vote in New York.

Similarly, in *Hoose v Malick*, the trial court found that an upstate candidate for State Senate failed the one-year district residency requirement because the candidate was registered to vote in New York City until July, 2016 (two months before the primary), and the candidate testified that she had made no plans to change her election residency until July 2016 (*Hoose v Malick*, Sup Ct, Albany County, October 19, 2016, Connolly, G, Index No. 5800/16; see also *Notaristefano v Marcantonio*, 164 AD3d 721 [2d Dept 2018]). In *Dilan v Salazar* appearing on the rolls as a registered voter in another state during the residency period was distinguished from voting or filing a registration application in another state during the residency period (164 AD3d 713 [2d Dept 2018]). Accordingly, a candidate on the voter rolls in Florida during the residency period who had neither voted nor registered during the residency period was not removed from the ballot (*Id*).

Issues relating to sufficiency of the description of a candidate's address on a petition or certificate are covered in the Petition section.

Parties

The term "party" means any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor. Election Law § 1-104 (3). The term "major political parties" means the two parties which polled for their respective candidates for the office of governor the highest and next highest number of votes at the last preceding election for such office. Election Law § 1-104 [24].

Rules of New Party

Three appellate division decisions in 2015 grappled with the validity of the rules of the Women's Equality Party pursuant to Election Law § 6-128. The Third Department in *Grasso v Cleveland* found “no statutory support for petitioner’s assertion that the new party rules must be certified by a majority of the statewide candidates in the 2014 general election in order to be valid” (132 AD3d 1059 [2015]). The court noted one set of rules was certified by two statewide candidates, while the other two sets of rules were not certified by any statewide candidate of the new party. “Absent such statewide candidate support, they cannot be deemed rules of the WEP for the purpose of creating a ‘question or conflict relating to the rules or the rule-making body’” (*Id*; see also *DeLabio v Allen*, 131 AD3d 1340 [4th Dept 2015]; *Donovan v Cabana*, 132 AD3d 919 [2d Dept 2015] [decided on different grounds]; *Dadey v. Czarny*, 132 AD3d 1427 [4th Dept 2015] [decided on similar grounds]).

Certificates of Nomination By New Party

The certificate of nomination issued by a newly formed party pursuant to Election Law § 6-128 must include an affidavit “containing a statement by the presiding officer and secretary of the committee that they are such officers and the statements in the certificate are true.” In *McCormack v Jablonski* the Second Department found the challenged certificate included a “notarized signature” identifying the presiding officer and secretary, but not “a statement by either...attesting to the truth of the statements in the certificate” (132 AD3d 921 [2015]). The court determined “[t]he omission of such a statement constitutes a substantive departure from the mandates of the statute and not a mere error in form.”

Post Primary Reorganization

Under prior law, the powers of a newly elected party committee transitioned on primary day and the old committee had no authority to perform functions “in substantial matters” absent necessity pending the reorganization of the new committee (*Matter of Broacto v Tinari*, 157 AD3d 782 [2d Dept 2018]). Amendments to Election Law § 2-112 now provide that state committees shall organize between September 17 and October 1, and county committees will meet to organize between September 17 and October 6. Between the primary and the reorganization, “the existing...committee shall exercise all legal authority. Upon conclusion of the organization meeting, the new ... committee shall assume all legal authority vested in the previously organized committee.”

While courts will intervene to resolve intraparty disputes implicating a failure to follow the Election Law or the party’s own rules, judicial intervention is only warranted

upon a clear showing of impropriety. In dispensing with objections that vacancies on the county committee were not filled by a weighted roll call vote, the Court noted “no rival candidates were nominated, though an opportunity to nominate opposing candidates was provided” (*Matter of Auerbach v Suffolk County Comm of the Conservative Party*, 2019 NY Slip Op 02515 [2d Dept 2019]).”The use of a voice vote to select an unopposed candidate or slate of candidates at political party meetings is not prohibited by statute [citation omitted] and is not unusual or unprecedented, particularly in meetings, such as the one involved here, in which the number of participating members is in the hundreds and the calling of the roll would be protracted” (*id*).

Changing Party Enrollment

A new voter both registers to vote and enrolls in a party (optional) simultaneously by submitting a voter registration application to the board of elections. Any registered voter may thereafter submit a *change of enrollment* to switch political parties at any time. However, under current law, as of publication, the change of party enrollment is not effective until the Tuesday following the next General Election, provided the change of enrollment was received by the board at least twenty-five days before the General Election (Election Law § 5-304 [3]). The statutory delay for enrollment changes has withstood constitutional challenges. (*Rosario v Rockefeller*, 410 752 [1973]; *VanWie v Pataki*, 87 F Supp 2d 148 [NDNY 2000]). There has been a significant piece of legislation passed by both houses that, if signed by the Governor, will alter change of enrollment effective dates. Please see the pending legislation section for more information. Please see page 53 below.

Political Party Enrollment and the Closed Primary

Generally, only voters enrolled in a political party may vote in the party's primary election or participate in the party's caucus (Election Law §§ 8-302 [4], 6-108 [3] [towns], 6-204 [4] and 15-108 [2] [d] (villages). However, a political party may opt to allow non-party members to vote in their primary election as specified by party rule (*State Committee of the Independence Party v Berman*, 294 F Supp 2d 518 [SDNY 2003]). Where the Independence Party of Richmond County rules were silent with respect to non-party members voting in a party's primary, the Court held that the Executive Committee could adopt an ad-hoc resolution allowing the unaffiliated voters of Richmond County to vote for Independence Party candidates for Richmond County public offices in the primary election (*Independence Party of Richmond County v Nero*, 332 F Supp 2d 690 [SDNY 2004]).

Cancelling Enrollment

Election Law § 16-110 [2] establishes a procedure for cancelling a voter's enrollment when a party finds the voter is "not in sympathy with the principles of such party." If a political party's procedure meets the statutory requirements and the court finds the process was "just", the court will order the cancellation of a voter's enrollment as requested by the party. A political party's application to cancel the enrollment of voters who declined to appear before the party's investigation committee was summarily granted (*Rhoades v Westchester County Board of Elections*, 115 AD3d 958 [2d Dept 2014]). In *Green Party of Erie County v. Erie County Board of Elections*, though the challenged voter did not appear before the party's investigation committee, the voter provided an affidavit and sent an attorney to the hearing (54 Misc.3d 318 [Sup Ct, Erie 2016]). The court held the investigation committee was obliged to make evidentiary findings to justify disenrollment (*id*).

Once a voter is disenrolled pursuant to statutory proceedings, the voter is no longer eligible to vote in the party's primary elections or caucuses. The *Green Party* case also examined the consequence of disenrollment on the voter's status as a party's candidate. The court concluded if a candidate is disenrolled subsequent to accepting the nomination of a party, removal from the ballot is not appropriate because Election Law 16-110 makes no mention of such removal. (*Id. [dicta]*.)

Affiliated Voters

Voters may choose to be unaffiliated with any party or organization if they do not wish to enroll in a party. In such a case they are deemed enrolled "blank." Voters may alternatively choose to be affiliated with a political organization. (See *Green Party of New York State v New York State Board of Elections*, 389 F. 3d 411 [2d Cir. 2004.]) A voter may write in the name of the group the voter wants to affiliate with on the "other" line on the voter registration form. The board of elections is only required to maintain separate lists of affiliated voters who affiliate with an entity that placed a candidate for governor on the ballot at the last gubernatorial election. As a result of the 2018 gubernatorial election, the board of elections must maintain a current list of voters who were registered in the "Reform" or "Women Equality Party" prior to November, 2018 (and have not changed enrollment otherwise), or who have since written "Reform" or "Women's Equality Party" on the "other" enrollment line of the voter registration form..

ELECTION DAY

Polling Place Accessibility

In *Disabled in Action v Board of Elections in the City of New York* (752 F3d 189 [2014]), the Second Circuit Court of Appeals held that under federal law, persons with disabilities have a right to “fully participate in BOE’s voting program”. This includes “the option to cast a private ballot on election days.” “By designating inaccessible poll sites and failing to assure their accessibility through temporary equipment, procedures, and policies on election days, BOE denied plaintiffs meaningful access to its voting program” (*Id*). To remedy such violations, federal courts are empowered to direct remedial actions. The District Court granted two disability advocacy groups summary judgment against the New York City Board of Elections under the Americans with Disabilities Act (42 USC §12131 *et seq.*) and the Rehabilitation Act of 1973 (29 USC §794 *et seq.*) to remedy “pervasive and persistent access barriers at poll sites” operated by the NYCBOE (*United Spinal Association v Board of Elections of the City of New York*, 882 FSupp2d 615 [SDNY 2012]). On May 13, 2013, the court’s modified order required an Americans with Disabilities Act Coordinator at every NYCBOE poll-site; required the NYCBOE to contract with a third-party disability access trainer and reporting of accessibility complaints to the plaintiffs in the case within 45 days of any general or special election. NYCBOE monitors were required to visit each polling site twice on any election day to assess accessibility.

Two identical cases were brought by the New York Attorney General against the boards of elections in Delaware and Schoharie counties (*New York v County of Delaware*, 82 FSupp2d 12 [NDNY 2000]); *New York v County of Schoharie*, 82 FSupp2d 19 [NDNY 2000]). A third case brought against Otsego County was settled. The District Court in granting a preliminary injunction found that (1) the county board could be sued because of its role in selecting poll sites, and (2) compliance with federal and state building requirements for accessibility must be implemented by counties to the extent “feasible.”

Poll site accessibility requirements under state law now harmonize with federal requirements. As a matter of state law, poll sites must be accessible and “comply with the accessibility guidelines of the Americans with Disabilities Act of 1990,” and local boards are required to assess and certify compliance (Election Law 4-104 § [1-a]; 9 NYCRR Part 6206).

Write-In Voting

The ability to cast a write-in vote is required when there is a contested primary election for public office or party position (Election Law §7-106 [9]).

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 (*Rosenblum v Tallman Fire Dist*, 117 AD3d 1064 [2d Dept 2014]; *Guilianelle v Conway*, 265 AD2d 594 [3d Dept 1999]).

No write-in ballot shall be counted for any person for any office whose name appears on the ballot as a nominated or designated candidate for the office or position in question (Election Law §8-308 [2]; *Francis v Palombo*, 2 AD3d 1148 [3d Dept 2003]).

Absentee Voter

Mere proof that an absentee ballot voter is in the county on the day of the election is not sufficient to void the ballot. A challenger must show the voter did not have a “good-faith belief” that they would be absent from the county on Election Day (*Sherwood v Albany County Board of Elections*, 265 AD2d 667 [3d Dept 1999]). Failure to complete the information required for the absentee ballot will void the ballot (*Carney v Davignon*, 289 AD2d 1096 [4th Dept 2001] citing Election Law § 8-302 [3] [e] [ii]; *Kolb v Casella*, 270 AD2d 964 *lv denied* 94 NY2d 764). Residents of Puerto Rico are not entitled to absentee ballots to vote for the office of President of the United States (*Romeu v Cohen*, 265 F3d 118 [2d Cir 2001]).

POST ELECTION

Review of Cast Ballots

Ballots where voters intentionally marked outside the voting square have been found invalid (*Kolb v Casella*, 270 AD2d 964 [4th Dept 2000]; *Boudreau v Catanise*, 737 N.Y.S. 2d 469 [4th Dept 2002], citing, Election Law § 9-112 [1], *Pavlic v Haley*, 20 AD2d 592, *aff'd* 13 NY2d 1111).

When there are written words intentionally placed on the ballot by the voter, it has been held the entire ballot is void (*Johnson v Martins*, 79 AD3d 913, 921-922 [2d Dept 2010]; *Matter of Scanlon v Savago*, 160 AD2d 1162, 1163 [3d Dept 1990]).

A court’s analysis of markings on ballots is very fact-specific and contextual. Recently the Second and Third Departments of the Appellate Division¹ reached different conclusions regarding words written on the ballot by a voter to clarify the voter’s selections.

The following three cases summarize much of the law on ballot markings and demonstrate two very different approaches leading to different conclusions.

¹ Because of the significant differences in the recent appellate division holdings it is important to note: The *Young* case is the controlling law in the counties of the Third Department, and the case law in the Fourth Department (i.e. *Kolb v Casella*) mirrors *Young*. The *Tallman* and *Kelley* case apply in the Second Department. A chart of which counties are included in which Department is on page 58.

In *Young v Fruci* (112 AD3d 1138 [3d Dept 2013]) the Court held:

Pursuant to Election Law § 9-112 (1), “[t]he whole ballot is void if the voter . . . (d) makes any mark thereon other than a cross X mark or a check V mark in a voting square, or filling in the voting square, or (e) writes, other than in the space provided, a name for the purpose of voting.” While “inadvertent marks on a ballot do not render a ballot void in whole or in part[,]’ extraneous marks that could serve to distinguish the ballot or identify the voter” render the entire ballot invalid (*Matter of Brilliant v Gamache*, 25 AD3d 605, 606-607 [2006], *lv denied* 6 NY3d 783 [2006], quoting *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 24 [2004]). Thus, where the challenged marks on a ballot constitute written words, deliberately placed on the ballot by the voter, the entire ballot is rendered void because those markings “could distinguish the ballot from others cast and consequently mark the ballot for identification” (*Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d at 25; see *Matter of Johnson v Martins*, 79 AD3d 913, 921-922 [2010], *aff’d* 15 NY3d 584 [2010]; *Matter of Scanlon v Savago*, 160 AD2d 1162, 1162-1163 [1990]). Here, on the absentee ballot marked exhibit No. 1, in the box for “Proposal Number Four,” the apparent “Yes” vote was crossed out and the words “No vote” were written below the box, along with letters that appear to be initials. Similarly, on the absentee ballot marked exhibit No. 2, in the box for “Proposal Number Five,” there is a horizontal line drawn through both the “Yes” and “No” boxes with the words “NO VOTE” handwritten next to the boxes. Thus, as Supreme Court correctly determined, the “written words deliberately placed on the ballot by the voter[s] render the entire ballot[s] invalid” [emphasis added].

In *Rosenblum v Tallman Fire Dist*, (117 AD3d 1064 [2d Dept 2014]) the Court, citing to 9 NYCRR Subtitle V, Part 6210.13, in the context of a fire district election, focused on voter intent:

Although the voter used a mark next to each candidate’s names, he or she clearly indicated his or her choice, including by writing the words “no” next to petitioner’s name and “yes” next to [other candidate’s name]...Since the voter clearly

indicated his or her selection, the fact that his or her use of multiple marks did not strictly comport with the ballot instructions did not render the ballot invalid.

Tallman cites *Matter of Kelley v Lynaugh* (112 AD3d 862 [2013]) decided a year earlier in which the Second Department outlined its analysis of ballot markings, generally:

“A vote for any candidate or ballot measure shall not be rejected solely because the voter failed to follow instructions for marking the ballot. . . . A mark is considered valid when it is clear that it represents the voter's choice and is the technique consistently used by the voter to indicate his or her selections” (9 NYCRR 6210.13 [a] [2], [3]; see *Matter of Stewart v Chautauqua County Bd. of Elections*, 14 NY3d 139, 149 [2010]; *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d 18, 23-24 [2004])...Supreme Court did not err in determining that the inconsistent and extraneous markings on the absentee ballot designated as exhibit 8 rendered it impossible to determine the voter's intent (see 9 NYCRR 6210.13 [a] [2], [3]; *Matter of Stewart v Chautauqua County Bd. of Elections*, 14 NY3d at 149; cf. *Matter of Mondello v Nassau County Bd. of Elections*, 6 AD3d at 24). ... Based on these same principles, the court properly determined that the absentee ballots designated as exhibits 12, 13, 14, and 22 were valid because the markings used by each voter clearly and consistently indicated his or her choice on the ballot...However, the Supreme Court erred in determining that the absentee ballots designated as exhibits 19, 20, 21, and 23, and the affidavit ballot designated as exhibit 24, were invalid. Although the markings on these ballots did not strictly comport with the instructions for marking the ballot, they clearly represented each voter's choice (see *Matter of Stewart v Chautauqua County Bd. of Elections*, 14 NY3d at 149).

Ballots may not be counted where the signature on the envelope is “substantially different” from the signature on the voter’s registration card, or the voter failed to sufficiently fill out the affidavit ballot envelope (*Kolb v Casella*, 270 AD2d 964 [4th Dept 2000], citing *Hosley v Valder*, 160 AD2d 1094 [3d Dept 1990]; *Matter of Kelley v Lynaugh*, 112 AD3d 862 [2d Dept 2013]).

Affidavit Voting

Affidavit ballots cast by voters at the wrong election district but within the correct poll site should be counted. Conversely, affidavit ballots cast at the wrong poll site cannot be counted (*Panio v Sunderland*, 4 NY3d 123 [2005]).

Abandoned / Non-machine Processable Optical Scan Ballots

In Stewart v Chautauqua County Board of Elections (14 NY3d 139 [2010]) the Court of Appeals distinguished *abandoned* ballots (which are not to be counted) and ballots that voters intended to have counted but were un-readable by the scanner (which are to be counted):

We agree with the Appellate Division that the Board of Elections properly hand-counted the two unscanned optical scan ballots. The applicable regulation, which “appl[ies] in determining whether a ballot has been properly voted and whether a vote should be counted,” provides: “If a voter leaves the voting machine or system without casting their ballot, a bipartisan team of election inspectors shall cause the ballot to be cast as the voter left it, without examining the ballot” (9 NYCRR 6210.13 [A][11][a]). If the voter leaves a ballot “in a privacy booth” without casting the ballot, the ballot is spoiled (9 NYCRR 6210.13 [A][11][b]). But, if a ballot is “non-machine processable as submitted by the voter, [it] shall be manually counted by a bipartisan team of election inspectors and such vote totals shall be added to the canvass” (9 NYCRR 6210.13 [A][8]).

(*Stewart* at 148)

In reaching its decision, the Court specifically cited and applied several provisions of State Board regulation 9 NYCRR § 6210.13.

Audit Provisions

As a matter of law, following an election county boards of elections must conduct an audit of 3% of all voting machines, including any central count ballot scanners, utilized (NYCRR § 6210.18[c][1-3]).

Following the general election of 2010, Nassau County was required to audit 32 machines, 7 of them from the Seventh Senate District. Three types of errors were found: (1) less ballots in the ballot box than reflected on the machine tape; (2) more

ballots found in the ballot box than reflected on the machine tape, and (3) an undervote on the machine that was not detected by the visual audit.

The Democratic Commissioner found these findings to be unresolved discrepancies calling for an escalation of the audit, while the Republican Commissioner found reasons why these findings could have occurred and did not agree to an escalation or full manual count. A court case ensued. In *Johnson v Martins* (30 Misc3d 844 [Sup Ct, Nassau County 2010]) the Court heard arguments on the discrepancies and held “the term ‘reconcilable’ means that there is a clear and logical explanation/reason why the ‘discrepancy’ occurred” (*Id.* at 852). Based upon this statutory interpretation, the Court found that the discrepancies were resolvable and there was “insufficient basis to order a manual audit of the voter verifiable records” (*Id.* at 855).

On appeal to the Appellate Division, appellants contended they met the statutory showing necessary to permit the trial court to order an additional manual audit, and further contended the trial court improperly considered factors promulgated by the state board of elections, thus erroneously deciding not to direct a further manual audit. The Appellate Division found the trial court “did not err, when in the exercise of its discretion, it utilized factors enumerated by regulation which were material to its determination including ‘whether, when projected to a full audit, the discrepancies detected....might alter the outcome of the contest’” and upheld the Supreme Court’s conclusion that an additional manual audit was not warranted (*Johnson v Martins*, 79 AD3d 913, 918 [2d Dept 2010], quoting 9 NYCRR 6210.18 [h] [7]).

From the Appellate Division, the case went to the Court of Appeals (15 NY3d 584), which ruled:

In order for a denial of a manual audit under either subdivision of Election Law §16-113 to be deemed an abuse of discretion as a matter of law, the record must demonstrate the existence of a material discrepancy likely to impact upon the result of the election, or flagrant irregularities in the election process. The regulations recognize that some level of discrepancy is inevitable. That mere fact begs the question as to the degree of the discrepancy requiring a manual audit. The statute allows Supreme Court to direct a manual audit where the evidence shows a discrepancy indicating “a substantial possibility” that the result of the election could change (see Election Law § 16–113[2]). There is no such legal error where, as here, the discrepancy rate is significantly below the margin of victory, such that there is no substantial likelihood that the result of the election would be altered by the conduct of a full manual audit. Moreover, there is no evidence that the discrepancies arose from any flagrant irregularity in the election process. Therefore, on this record, this

Court is without the power to disturb the discretionary determination below.

The County Boards of Elections have the authority to escalate the 3% audit on their own initiative under Election Law § 9-211(3), if both Commissioners agree.

Review of Validity of Primary Election

The party seeking to challenge the validity of a primary election must establish the “existence of irregularities ‘which are sufficiently large in number to establish the probability’ that the result of the election was affected” (*Thompson v Board of Election of the County of Rockland*, 287 AD2d 667 [2d Dept 2001]).

Review of Validity of General Election

The State Supreme Court is without jurisdiction to order a new election on a challenge to the General Election results. Only the Attorney General can challenge the results of a general election through a *quo warranto* action commenced pursuant to Executive Law § 63-b (*Delgado v Sunderland*, 97 NY2d 420 [2002]). A federal constitutional challenge to the validity of a General Election must be predicated on a showing of an *intentional* act of the government that caused the election results to not reflect the will of the voters. Unfortunate but unintended irregularities, even if outcome changing, are insufficient basis for federal jurisdiction (*Shannon v Jacobowitz*, 394 F3d 90 [2d Cir 2005] [malfunctioning voting machine]).

The Supreme Court also lacks jurisdiction to conduct a canvass or determine a winner before the Board of Elections has conducted its canvass (*Testa v Ravitz*, 84 NY2d 893 [1994]). However, where petitioners objected to the county board’s invalidation of absentee ballots, the Court of Appeals held that the Supreme Court does have jurisdiction and authority after the board’s canvass to direct a recanvass or correction of error (*Alessio v Carey*, 10 NY3d 751 [2008]).

PETITIONS

This section highlights issues related to designating and independent petitions. It is divided into sections covering the basic form of the petition, candidate related issues, petition signer issues, subscribing witness issues and placement on the ballot. There are also sections covering opportunity to ballot petitions and alterations.

Board of Elections Authority Regarding Petitions

Generally, the substantive authority of the board of elections over petition challenges is limited to defects discernable by reference to the document under review and the board's own records.

The Board of Elections, pursuant to Election Law § 6-154 [1] even without the filing of objections “was free to hold that the designating petition, which lacked the necessary number of signatures to support any of petitioners' candidacies, was facially defective and invalid in its entirety” (*Matter of Sloan v Kellner*, 120 AD3d 895 [3d Dept 2014]); *Scavo v Albany County Board of Elections*, 131 AD3d 796 [3d Dept 2015] [holding board of elections could rule on objection based on county charter residency requirement when petition filed by candidate clearly indicated he did not obtain timely residency within the district]).

In contrast, in a case challenging a petition designating judicial delegates and alternates, the Third Department held that the board of elections “invalidated the petitions out of a misguided interest in what the candidates might do at the [judicial] convention if elected, a matter that plainly does ‘not appear [] upon the face of the petition[s]’ and is beyond the Board's power to review” (*Matter of Conti v Clyne*, 120 AD3d 884 [3d Dept 2014]).

The Board of Elections has procedural authority to adopt rules requiring an objector to serve general objections upon each candidate whose petitions are the subject of the objections (*Matter of Zalocha v Donovan*, 120 AD3d 994 [4th Dept 2014] [relying on Election Law § 6-1549(2); 9 NYCRR 6204.1; *Matter of Grancio v Coveney*, 60 NY2d 608, 610]).

Form and Contents of Petitions

Petitions shall be in substantially the form set forth by the Election Law (Election Law §§ 6-132 [1], 6-140). The test of compliance is whether the petition form contains the required information. A slight rearrangement as to how the information is presented or an insignificant deviation in the wording is not a fatal defect (*Matter of Irvin v Sachs*, 129 AD2d 827 [2d Dept 1987]).

Pre-printing the name of petition signers' town on the signature line of a designating petition form does not render the petition invalid (*Collins v New York State Board of Elections*, 120 AD3d 882 [3d Dept 2014]).

Number of Signatures Needed

Election Law § 6-136 (designating petitions) and Election Law § 6-142 (independent nominating petitions) provide signature requirements for petitions.

The calculation of the number of signatures required for a particular office is

determined from the enrollment lists released immediately preceding the signature gathering period, notwithstanding any subsequent reduction in the established number of enrolled voters (*Horwitz v Egan*, 264 AD2d 454 [2d Dept 1999]).

The ballot access requirement of signatures from five percent of the relevant voter group ordinarily does not violate constitutional rights (*McMillan v New York City Board of Elections*, 234 F3d 1262 (2d Cir 2000), citing *Prestia v O'Connor*, 178 F3d 86, 87 [2d Cir 1999]).

The Fourth Department concluded in *Vescera v Stewart* (120 AD3d 990 [2014]) that citywide signature requirements apply to the office of “Member at Large of Common Council” as opposed to the “all the voters of...a councilmanic district” signature requirement.

Vescera also held the statutory provision preventing a smaller political subdivision from having a larger signature requirement than a larger political subdivision of which the smaller is a portion “has no application to public offices in political subdivisions for which a specific provision exists elsewhere in the statute.” The court held:

Election Law § 6-136 (2) (j) provides that the number of signatures required “[f]or any office to be filled by all the voters of any political subdivision, except as herein otherwise provided, contained within another political subdivision, [need] not . . . exceed the number of signatures required for the larger subdivision.” Petitioners therefore contend that their designating petitions require only 500 signatures because the City of Utica is wholly within a single assembly district (see Election Law § 6-136 [2] [i]). We agree with the court, however, that the phrase “except as herein otherwise provided” modifies “any political subdivision,” such that section 6-136 (2) (j) has no application to public offices in political subdivisions for which a specific provision exists elsewhere in the statute (see generally *Matter of Buffalo Columbus Hosp. v Axelrod*, 165 AD2d 605, 608 [1991]). Because section 6-136 (2) (e) applies to citywide public offices in the City of Utica, section 6-136 (2) (j) does not apply. The applicable signature requirement is therefore the lesser of 1,000 or five percent of the number of enrolled Democrats in the City of Utica. Here, the five percent figure, i.e., 708, is the lesser number, and the court properly determined that the designating petitions are invalid on the ground that they do not contain at least 708 valid signatures.

(Vescera at 991)

Invalidity of a Single Signature

The invalidity of a single signature, or a number of signatures, in the absence of fraud does not render the entire page invalid (*Matter of Kent v Bass*, 83 AD3d 898 [2d Dept 1981], *aff'd* 54 NY2d 776 [1981]; *DiSanzo v Addabo*, 76 AD3d 665 [2d Dept, 2010]).

No Requirement that Signatures Be Sequential

There is no requirement that signatures on a designating or independent nominating petition be in sequential date order (see Election Law § 6-134; *Matter of Kent v Bass*, 83 AD2d 898 [2d Dept 1981]; *Molloy v Scaringe*, 153 AD2d 78 [3d Dept. 1989]).

Cover Sheets

If there is substantial compliance and no evidence of confusion to either the voters or the board of elections, there is no basis to invalidate petitions for failure to comply with the petition cover sheet requirements (*Siems v Lite*, 307 AD2d 1016 [2d Dept 2003]; see also *Magelaner v Park*, 32 AD3d 487 [2d Dept 2006]). Cover sheet requirements are set forth in Election Law § 6-134, which delegates to the State Board of Elections the duty of promulgating regulations on cover sheets. The State Board has promulgated those regulations at 9 NYCRR § 6215. A board of elections must review the petitions within two business days to determine compliance with the cover sheet requirements (Id. at § 6215.7[a]). A candidate must be notified (id. at § 6215.7[b]) and given the opportunity to cure any defects in a cover sheet within three business days (Id. at § 6215.7[d]; *Pearse v New York City Board of Elections*, 10 AD3d 461 [1st Dept 2004]).

If a petition required a cover sheet under Election Law § 6-134 and 9 NYCRR § 6215.1 and none was filed, the failure to have filed a cover sheet is not curable under 9 NYCRR § 6215.7 (*Matter of Armwood v McCloy*, 109 AD3d 558 [2d Dept 2013], *lv denied* 21 NY3d 861 [2013]).

Page Numbers

The pages of a petition shall be numbered (Election Law § 6-134 [2]). While the failure to number the sheets of a petition will invalidate the petition (*Braxton v Mahoney*, 63 NY2d 691 [1984]), this defect is curable (*Matter of Zulauf v Martin*, 131 AD3d 656 [2d Dept 2015]; Election Law § 6-134 [2]; 9 NYCRR § 6215.7 [d]).

Prior to 2015, there was a split in the appellate divisions. The Second

Department held in 1997 that no cure was permitted for a failure to number pages, and the longstanding rule of strict compliance with the page numbering requirement was upheld (*Jaffe v Visconti*, 242 AD2d 345 [2d Dept 1997], *lv denied* 90 NY2d 805 [1997]). In contrast, the Third and Fourth Departments took the opposite view. “The three-day cure provision for designating petitions is available for technical violations of the regulations, including the omission of page numbers” (*May v Daly*, 254 AD2d 688 [4th Dept 1998], *lv denied* 92 NY2d 806 [1998]). The Third Department citing the *May* decision of the Fourth Department allowed the three-day cure provision of the election law to apply even when the page numbers were omitted (*Bonnett v Miner*, 275 AD2d 585 [3d Dept 2000]). In *Zulauf*, the Second Department recast its holding in *Jaffe* and now aligns to the Third and Fourth Department holdings (*Zulauf* at 656 [holding “[t]he addition of the three-day cure provision as part of the Ballot Access Law of 1996...has enabled candidates to correct technical errors, including the omission of page numbers” within the applicable period]).

Preamble

Date of election on petition must be stated accurately and correctly (*Sternberg v Hill*, 269 AD2d 730 [3d Dept 2000]; *Purtell v Kuczek* 129 Misc2d 166 [Sup Ct Montgomery County 1985] *aff'd* 112 AD2d 1092; *O'Connor v Salerno*, 105 AD2d 487 [3d Dept 1984]).

Committee to Fill Vacancies

The failure to list a committee to fill vacancies shall not be a fatal defect (Election Law § 6-134 [8]). However, if a vacancy occurs which may be filled by a committee on vacancies and no committee is listed, the petition fails and the vacancy cannot be filled (Election Law § 6-134 [8]); *Tinari v Berger*, 196 AD2d 798 [2d Dept 1993], *lv denied* 82 NY2d 656 [1993]).

Petition listing different committees to fill vacancies will not invalidate the petition when no vacancy has occurred (*Pascazi v New York State Board of Elections*, 207 AD2d 650 [3d Dept 1994], *lv denied* 84 NY2d 802 [1994]). However, if a vacancy occurs, there is no committee to act. A petition which names a committee on vacancies is not invalid because of the disqualification of one of the members of the committee on vacancies (*Brennan v Power*, 307 NY 818 [1954]). But if it only has one eligible member, it is the functional equivalent of no committee (*Markel v Smolinski*, 89 AD2d 1052 [4th Dept 1982], *aff'd* 57 NY2d 743 [1982]; *see also Hensley v Efman*, 192 Misc2d 782 [Sup Ct Nassau County 2002] [death of one of the three members of vacancy committee, prior to the filing of the petition invalidated the actions of the remaining members of the committee in filling a vacancy in a nomination]).

A candidate may be a member of the committee on vacancies (*Brandshaft v*

Coveney, 96 AD2d 914 [2d Dept 1983]).

Committee on vacancies may fill a vacancy created by the post- primary declination of an independent candidate by filing documents as soon as practicable as provided in Election Law § 6-158 [13]; *Cipolla v Golisano*, 84 NY2d 450 [1994]).

Candidate on Petition

Qualifications for Office

Boards must assume that the candidate meets constitutional and statutory qualification requirements. *Application of Lindgren*, 232 NY 59 (1921). Nomination of a candidate who is constitutionally and statutorily ineligible to serve is a nullity (*Brayman v Stevens*, 54 Misc2d 974 [Sup Ct Dutchess County 1967] *aff'd* 28 AD2d 1095; Election Law § 6-122). A candidate for City Council who does not meet the one year residency requirement in the new district, even in a redistricting year, is ineligible for the office and his/her petition may be invalidated by the county board (*Matter of Adamczyk v Mohr*, 87 AD3d 833 [4th Dept 2011]; *see also Matter of Walsh v Katz*, 17 NY3d 336 [2011]; *Matter of Revera v Erie County Bd. of Elections*, 164 AD2d 976 [4th Dept 1990], *lv denied* 76 NY2d 705 [1990]; *Reid v Richards*, 89 AD2d 939 [1st Dept 1982]). Because the law of residency for voters and candidates is substantially the same, see section on Residency herein.

Running for Judicial Office

County Board faced with inquiries as to qualifications for judicial office and restrictions unique to judicial campaigns would be wise to refer such issues to the Office of Court Administration's Judicial Campaign Ethics Center:
<http://ww2.nycourts.gov/ip/jcec>.

Running for Two Offices

"It is well settled that one may not run for two public offices where one would be precluded from holding both offices at the same time" (*Lawrence v Spelman*, 264 AD2d 455 [2d Dept 1999] *citing Burns v Wiltse*, 303 NY 319 [1951]). This prohibition does not preclude a candidate for judicial delegate from supporting the Supreme Court nomination of a person presently running for another judicial office (*Conti v Clyne*, 120 AD3d 884 [3d Dept 2014]).

Over Designations

If the petition contains a greater number of candidates than there are offices to be elected the entire petition is invalid (Election Law § 6-134 [3]). Such an over-designated petition cannot be saved by having the extra candidates decline (*Elgin v Smith*, 10 AD3d 483 [4th Dept 2004]).

Voter Registration of the Candidate

There is no requirement that a person must be registered to vote to be a candidate for public office (Public Officers Law § 3).

Enrollment and Authorization of the Candidate

If the candidate for office is not enrolled in the political party whose nomination the candidate seeks, such candidate must be authorized by such party to be the party's candidate—unless the candidate is running for judicial office, is nominated by caucus or a party in its first year (Election Law § 6-120 [4]; *Dorfman v Meisser*, 56 Misc2d 890 [Sup Ct Nassau County 1968], *aff'd* 30 AD2d 684, *aff'd* 22 NY2d 770). Failure to file the required certificate of authorization and acceptance of a non-party member invalidates the underlying designating petition (*Maurer v Monescalchi*, 264 AD2d 542 [3d Dept 1999]). There was no violation of a candidate's constitutional rights when a party does not file an authorization (*Rider v Mohr*, 2001 WL 1117157 [WDNY 2001] [unreported]).

The certificate of authorization can be submitted such that the signature of the secretary and presiding officer appear on two separate documents filed on two separate dates (*Farrell v Reid*, 131 AD3d 628 [2d Dept 2015]).

Candidate's Identifying Information

Candidate must be identifiable from information provided. The law requires candidate's name, the specific office being sought, including district number if any, place of residence, and post office address if not identical (Election Law §§ 6-132 (designating); 6-140 (independent); *see also Ferris v Sadowski*, 45 NY2d 815 [1978]).

Name

The name that a candidate uses on his or her petition is the name that will appear on the ballot (Election Law § 7-102). A candidate may be put on the petition and ballot under a name he or she has adopted in good faith and by which he or she is recognized in the community (*In re Steel*, 186 Misc 98 (Sup Ct New York County 1946), *aff'd* 270 AD 806 [1946]). The use of a nickname such as "Tom" for Thomas, "Jack" for

John may be used on petition (*Gumbs v Board of Elections*, 143 AD2d 235 [2d Dept 1988]), *lv denied* 72 NY2d 805; *see also Innamorato v Friscia*, 2007 NY Misc Lexis 457 [Sup Ct Richmond County] [“Manny” for Emanuel] “In connection with the designation of a candidate on official ballots, the word “name” as used in the Election Law should be afforded its plain, ordinary and usual sense” (*Lewis v New York State Bd. of Elections*, 254 AD2d 568 [3d Dept 1998] [citations omitted]). Characterizations and designations before or after a candidate's name on an official ballot are generally impermissible. (*Id.*) Misspelling of name of candidate is not fatal absent intent to mislead (*Harfmann v Sach*, 138 AD2d 551 [2d Dept 1988]), *lv denied* 72 NY2d 810 [1988]). The failure to include the appellation “Jr.” is no basis to invalidate the designating petition where there is no showing of any confusion upon the voters as to the candidate’s identity (*Reagon v LeJune*, 307 AD2d 1015 [2d Dept 2003]).

Residence and Address of Candidate

Each sheet of petition must properly state the place of residence (*Winn v Washington County Board of Elections*, 196 AD2d 674 [3d Dept 1993], *lv denied*, 82 NY2d 654 [1993]). The address information must be sufficient to identify the candidate without misleading or confusing the signatories to the petition (*Eisenberg v Strasser*, 307 AD2d 1053 [2d Dept 2003]). Candidate must reside at address shown on petition (*Finneran v Hayduk*, 64 AD2d 937 [2d Dept 1978], *aff’d*. 45 NY2d 797 [1978]; *Bastone v Cocco*, 270 AD2d 950 [3d Dept 1996], *lv denied* 88 NY2d 971; *Brigandi v Barasch*, 144 AD2d 177 [3d Dept 1988], *lv denied* 72 NY2d 810; *see also Walkes v Farrakhan*, 286 AD2d 464 [2d Dept 2001]). While courts are forgiving of incorrect addresses where candidates move proximate to petitioning (*Matter of Ferris v Sadowski*, 45 NY2d 815 [1978]), evidence adduced at trial that a candidate moved from the address listed on his designating petition months prior to the petition’s circulation resulted in petition’s invalidation (*Matter of Marchionda v Casella*, 153 AD3d 1133 [4th Dept 2017]). The Appellate Division upheld candidate’s residence stated on petition when the candidate was actively renovating the property at the address on the petition and had signed a temporary lease elsewhere also located in the district (*Matter of McNiel v Martin*, 2019 NY Slip Op 4305 [4th Dept 2019]).

Title of Office or Position

“It is settled that the name of the public office or party position sought must be clearly set forth on the designating petition” (*Bliss v Nobles*, 297 AD2d 457, 457-458 [3d Dept 2002] citing Election Law § 6-132 [1]; *Dunlea v New York State Board of Elections*, 275 AD2d 589, 590 [3d Dept 2000]; *Parker v Savago*, 143 AD2d 439, 441 [3d Dept 1988]). “The name of the office set forth in a candidate’s designating petition may be described in a variety of ways provided that the description thereof is specific enough . . .

.to preclude any reasonable probability of confusing or deceiving the signers, voters or board of elections” (*Lozano v Scaringe*, 253 AD2d 569 [3d Dept 1998]), *lv denied* 92 NY2d 806 [citations omitted]; *see also Shaffer v Norris*, 275 AD2d 881 [4th Dept 2000] and). Title of office need not be exact but must be identifiable (*Jacobson v Schermerhorn*, 104 AD2d 534 [3d Dept 1984]); *Denn v Mahoney*, 64 AD2d 1007 [4th Dept 1978]). The petition as a whole may be read to determine the town of the office sought (*Carreto v Sunderland*, 307 AD2d 1004 [2d Dept 2003]). A description of an office has two components, the title and the geographic territory covered by the office (*Dunlea v New York State Board of Elections*, 275 AD2d 589 [3d Dept 2000]; *see also Ighile v The Board of Elections in the City of New York*, 66 AD3d 899 [2d Dept 2009]). A description that only describes a geographic region is generally insufficient (*see Matter of Hayes v New York State Bd. of Elections*, 32 AD3d 660 [2006] [describing office as “127th Assembly District”]; *Matter of Bliss v Nobles*, 297 AD2d 457, 458 [2002] [describing office as “Assembly District 115”]; *Matter of Denn v Mahoney*, 64 AD2d 1007, 1008 [1978] [describing office as “147 Assembly District”]). However, the description “New York State Assembly—122nd District” was ruled to be sufficiently informative for a candidate seeking the office of Assemblymember in the 122nd district as the term “New York State Assembly” adequately describes the office, and 122nd district describes the region (*Hicks v Walsh*, 76 AD3d 773 [3d Dept 2010]).

Because the Town Law includes both town supervisor and member of the town council in its definition of the “town board” (Town Law § 60 [1]), the Second Department held the description of a public office as “Town Board, Town of East Hampton” was insufficient as a matter of law because a signer would not know whether the candidate was seeking position of member of town council or supervisor (*Bragman v Larsen*, 153 AD3d 813 [2d Dept 2017]).

Despite courts being forgiving in this area, departing from the statutory language on the petition presents peril—as the respondents learned in *Matter of Roberta James v. Westchester BOE*, 53 Misc.3d 423 [Sup Ct, Westchester 2016]). In *James* a petition for party committee did not include the phrase “or for election to a party position of such party” in the preamble. Instead of using the heading “Public Office or Party Position”, the petition erroneously stated only “Public Office.” The court invalidated the petition for party office because it did not specify it was a petition for party office. The *James* court noted the form failure gave rise to even more confusion because the petition also identified the position sought as “District Leader” instead of “member of the county committee”, the latter being the party office title provided in the rules of the party. *Id.*

When districts overlap, the petition must clearly identify which office is being sought. “Because both a Member of the Assembly and a delegate to the judicial convention are selected from the 127th Assembly District (Election Law § 6-124), simply denoting the geographic territory without reference to the title of the public office or position sought is not “sufficiently informative . . . so as to preclude any reasonable probability of confusing or deceiving the signers, voters or board of elections” (*Hayes v*

New York State Board of Elections, 32 AD3d 660 [3d Dept 2006] citing *Matter of Dipple v Devine*, 218 AD2d 918, 918-919, [3d Dept 1995], *lv denied* 86 NY2d 704 [1995]; see also *Sears v Kimmel*, 76 AD3d 1113 [3d Dept 2010]; *Notholt v Nassau County Board of Elections*, 131 AD3d 641 [2d Dept 2015] [for member of county committee listing only Assembly District and Election District number insufficient when more than one town in the Assembly District had the same Election District numbers). However, when the description of a petition for a Member of the Assembly was “Member of New York State 145th Assembly District”, the word “member” adequately described the position being sought (*Zacher v Ceretto*, Sup Ct, Albany County, August 4, 2016, O’Connor, K, Index No. 4355/16). Owing to no possibility of confusion, description of office as “15th District Nassau County Legislature,” instead of the correct nomenclature “Legislator,” was found sufficient (*Matter of Fochtman v Coll*, 153 AD3d 1214 [2d Dept 2017]).

For a party position divided by gender (i.e. Member of State Committee – Female / Male), the gender specification for the position must be expressly stated. The gender of the particular position cannot be inferred from the name of the candidate (*Mintz v Board of Elections in City of New York*, 32 NY3d 1054 [2018]).

Signer of Petition

The Election Law requires date, name of signer, residence, and town or city for each signer (Election Law §§ 6-130, 6-132 [designating]; 6-138, 6-140 [independent]; see also, *Berger v Acito*, 64 AD2d 949 [3d Dept 1978], *lv denied* 45 NY2d 707 [1978]). All required information must be provided in ink (*In re. Bialis*, 92 NYS2d 450 [County Ct, Oneida County 1949] [otherwise fatal defect for that signature]). “Strict compliance with Election Law § 6-130 is mandated, as its requirements constitute ‘a matter of substance and not of form’ [internal citation omitted]” (*Canary v New York State Board of Elections*, 131 AD3d 792 [3d Dept 2015]).

Date

The signature on a petition must bear the date it was made (*De Barardinis v Sunderland*, 277 AD2d 187 [2d Dept 2000]). The date is a matter of prescribed content, strict compliance is required (*Vassos v New York City Board of Elections*, 286 AD2d 463 [2d Dept 2001]). Signatures dated after date of witness statement cannot be counted (*Velez v Nienes*, 164 AD2d 931 [2d Dept 1990] [dated before witness valid]; *McNulty v NcNab*, 96 AD2d 921 [2d Dept 1983] [dated after witness invalid]; Election Law §§ 6-130, 6-138(2); *Nunley v Cohen*, 258 AD 746 [2d Dept 1939]).

When the petition signature dates include the month and day, but not the year, the signatures are invalid as they do not strictly conform to statute. (*Avella v Johnson*, 142 AD3d 1111 [2d Dept 2016].) However, signatures that only have the month and day, but not year, may be valid if the petition “sets forth at the top of each page the full

date of the primary election and it also includes at the bottom of each page the full date that the subscribing witness or the notary public signed and authenticated the signatures.” (*Id.* at 1112; *Matter of Struble v Chiavaroli*, (71 AD2d 1047 [1979], *aff'd* 48 NY2d 613 [1979]).

Name

A voter must place his or her signature on the petition. A printed name may appear above or below the signature. Not including a printed name in addition to the signature is not a fatal defect (Election Law § 6-134 [13]).

The form of the signature may be printed letters as opposed to cursive script. (*Controneo v Monroe County Board of Elections*, 166 Misc2d 63 [Sup Ct Monroe County 1995]). However, a “signature” upon a petition that is printed will likely be invalid if the signature exemplar on file with the board of election is not also in “printed” characters.

In *LaMarca v. Quirk* (110 AD3d 808 [2d Dept 2013]), the court held “printed” signatures on a petition that did not match the registration signature were not valid absent evidence from the signatories or from any of the subscribing witnesses attesting that the individuals who signed the registration forms were the same individuals whose signatures appeared on the petition. In *Benson v. Eachus* (Sup Ct, Albany County, August 12, 2016, Weinstein, D., Index No. 4308/16), the court reasoned printed signatures that do not match the registration signatures are invalid even if the signatory testified that she signed the petition because Election Law § 6-134(5) requires that “(t)he use of titles, initials or customary abbreviations of given names by the signers of, or witnesses to, designating petitions or the use of customary abbreviations of addresses of such signers or witnesses, shall not invalidate such signatures or witness statement *provided that the identity of the signer or witness as a registered voter can be established by reference to the signature on the petition and that of a person whose name appears in the registration poll ledgers.*” (*Id.*).

A wife cannot sign as “Mrs. John Jones”. She must use her name. She can sign as “Mrs. Mary Jones” (*Lydan v Sullivan*, 269 AD 942 [2d Dept 1945]).

Signatures which only include the first name are invalid where they do not match the signatures in the poll ledgers (*Fusco v Miele*, 275 AD2d 426 [2d Dept 2000]).

A power of attorney cannot sign a petition for a voter, as the statute requires the witness to attest that the signatory appeared before the witness and signed the petition (see e.g. *Fatata v Philips*, 140 AD3d 1295 [3d Dept 2016]; see also *Matter of Van Der Water v Czarny*, 153 AD3d 1555 [4th Dept 2017] [noting only invalid signature should be stricken, not entire petition page, absent “hidden infirmity” designed to confuse or hinder ascertainment of “identity, status and address” of a signatory]).

Residence

Residence of the signer should be the signer's residence at the time the signer signs the petition (*Dye v Callahan*, 42 AD2d 916 [3d Dept 1973]). An address is acceptable if it matches the address listed in the board's registration list. Some latitude should be given if the address does not match but it appears that it is one and the same (*Regan v Toole*, 63 NY2d 681 [1984]). It is not fatal if address does not contain the hamlet since the town is given (*Grancio v Coveney*, 60 NY2d 608 [1983]). Customary abbreviations of addresses are acceptable (Election Law § 6-134 (15)). There is an opportunity to show post office address is correct (Election Law § 6-134 [12]). Where no such proof is provided that the postal address and the residence address are one and the same, the signatures are invalid (*Ligammari v Norris*, 275 AD2d 884 [4th Dept 2000]).

The residence address of the signatures on the designating petition is adequate and does not warrant invalidation of the designating petition where "there has been substantial compliance with the statutorily prescribed format" (*Toporek v Beckwith*, 32 AD3d 684 [4th Dept 2006], quoting *Matter of Belak v Rossi*, 96 AD2d 1011, 1012, *lv denied* 60 NY2d 552). The *Toporek* Court went on further to say that "the Election Reform Act of 1992, amending section 6-134 [2] of the Election Law . . . provides for liberal construction of the residence address requirement" (*Toporek* at 685 citing *Matter of Regan v Starkweather*, 186 AD2d 980, 981). Indeed, "where the information sought is apparent on the face of the form and the defect cannot possibly confuse, hinder or delay any attempt to ascertain or to determine the identity, status and address of the witnesses, the defect is not such as to mandate invalidation of all signatures on each of the several pages" (*Toporek* at 685, citing *Matter of Weiss v Mahoney*, 49 AD2d 796, 797).

When the stated address of the voter does not match the address on file with the board of election, courts uphold the validity of the signature if the voter is registered to vote in the county and the stated address is correct and in the correct jurisdiction for signing the petition (*Matter of Robeletto v Burch*, 242 AD2d 397 [3d Dept 1997]; *Bray v Marsolais*, 21 AD3d 1143 [3d Dept 2011]; *Sheldon v Bjork*, 142 A.D.3d 763 [4th Dept 2016]). If the address on the petition does not match the records of the board of elections, the burden may shift to the proponent of the petition to show the address is valid through testimony or perhaps affidavits (*see e.g. Fall v Luthmann*, 109 AD3d 540 [2d Dept 2013]).

While the witness to a petition can fill in and subsequently correct the signer's address listed on a petition before filing, an inaccurate address on a petition is a fatal defect that cannot be cured by testimony at a hearing (*Canary v New York State Board of Elections*, 131 AD3d 792 [3d Dept 2015] [witness inserted incorrect street number]; Election Law § 6-134 [6]).

Town or City

Signers to petition must provide town or city, as required by statute (*Stoppenbach v Sweeney*, 98 NY 2d 431 [2002], citing *Matter of Frome v Board of Elections of Nassau County*, 57 NY2d 741, 742-743 [1982]; *Matter of Tischler v Hikind*, 98 AD3d 926 [2d Dept 2012]; *Stark v Kelleher*, 32 AD3d 663 [3d Dept 2006]; *Matter of Ptak v Erie County Board of Elections*, 307 AD2d 1072 [4th Dept 2003]; *but cf Matter of Giordano v Westchester Board of Elections*, 153 AD3d 821 [2d Dept 2017]). Name of village or hamlet is not acceptable (*Zobel v New York State Board of Elections*, 254 AD2d 520 [3d Dept 1998]; *Ptak v Erie County Board of Elections*, 307AD2d 1072 [4th Dept 2003]). Signers do not need to specify whether the municipality is a “town” or a “city” (*Hinkley v Egan*, 181 Misc2d 921 (Sup Ct Dutchess County 1995)). Strict compliance with the town or city requirement serves the purpose of facilitating the discovery of fraud and allows for rapid and efficient verification of signatures within the short time frame the election law allows (*Zobel v New York State Bd. of Elections*, 254 AD2d 520 [3d Dept1998]). If petition does not have a separate column for a town but the column for the address has the name of the town, for example, the address column is entitled “Town of Guilderland residence”, it is valid because it contains all the required information (*Sheehan v Aylward*, 54 NY2d 934 [1981]).

There is no requirement that a signer list the hamlet or particular geographic area within the town or city in which he or she resides (*Gonzalez v Lavine*, 32 AD3d 483 [2d Dept 2006], citing *Matter of Grancio v Coveney*, 60 NY2d 608, 610-611; *Matter of Cheevers v Gates*, 230 AD2d 948, 949. The Appellate Division held that the Supreme Court improperly determined that five signatures were invalid because the signers either omitted or incorrectly listed the hamlet within the town in which they reside. “Since the signers provided all the information required by Election Law § 6-130, including their correct street addresses and the towns in which they reside, their signatures were valid” (*Gonzalez* at 483).

Town information can be preprinted on form of petition (*Collins v New York State Board of Elections*, 120 AD3d 882 [3d Dept 2014]).

An erroneous or vague reference to a town cannot be corrected by testimony at a hearing. “Supreme court properly concluded that...signature is invalid, despite the fact that the correct town was established at the hearing” (*Canary v New York State Board of Elections*, 131 AD3d 792 [3d Dept 2015] [signer of petition listed merely “village” as his town]).

Signed Previous Petition

Signatures of persons who signed a previous designating, nominating or opportunity to ballot petition for the same office are not valid (Election Law § 6-134 [3]; *McNulty v McNab*, 96 AD2d 921 [2d Dept 1983]; *Angelo v Marino*, 309 AD2d [2d Dept

2003]; *DiCicco v Chemung County Board of Elections*, 93 NY 2d 1008 [1999]).

If the prior signature at issue is on an invalid petition, the validity of the subsequent signature depends on the type of petition at issue.

In *Keenan v Chemung County Board of Elections*, the Third Department held a person's "signing of two designating petitions for a single office rendered the later signature on [a] designating petition not countable, regardless of the subsequent invalidation of the first petition" (43 AD3d 623 [2007]). However, "[a] voter who previously signed a designating petition which was subsequently invalidated is not barred from signing an opportunity-to-ballot petition" (*Jones v Cayuga County Board of Elections*, 123 AD 2d 517 [4th Dept 1986] citing, *Matter of Lobaito v. Molinaro*, 45 A.D.2d 940; *Matter of Lawrence v. Board of Elections of Nassau County*, 31 Misc.2d 330; cf. *Matter of Simon v. Power*, 50 Misc.2d 761, rev'd. on other grounds 26 A.D.2d 531, rev'd. on other grounds 17 N.Y.2d 924; *Matter of Gilmore v. Kugler*, 21 A.D.2d 293; *Matter of Stack v Harrington*, 2019 NY Slip Op 4314 [3d Dept 2019] [upholding prior signature on opportunity to ballot petition where such signature was after the invalidation of the designating petition]).

For independent nominating petitions, a voter's prior signature on an invalid petition does not preclude the voter later validly signing an independent nominating petition (see Election Law § 6-138 [1] [providing rule for independent nominating petitions that a signature "shall not be counted if the name of a person who has signed...appears upon another valid and effective petition designating or nominating the same or a different candidate for the same office" (Election Law § 6-138 [1]).

Independent Body Name

Election Law § 6-138 states that in naming a party use of words "American," "United States,"..."New York State"...or any abbreviation thereof is not permitted. In *Hanna v Arcuri* the court dealt with the situation wherein a petition stating the name of the party as "New York Moderates" was filed with the state board of elections. The state board recognized the validity of the petition itself but notified the candidate that the party name was going to be reflected as "Moderates" on the ballot. Petitioner claimed the state board acted erroneously and that the entire petition should be declared invalid. The court held that "no fraud was shown that would have required the invalidation of the petition and the Board acted properly in changing the name." In contrast, *DiResto v Cornell* (59 AD3d 643 [2d Dept 2009]) held "there is no authorization for a board of elections to grant a candidate the opportunity to select a new name when, as here, the original name selected for an independent body includes the name or part of a name of an existing party" (See also *Carey v Chiavaroli*, 97 AD2d 981 [4th Dept 1983]).

Witness Statement

Residency of Witness Stated on Petition

A witness to a designating petition or an independent nominating petition must be a registered voter² residing in New York State or a notary public (Election Law §§ 6-132 [designating petitions]; 6-140 [independent petitions]). A witness may be a voter in active or inactive status (*Matter of Bichotte v Adolphe*, 120 AD3d 674 [2d Dept 2014]). The previous requirement in the Election Law that a subscribing witness must be a resident of the political subdivision for which the petition is circulated was been ruled unconstitutional (*Lerman v Board of Elections in the City of New York*, 232 F3d 135, 145 [2d Cir 2000] *cert denied*, 535 U.S. 915 [2000]; *see also LaBrake v Dukes*, 96 NY2d 913 [2001] [designating petitions]; *Chou v New York State Board of Elections*, 332 F Supp 2d 510 [EDNY 2004]; *McGuire v Gamache*, 5 NY3d 444 [2005] [independent nominating petitions]).

The address of witness stated on a petition must be the current address of such voter. The address on the “residence address” line must include the street name and house number. The address required on the “residence address” line need not include the municipality or postal zip code (*Washburn v Kelsey*, 45 Misc3d 1216 [Sup.Ct. Dutchess Co. 2015]). Such address need not be the same as the record on file with the board of elections in as much as change of address within the jurisdiction of a board of elections does not change person’s status as a “duly qualified voter” (*Bichotte v Adolphe*, 120 AD3d 674 [2d Dept 2014]; *Matter of Lee v Orange County Board of Elections*, 164 AD3d 717 [2d Dept 2018]; *Sheldon v Bjork*, 142 AD3d 763 [4th Dept 2016]).

Sometimes a witness’s current address is not clear. A candidate completed the witness statement on her petition stating her residence address as an apartment for which she held a lease and into which she had moved furniture and personal items but into which she had not been able to move because a certificate of occupancy delay pushed back the beginning of the lease term. The court found the candidate did not make a materially false statement on her petition (*Vescera v Karp*, 131 AD3d 1338 [4th Dept 2015]). The court noted the candidate had registered to vote from the would-be address, changed her driver’s license address to the apartment address and even had her mail forwarded there. The Fourth Department held “[a]lthough respondent had not yet moved to the address at the time she witnessed the signatures, the record establishes that the address was intended to be ‘that place where [she] maintains a fixed, permanent and principal home’ (Election Law § 1-104[22]). ‘The determination of an individual’s residence is dependent upon an individual’s expressed intent and

² In *Free Libertarian Party Inc. v Spano* (16 CV 3054 [EDNY 2017]), the trial court held that New York’s requirement that witnesses to independent nominating petitions be registered voters and thereby state residents was unconstitutional. The court’s order, however, was vacated on Appeal on procedural grounds.

conduct” (*Vescera* at 1339, quoting *People v. O’Hara*, 96 NY2d 378,384 [2001]).

A subscribing witness displaced from her residence who intended to return there “once construction was completed” was held to have retained the voting residence. The Court noted that the witness had not established a fixed residence elsewhere. (*Matter of Walfish v Brezler*, 2019 NY Slip Op 4179 [2^d Dept 2019])

In the Third and Fourth Department, unless the voter registration cancellation procedures of the Election Law are followed prior to petition circulation, the signatures collected by a subscribing witness who is registered to vote cannot be challenged on the basis of the subscribing witnesses’ nonresidency at the address given. The decision of the Board of Elections to register a person at a particular address constitutes “presumptive evidence of [his] residence for voting purposes” (Election Law § 5-104 [2]; *Matter of Hosley v Curry*, 85 NY2d 447, 452 [1995]). “The Board’s decision [to register] may not be collaterally attacked in a proceeding to invalidate a designating petition.” (*Carney v Ward*, 120 AD3d 995, 996 [4th Dept 2014]). In *VanSavage v Jones* the Third Department reached the same conclusion. Signatures gathered by a witness are valid even though the witness’s registration was subsequently cancelled on the grounds that he did not live at the address and was a felon (*VanSavage v Jones*, 120 AD3d 887 [3^d Dept 2014]).

“Where an alleged impropriety ‘does not involve the substantive requirements of witness eligibility[,]’ [i.e. that respondent is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualifies to sign the petition] and ‘there is no implication of fraud, resort to strict construction should be avoided if it were to lead to injustice in the electoral process or the public perception of it’ [internal citations omitted]. We therefore conclude, contrary to petitioner’s contention, that strict construction of Election Law § 6-132 [2] is not necessary with respect to respondent’s specification of the address on the witness statement” (*Vescera* at 1339).

Party of Witness

The subscribing witness to a designating petition must be an enrolled member of the party (Election Law § 6-132 [2]). The party enrollment of subscribing witness is a substantive requirement (*Hoshhauser v Grinblat*, 307 AD2d 1007 [2^d Dept 2003], citing *Staber v Fidler*, 65 NY2d 529 [1985]) and the requirement has been held to be constitutional in *Maslow v Board of Elections* (658 F3d 291 [2^d Cir 2011]). A designating petition’s witness statement must identify the enrollment of the witness. If it does not, the sheet is invalid (*Matter of Craig v Borrero*, 2019 NY Slip Op 4310 [4th Dept 2019]).

Witness Identification Information

A witness need only provide town or city below signature and need not include this information online in witness statement for witness address (*Barrett v Brodsky*, 196 AD2d 603 [2d Dept 1983], *lv denied* 82 NY2d 653 [1983]). A witness may have two different addresses within the same petition provided that both were accurate when the page was witnessed (*McManus v Relin*, 286 AD2d 855 [4th Dept 2001]).

Where a candidate who was a witness to a petition failed to complete the witness identification information below the witness signature line (town or city and county) the court found that since the petition already contained sufficient information at the top of the sheet to identify the witness, “omission of redundant witness information was an inconsequential violation of the statute” (*Hurst v Board of Elections of Broome County*, 265 AD2d 590 [3d Dept 1999], citing *Matter of Pulver v Allen*, 242 AD2d 398 [3d Dept 1997], *lv denied* 90 NY2d 805; *see also Curley v Zacek*, 22 AD3d 954 [3d Dept 2005]).

The Appellate Division has reiterated that where the witness/candidate failed to provide their town or city of residence, “such an error is not a fatal defect, particularly where the complete residence address of the subscribing witness appears elsewhere on the same page of the petition (*Arcuri v Hojnacki*, 32 AD3d 658 [3d Dept 2006]).

It is important to note the difference in the “town or city” requirement for **signers** of a petition compared to **witnesses**. The failure of a subscribing witness statement to contain the town or city in the witness identification section is not always a fatal defect as discussed above, but the failure to list the correct town or city on a signature line of a petition is typically fatal to the signature (*Matter of Stoppenbach v Sweeney* (98 NY2d 431 [2002])).

Completion of Witness Information

The failure of a subscribing witness to fill in all information on a witness statement invalidates all signatures on that petition page (*Sheldon v Sperber*, 45 NY2d 788 [1978]), *but see Hoare v Davis*, 207 AD2d 309 [1st Dept 1994] [court allowed incorrect address of witness if no showing of deceit or fraud]; *Pulver v Allen*, 242 AD2d 398 [3d Dept 1997], *lv denied* 90 NY2d 805 [1997]). The information may be filled in by someone else, but it should be completed before the subscribing witness signs the witness statement or in the presence of the witness (Election Law § 6-134 [9]). Information below the witness signature may be filled in by someone other than the witness, before or after the witness signs (Election Law §§ 6-132 [2] and 6-140 [1] [b]; *see also Pulver v Allen*, 242 AD2d 398 [3d Dept 1997], *lv denied* 90 NY2d 805 [1997]).

Number of Signatures

The law requires identification data including number of signatures on sheet (*Bernhardt v Sachs*, 57 AD2d 598 [2d Dept 1977]). “Where [] there is no allegation of fraud and there was substantial compliance with the provisions of the Election Law, the inadvertent mistakes in the signature totals ’should not be the basis for the elimination of the right to vie for public office” (*Matter of Rancourt v. Kennedy*, 87 AD3d 654, 656-657 [2d Dept 2011], quoting *Matter of Staber v Fidler*, 110 AD2d 38, 39 [2d Dept 1985], *aff’d* 65 NY2d 529 [1985]; Election Law § 6–134 [10]; see also *Matter of Ruggiero v Molinari*, 112 AD2d 1071 [2d Dept 1985], *aff’d* 65 NY2d 968; *Matter of Fox v Westchester County Bd. of Elections*, 112 AD2d 1063, 1064 [2d Dept 1985], *aff’d* 65 NY2d 971; *Matter of Bland v Board of Elections of City of N.Y.*, 112 AD2d 1053 [2d Dept 1985], *aff’d* 65 NY2d 962; *Matter of Brown v Sachs*, 57 AD2d 583 [2d Dept 1977]; cf. *Matter of Fromson v Lefever*, 112 AD2d 1064, 1066 [2d Dept 1985], *aff’d sub nom Matter of Barrett v Scaringe*, 65 NY2d 946 [1985]).

If the number of signatures stated in witness statement is understated, count only the number stated (Election Law § 6-134 [11]). “[A]bsent any allegation of fraud, the overstatement of the signature totals on pages...was not such a gross irregularity as to warrant invalidation” (*VanSavage v Jones*, 120 AD3d 887 [3d Dept 2014]).

In *Rancourt v Kennedy* (87 AD3d at 655-656), all of the petition sheets contained a misstatement of the number of signatures as the preprinted sheets contained no line 6, notwithstanding that each sheet contained an overstatement the Court upheld the validity of the petition (See also *Rancourt v McGill*, 87 AD3d 656 [2d Dept 2011]).

If the number of signatures stated in witness statement is *missing*, the entire sheet should be invalidated (*Esse v Chiavaroli*, 71 AD2d 1046 [4th Dept 1979]; *Keper v Tullo* 88 AD3d 826 [2d Dept 2014]). This otherwise fatal error may be correctable during the petition filing period. In *Etkin v Thalmann* (287 AD2d 775 [3d Dept 2001]) several pages of a petition were filed without any number of signatures stated in the witness statement. Before the end of the petition filing period, a statement from the subscribing witness was filed along with a copy of the defective petition pages with the missing information filled in on the copies. The Court held substantial compliance occurred during the time to file petitions.

Previously Witnessing or Signing Petition

Serving as a witness to a petition does not preclude a witness from witnessing any other petitions, even others for the same office – assuming the witness is otherwise eligible. However, the rule is quite different when a witness has **signed** a petition for a candidate. A person becomes ineligible to witness a petition “for **another candidate for the same office**” once he or she signs a petition for a candidate (Election Law §§ 6-132 [2]; 6-140). This rule was clarified by amendments to the Election Law enacted in

2017 (Laws of 2017 c 106).

Previous Participation in a Caucus

For town elections (Election Law §6-138 [1]), unlike village elections (Election Law § 6-208), there is no bar to a person participating in a caucus and also signing an Independent Nominating Petition. In fact, the County Board of Elections would not have a list of those who participated in the town caucus.

Signing and Dating

Witness statements must be signed and dated (*Pabian v McNab*, 9 Misc2d 995 (Sup Ct Suffolk County 1957), *aff'd* 4 AD2d 834 [2d Dept 1957], *aff'd* 3 NY2d 888 [1957]; *Higby v Mahoney*, 48 NY2d 15 [1979]). The omission of the date on subscribing witness statement is fatal (*McKay v Cochran*, 264 AD2d 699 [2d Dept 1999], *Klemann v Acito*, 64 AD2d 952 [3d Dept 1978], *aff'd* 45 NY2d 796 [1978]). An inaccurate date in the witness statement can be fatal. In *Stevens v. Collins* (120 AD3d 696 [2nd Dept 2014]), the witness statement was dated “6-16-14” but the signatures on the page were all dated in July. That discrepancy was fatal to the signatures even though the notary witness testified that he simply placed the wrong date in the witness statement. The notary’s testimony was not curative “inasmuch as the time to file petitions...as well as the time to amend or correct such petitions, had expired by the time the hearing was held” (*Stevens*, 120 AD3d at 697; *see also Quinn v Erie County Board of Elections*, 120 AD3d 992 [2d Dept 2014] [holding subscribing witness statement dated earlier than date on signature lines invalidated signatures, but “petitioners could have filed...affidavit attesting to his purported mistake on or before the last day provided by law for filing a designating petition...”]).

Signatures Taken by Notary or Commissioner of Deeds

When a notary public signs a designating petition, his or her signature and statements enjoy a “strong presumption of regularity” (*Matter of Bonner v Negron*, 87 AD3d 737 [2d Dept 2011]). However, as discussed below, this presumption can be rebutted.

A candidate who is a notary or commissioner of deeds is not prohibited from circulating his or her own petition in that capacity (*Matter of Braunfotel v Feiden*, 209 NY Slip Op 4316 [2d Dept 2019]; *Rittersporn v Sadowski*, 48 NY2d 618 [1979]; *Harte v Kaplan*, 87 AD3d [3d Dept 2011];

If a signature is taken by a notary or commissioner of deeds, the witness must include the witness’s title or the sheet is invalid (*Fuentes v Lopez*, 264 AD2d 490 [2d Dept 1999]; *Hunter v Compagni*, 74 AD2d 1000 [4th Dept 1980]). However, the failure

to include the title “notary” or “commissioner of deeds” was held a “mere technical defect” when the notary provided the notary’s identification number and the expiration date of that office. (*Matter of Marchionda v Casella*, 453 AD3d 1133 [4th Dept 2017]).

Failure to use the notary stamp does not render the sheet invalid (*McKay v Cochran*, 264 AD2d 699 [2d Dept 1999]; Executive Law §142-9 [defects which do not invalidate a notary]).

If a signer is not duly sworn by the notary or commissioner of deeds, the signature of the person not sworn is invalid (*Napier v Salerno*, 74 AD2d 960 [3d Dept 1980]; *Boyle v New York City Board of Elections*, 185 AD2d 953 [2d Dept 1992]; *Leahy v O’Rourke*, 307 AD2d 1008 [2d Dept 2003], *Lebron v Clyne*, 65AD3d 801 [3d Dept 2009]; *Fuchs v Itkowitz*, 120 AD3d 682 [2d Dept 2014]; *MacKenzie v Ghartey*, 131 AD3d 638 [2d Dept 2015]). Substantial compliance is required with respect to the oath requirement (*Mertz v Bradshaw*, 131 AD3d 794 [3d Dept 2015]). The Second Department offered guidance on how a notary or commissioner of deeds should obtain signatures in *Finn v Sherwood*:

Jobson (the notary) testified that he introduced himself to each signatory, explained to them what they were signing, and administered to and took an oath from each signatory. Jobson thereby substantially complied with Election Law § 6–132 [3] (see *Matter of Kutner v Nassau County Bd. of Elections*, 65 AD3d 643, 644–645; *Matter of Liebler v Friedman*, 54 AD3d 697). What the signers are swearing to, in a designating petition is the information at the beginning of the petition wherein the signer states that he/she is a duly enrolled voter of the party and entitled to vote at the primary and that their place of residence is truly stated opposite their signature on the petition and they do thereby designate the following named person or persons as candidate.

(87 AD3d 1044 [2d Dept 2011]).

The omission of the date on which the authenticating notary statement was made renders the page invalid (*Weiss v Mahoney*, 49 AD2d 796 [4th Dept 1975]; *Sortino v Chiavaroli*, 59 AD2d 644 [4th Dept 1977], *aff’d* 42 NY2d 982 [1975]; *Boniello v Niagara County Board of Elections*, 131 AD3d 806 [4th Dept 2015]). However, a witness statement completed by a notary on the reverse side of a petition, while not the preferred form, does not warrant invalidation (*Bay v Santoianni*, 264 AD2d 488 [2d Dept 1999]). Further, the fact that notary’s signature was stapled to signature sheets instead of “appended [to] the bottom” of each sheet as required by Election Law § 6-132 (2), did not require invalidation of signatures and opportunity to ballot petitions. *Matter of DiNonno v Castioni*, 43 AD3d 476 [2d Dept 2007]; *Sheldon v Bjork*, 142 A.D.3d 763 [4th Dept 2016].

The signatures collected by a notary public who refused at trial to answer questions concerning the administration of an oath to signatories and could not recall if he committed forgery, were invalidated (*McCoy v Jenkins*, 242 AD2d 349 [2d Dept 1997]).

Signatures taken by a commissioner of deeds knowingly acting outside the boundaries of their commission are invalid (*Shuboney v Monroe County Board of Elections*, 297 AD2d 462 [4th Dept 2002]).

Notary public and commissioner of deeds are not qualified to witness village designating or nominating petitions when the village election is conducted by the village clerk (Election Law § 15-108).

Alterations

Alterations to the Signers Line

Uninitialed alterations or corrections may be made to information on the signer's line of a petition, **except** the signature and date (Election Law § 6-134 [6]). Alterations to the signature or date must be initialed (*Andrews v Albany County Board of Elections*, 164 AD2d 960 [3d Dept 1990]; *King v Sunderland*, 175 AD2d 896 [2d Dept 1991]). Alterations to the signers' date is permitted where the subscribing witness signed her initials next to the date corrections; such corrections are inconsequential and did not invalidate the signatures (*Strenberg v Hill*, 269 AD2d 730, 731 [3d Dept 2000]).

Material Alteration

If unexplained material alteration is made to witness statement, the entire page should be invalid (*Jonas v Velez*, 65 NY2d 954 [1985]); *Magee v Camp* 253 AD2d 573 [3d Dept 1998]; *Berger v Acito*, 64 AD2d 949 [3d Dept 1978], *lv denied* 45 NY2d 707; *Nobles v Grant*, 57 AD2d 600 [2d Dept 1977], *aff'd* 41 NY2d 1048; *but see Pulver v Allen*, 242 AD2d 398 [3d Dept 1997]; *McGuire v Gamache*, 22 AD3d 614 [2d Dept 2005]).

The alteration must be material. An unexplained alteration to a candidate's address changing "Reed Street" to "Reed Avenue" did not invalidate the petition sheet (*Pericak v Hooper*, 207 AD2d 1003 [4th Dept 1994]). An overwriting which did not change what was originally written is not an alteration (*Schroeder v Smith*, 21 AD3d 511 [2d Dept 2005]).

An affidavit may be submitted at time of filing to explain alterations but it may not be used to cure omissions or make corrections (*Hunter v Compagni*, 74 AD2d 1000 [4th Dept 1980]; *Oberman v Romankowski*, 65 AD3d 992 [2d Dept 2009]; *but see Etkin v Thalmann*, 287 AD2d 775 [3d Dept 2001] [permitting resubmission during petitioning period to cure omission of number of signatures]).

If incorrect information is crossed out and correct information put in the witness statement, but is not initialed or explained, the entire sheet is invalid (*Quinlin v Pierce*, 254 AD2d 690 [4th Dept 1998]; *Shoemaker v Longo*, 186 AD2d 979 [4th Dept 1992], *lv denied*, 80 NY2d 755; *but see Pulver v Allen*, 242 AD2d 398 [3d Dept 1997], *lv denied* 90 NY2d 805 [1997]).

Fraud

Issues of fraud are generally reserved for court proceedings. Every fraudulent signature will be invalidated. Moreover, fraud that permeates a petition or fraud perpetrated by a candidate will invalidate the entire petition even if the number of signatures tainted are mathematically insufficient to invalidate the petition. “A designating petition will be invalidated if the challenger shows, by clear and convincing evidence, ‘that the entire petition is permeated with fraud or that the candidate participated in, or can be charged with knowledge of, fraudulent activity’” (*Matter of VanSavage v Jones*, 120 AD3d 887 [3d Dept 2014]; *see also Matter of Steinert v Daly*, 118 AD3d 808 [2d Dept 2014]). “[C]andidates are held to a higher standard than noncandidates under the Election Law” (*Matter of Burman v Subedi*, 2019 NY Slip Op 4315 [3d Dept 2019]; *see also Buttenschon v Salatino*, 464 AD3d 1588 [4th Dept 2018]). A trial Court’s assessment of a candidate’s credibility regarding fraud or knowledge of fraud is entitled to deference (*see Steinert; VanSavage supra*).

Petition fraud cases turn on the specific facts and testimony of the case. Two cases decided on the same day in the Third Department in 2015 demonstrate the bounds of judicial forgiveness and strictness.

In *Vincent v Sira*, the candidate testified she did not administer an oath to 307 petition signers despite the contrary assertion she signed in the witness statement (131 AD3d 787 [3d Dept 2015]). She also testified that she altered the title of the office on several sheets of the petition after they were signed – an act the court identified as a violation of Election Law § 17-122 [8]. Nonetheless, the court was forgiving, finding these facts did not establish clear and convincing proof of fraud and should only result in invalidation of all of the tainted signatures. The court noted as an enrolled Republican the candidate could have completed the party witness statement for the 307 signatories with respect to whom she did not administer an oath. The court also noted the alteration of the title of the office while a clear violation of law “effected no material change, and...there was no evidence undermining the accuracy and veracity of the underlying voter signatures.”

The same panel of Third Department judges on the same day came to a different conclusion on a question of candidate fraud (*Mattice v Hammond*, 131 AD3d 790 [3d Dept 2015]). In *Mattice*, a candidate for the party position of judicial delegate needed eight valid signatures to qualify for the ballot. He filed thirty-eight. The candidate witnessed all of the signatures, and in three instances the candidate allowed the spouse

to sign for the voter. At trial the candidate admitted the error and plead innocent ignorance. The lower court found the candidate had no nefarious motive and upheld the petition. In reversing the Third Department emphasized the candidate knew that “three of the signatures were not signed by the individuals to whom they were attributed” (*Id.* at 791). This constituted candidate participation in fraud sufficient to invalidate the petition, and the candidate’s lack of “nefarious motive” was irrelevant.

The *Sira and Mattice* decisions are not easy to reconcile in as much as the candidate in *Sira* also knew the statements in the witness statement were false. Arguably, the difference is that in *Sira* the falsehoods did not implicate the “accuracy and veracity of the underlying voter signatures”. In *Mattice*, the fact of a voter *signing* the petition was falsely stated.

In *Matter of Overbaugh v Benoit*, the Court did not invalidate a petition on which the candidate’s spouse had fraudulently procured a signature, noting there was no evidence the candidate participated in the procurement or submission of any fraudulent signature (2019 Slip Op 4261 [3d Dept 2019]; *compare Matter of Haygood v Hardwick*, 110 AD3d 931 [2d Dept 2013]).

Opportunity to Ballot Petitions

Opportunity to ballot (OTB) petitions are filed to create a primary election when there otherwise would not have been one (Election Law § 6-164). The opportunity to ballot does not put a candidate's name on the ballot, but rather allows voters the ability to write in a candidate's name (Election Law § 6-164). A technically deficient designating petition is not a prerequisite for an OTB petition (*Coopersmith v Hershberger*, 264 AD2d 453 [2d Dept 1999]). An OTB petition may be filed even when a valid designating petition has been filed (*Mullane v Bauer*, 286 AD2d 460 [2d Dept 2001]). Signature on an OTB petition is invalid if voter previously signed another petition for the same office (*Rabadi v Galen*, 307 AD2d 1014 [2d Dept 2003]).

Failure to list a committee to receive notices on an OTB petition is a fatal defect (*Werner v Castiglione*, 286 AD2d 553 [3d Dept 2001]; *Lent v Katz*, 307 AD2d 1009 [2d Dept 2003]), *Matter of Cassar v Larsen*, 109 AD3d 560 [2d Dept 2013]).

Opportunity to Ballot as Equitable Remedy

When a petition or substitution of a candidate is invalid for technical reasons, a court, not the board of elections, can order an opportunity to ballot primary to allow the party to select a nominee (*Matter of Hunting v Power*, 20 NY2d 680 [1967]) The remedy is only proper “where the defects which require invalidation of a designating petition are technical in nature and do not call into serious question the existence of adequate support among eligible voters” (*Harden v Board of Election in City of NY*, 74 NY2d 796 [1989]). “Absent any indication that fraud was involved or that the voters who

signed the invalid pages were not entitled to sign the petition, Supreme Court properly directed an opportunity to ballot” (*Hall v Dussault*, 109 AD 3d 679 [3d Dept 2013] [failure to administer oath by witness and use of wrong witness statement were errors invalidating petition but proper premise for opportunity to ballot remedy]; cf *Stevens v Collins*, 120 AD3d 696 [2d Dept 2014] [holding incorrect date in notary statement is a substantive defect which cannot support opportunity to ballot remedy]). The remedy is proper where certificate of substitution is incorrectly executed when the petition to which it relates was sufficient (*Griffin v Torres*, 131 AD3d 631 [2d Dept 2015]). Listing incorrect town or incorrect address for signer of petition are “substantive and not technical in nature” and do not support opportunity to ballot remedy (*Canary v New York State Board of Elections*, 131 Ad3d 792 [3d Dept 2015]). Appellate Division has granted the opportunity to ballot remedy even when it is requested for the first time on appeal (*Landry v Mansion*, 65 Ad3d 803 [3d Dept 2009]).

The equitable remedy of an opportunity to ballot is not available when an opportunity ballot petition is defective due to technical errors (*Stevens v Collins*, 120 AD3d 696 [2d Dept 2014]).

Independent Nominations Placement on the Ballot

Election Law § 7-104 has been the subject of considerable litigation. In 2014, the Third Department affirmed a lower court ruling rejecting a challenge to the constitutionality of the statute. Two federal district court judges and one New York State Supreme Court judge declined to issue preliminary injunctions premised on the theory that this provision of the Election Law is unconstitutional.

“In short, controlling Court of Appeals precedent mandates a conclusion that Election Law § 7-104 (4) (c) is not unconstitutional as applied to petitioners and Supreme Court properly dismissed the petition” (*Cahill v Kellner*, 121 AD3d 1160 [3d Dept 2014]).

In 2010, a United States District Court Judge in the Southern District of New York ruled that the State Board’s refusal to allow a candidate for US Senate running as the candidate of two independent bodies a separate line for each such nomination, where the refusal to allow multiple line for the candidate would create a hole in one of the independent body lines, violated his First and Fourteenth Amendment rights, albeit in a ruling which came after the election (*Credico v New York State Bd. of Elections*, 751 FSupp2d 417 [EDNY 2010]). In 2013, a United States District Court Judge in the Eastern District of New York when presented with the same issue declined to follow *Credico* and upheld the Nassau County Board of Elections’ refusal to grant additional lines in violation of Election Law § 7-104 where the candidate had either been nominated by more than one party or by more than one independent body (*Gonsalves v New York State Bd. of Elections*, 974 FSupp2d 191 [EDNY 2013]).

NOMINATIONS

This section describes issues affecting caucuses.

Caucuses

Posting Notice of Caucus

In a village election case, the court in reviewing the posting requirements for the notice of a party caucus stated that, “the requirement for posting and filing of notice is obviously designed to ensure that the public, and more importantly to party nominations, the enrolled voters of the party, are adequately informed of the intention of the representatives of one of its political parties to fill a position on the ballot of an election affecting the voters of that municipality” (*Korniczky v Sunderland*, 175 Misc 2d 912 [Sup Ct Westchester County 1998]). The court went on to say that, “the court views the notice requirements as mandatory in nature and concludes that failure to strictly comply with such requirements voids the nomination” (*Id*; see also, *Scanlon v Turco*, 264 AD2d 863 [3d Dept 1999]). Failure to post or file the notice of caucus with the town clerk or the county board of elections renders the caucus and, consequently, the purported nominations invalid (*Gage v Hammond*, 309 AD2d 1061 [3d Dept 2003]; *Chevere v Sunderland*, 303 AD2d 428 [2d Dept 2003]).

Rule Limiting Nominees to Enrolled Party Members is Invalid

A town committee cannot adopt a caucus rule which mandates that only enrolled members of the party be nominated at caucus as such a rule would violate Election Law § 6-120 [4] (*Burkwit v Olson*, 87 AD3d 1264 [4th Dept 2011]).

Judicial Nominating Conventions

Delegates to Convention

Section 6-124 of Election Law requires that the number of judicial delegates from each Assembly District to a party nominating convention be substantially in accordance with the ratio of votes cast for the party’s candidate for governor in the last election. In *Diamond v DeJoseph*, (121 AD3d 1283 [3d Dept 2014]), the court held the Conservative Party nominating convention at issue was in substantial compliance given the practical difficulties achieving perfect representation. The Court noted most districts were properly represented in proportion to their voting strength. In *Stack v Fisher* (121 AD3d

1280 [3d Dept 2014]), the Conservative judicial nominating Convention was also found duly proportional under Election Law § 6-124 even though three Assembly Districts representing 10% of voters did not send delegates and there were other deviations between the voting power of Assembly districts at the convention and the preceding vote for governor in those districts. The *Stack* Court analyzed voting power at the convention and concluded “smaller districts were undoubtedly overrepresented at the convention, as 40% of elected delegates represented only 24% of the Conservative Party votes cast...” (*Id.*). However, the Court noted, the two largest districts represented 40% of the delegates and had 40% of the votes (*Id.*)

The Court distinguished *Snell v Young*, (88 AD3d 1149 [3d Dept 2014]), observing in that case the Court invalidated the convention on a finding that “almost 60% of the voters were represented by 30% of elected delegates.” “Substantial compliance is the touchstone of the statute and, under the circumstances present here, we find that goal to have been met.”

Delegate Residency

Supreme Court in Allegheny County held delegates must reside in the Assembly District they will represent at the judicial nominating convention. The Fourth Department reversed the lower Court without reaching the merits of this holding: “[A]ssuming, arguendo, that a candidate for the position of delegate to a judicial district convention must reside within the geographic boundaries of the assembly district that he or she seeks to represent...such requirement would not become operative until ‘time of commencement of term’ of the position...In this case, that date is...the date of the primary election” *Matter of Locke v Walsh*, 120 AD3d 997 [4th Dept 2014]). Notably the lower court declined to follow the Second Department holding in *Corbin v Goldstein* (64 AD2d 935 [2d Dept 1978] [holding judicial nominating delegate need only reside in the judicial district]).

VACANCIES

A vacancy in a nomination or a designation may only occur upon a declination by the candidate, the death of the candidate, the disqualification of the candidate from holding the office, or a tie vote at a primary election (Election Law § 6-148 [1]).

Certification of Vacancies

An independent petition was invalidated because signatures collected before the vacancy in the congressional office was certified by the State Board of Elections were

not valid and could not be counted (*Vitaliano v D'Emic*, 243 AD2d 662 [2d Dept 1997], *lv denied* 90 NY2d 812 [1997]). The court indicated that the signatures could only have been collected after the State Board of Elections certified the existence of the vacancy. If the certification of vacancy is not filed timely, the candidate's remedy is to commence a proceeding to compel filing of the certificate (*Vitaliano* at 663). The court did not address the statutory language for such petitions which clearly states that the time to begin collecting signatures begins to run from the date of the vacancy (Election Law § 6-158 [10]).

Disqualification

Hatch Act Disqualification

The Hatch Act is a federal law that prohibits federal government employees and certain others from seeking elective office in a partisan election. The Third Department held when a candidate receives a Hatch Act violation notice subjecting the candidate to loss of employment if the candidacy is continued, the candidate is thereby disqualified permitting the filing of a declination that creates a vacancy. (*Parete v Hunt*, 287 AD2d 777 [3d Dept 2001]). The Second Department rule is to the contrary (*In Matter of Li v Meehan*, 52 AD3d 544 [2d Dept 2008]).

Residency Disqualification

Candidate who, on Election Day, would lack the necessary residency for the public office sought, can be disqualified with another candidate being substituted by the political party which nominated him/her, even after the deadline to decline has passed (*Krysan v New York State Board of Elections*, 55 AD3d 1217 [3d Dept 2008]).

Substitutions

A candidate may be substituted when a designated candidate has properly declined the designation (Election Law § 6-148). But a substitution cannot fix an invalid petition.

“In the absence of a valid designating petition, a declination does not create a vacancy within the meaning of the Election Law” (*Hunter v New York State Board of Elections*, 32 AD3d 662 [3d Dept 2006]; *see also Matter of Leemhuis v State of New York, Bd. of Elections*, 186 AD2d 863 [1992], *aff'd on op below* 155 Misc2d 531[1992]; *Matter of Nowik v Jablonski*, 133 AD2d 874, 875 [1987]; *Matter of Gdanski v Rockland County Bd. of Elections*, 97 AD2d 744, 744-745 [1983]); *Matter of Turdik v Bernstein* 87 AD3d 748).

Certificates of authorization, when required by law, are required of both the

declining and the substituted candidate. If a candidate who declines was required to file an authorization pursuant to Election Law § 6-120 but failed to timely do so, the original petition is invalid, and no substitution is possible (*Id*). Assuming the proper authorization of the declining candidate was filed as it must be, the substituted candidate must still, in addition, file their own authorization if one is required by Election Law § 6-120.

CHALLENGES

This section addresses issues raised in challenging petitions through the objection process and by court action.

Objections

The board of elections is a purely ministerial board and “they had no power to deal with objections involving matters not appearing upon the face of the papers” (*Application of McGovern*, 291 NY 104 [1943], citing *Matter of Frankel v Cheshire*, 212 AD 664, 671 [2d Dept 1925]). Objections which allege fraud or forgery should not be ruled on by the board of elections but can only be ruled on by a court of competent jurisdiction (*Bednarsh v Cohen*, 267 AD 133 [1st Dept 1943], *lv denied* 267 AD 760, *lv denied* 292 NY 578 [1943]).

Standing to Object

Independent Petitions

Any qualified voter in the relevant political subdivision can challenge an independent nominating petition as a citizen objector (*Doran v Scranton*, 49 AD2d 976 [3d Dept 1975]). The objections must be signed by the objector (*Banker v Apfeldorf*, 93 AD2d 848 [2d Dept 1983]).

Objections To Party Petitions / Certificates For Public Office

An objector must be a registered voter in the relevant political subdivision in order to file objections to a party certificate or petition related to a **public office** (*Matter of Augustini v Bernstein*, 2019 NY Slip Op 4312 [4th Dept 2019] [dismissing subsequent court proceeding brought by objector who was not a valid objector by virtue of not living in the jurisdiction of the office on petition objected to]).

The objector does not need to be enrolled in the political party stated on the petition

or certificate for public office. (Election Law § 6-154 [2]; *Matter of Van Sleet*, 16 NY2d 848 [1965]; see also *Bonelli v Bahren*, 196 AD2d 866 [2d Dept 1993] [objector to a certificate of authorization has standing as a registered voter eligible to vote for the public office]; *Queens County Republican Committee v New York State Board of Elections*, F Supp2d 341 [EDNY 2002] [upholding constitutionality of non-party members to object to petition for public office]).

Objections Where Objector's Enrollment Matters

The objector to a petition **for party position** (*i.e.* petition for Member of County Committee or Member of State Committee) must, in addition to being a voter in the relevant political subdivision, be enrolled in the relevant political party (Election Law § 6-154 [2]; *Bennett v Justin*, 51 NY2d 722 [1980]). If the objector objects to the method of nomination (caucus or primary), the objector must be an enrolled member of the party to bring suit (*Stempel v Albany County Board of Elections*, 60 NY2d 801 [1983]; *Pirozzolo v Lia*, 142 AD3d 569 [2d Dept 2016]).

A non-member of a political party lacks standing to challenge that party's compliance with its own rules (*Matter of Nicolai v Kelleher*, 45 AD3d 960 [3d Dept 2007]; see also *Matter of Fehrman v New York State Board of Elections*, 10 NY3d 759 [2008] [where the non-member not only lacked standing to challenge the party rules, but further lost his standing to challenge as an aggrieved candidate pursuant to Election Law § 16-102 when he abandoned his assertion that he was the party's candidate and instead argued that the party had not validly nominated any candidate]). In *Occhipinti v Westchester County Board of Elections* (49 AD3d 674 [2d Dept 2008]), the non-party petitioner, who was a political party chairman, did have standing to commence a proceeding challenging the alleged failure to comply with the requirements governing nomination by party caucus in Election Law § 15-108 [2] [a].

Judicial Convention Objections

In a proceeding challenging the validity of certificates of nomination for supreme court candidates, the petitioner could not maintain standing as an aggrieved candidate pursuant to Election Law §16-102 since he was not a member of the party and did not allege that, but for the purported irregularities in the manner by which the nominating convention was conducted, he would have received the nomination (*Nicolai v McKay*, 45 AD3d 965 [3d Dept 2007]).

County Committee

An objector to a petition for county committee must be enrolled to vote in the election district of the committee position to which they are objecting (*Lucariello v Niebel*,

72 NY2d 927 [1988]; *see also Galow v Dutchess County Board of Elections*, 242 AD2d 344 [2d Dept 1997]; *Cantatore v Sunderland*, 196 AD2d 606 [2d Dept 1993]; *Luthman v Gulino*, 131 AD3d 636 [2d Dept. 2015]). Even a candidate for county committee who does not live in the election district he is seeking to represent is not a proper objector at the board of elections to an opponent's petition (*Id*).

When Objections Must Be Received

General objections must be filed with board of elections within three days of the filing of the petition and the specifications of objections must be filed within six days of the filing of the general objections (Election Law § 6-154 [2]).

The three days begin to run from the date that the petition is received by the board (*Miele v Reda*, 243 AD2d 566 [2d Dept 1997], *lv denied* 90 NY2d 811 [1997]; *Benson v Scaringe*, 84 AD2d 603 [3d Dept 1981], *lv denied* 54 NY2d 609 [1981]). The six days for specifications run from the date that the general objections are received at the board, if they are personally brought into the board, or from the date of the postmark of the general objections if they are mailed (*Bush v Salerno*, 51 NY2d 95 [1980]). The courts may not extend the time to file specifications of objections (*Breitenstein v Turco*, 254 AD2d 566 [3d Dept 1998]).

The time limits for filing of objections to certificates of nomination, authorization, acceptance, declination, substitution, etc. would also be measured from the date of receipt of the certificate (*Pierce v Breen*, 86 NY2d 455 [1995] [court allowed objections to a certificate of nomination to be filed within three days of last day to file the certificate when the certificate was filed before the first day the certificate was permitted to be filed]).

Objections were deemed valid where they were filed before 9:00 a.m. when the board was open and accepted the documents (*Fedak v Judge*, 71 AD3d 892 [2d Dept 2010]).

Postmarks

If filing objections by mail they must be properly postmarked. The absence of a postmark on the envelope is a fatal defect (*Raimone v Sanchez*, 253 AD2d 506 [2d Dept 1998]), *lv denied* 92 NY2d 806 [1998]; Election Law § 1-106 [1]). “[T]he postmark date is the date that controls for purposes of determining if papers sent by mail have been timely filed” (*Gallo v Turco*, 131 AD3d 785 [3d Dept 2015]). In addition to a timely postmark, any document filed by mail must arrive at the board of elections no later than two days after the last day to file the document in person. However, in *Hardwick v Ward* (109 AD3d 1223 [4th Dept. 2013]) the Appellate Division affirmed a lower court ruling that allowed the late filing of a certificate of authorization which was postmarked the day after it was delivered to the Post Office due to a clerical error on the part of the Post Office.

“[A] postage meter stamp is not the equivalent of a postmark” (*Gallo v Turco*, 131

AD3d 785 [3d Dept 2015]).

Pursuant to Election Law § 1-106 documents may be filed by use of express delivery services designated pursuant to 7502 of the Internal Revenue Code. Documents sent through such delivery services are deemed the equivalent of a mailing by the United States Postal Service, and any date recorded or marked indicating when the item was received by the delivery service is the equivalent of a postmark. Only the following delivery services and products qualify: DHL Express 9:00, DHL Express 10:30, DHL Express 12:00, DHL Express Worldwide, DHL Express Envelope, DHL Import Express 10:30, DHL Import Express 12:00, DHL Import Express Worldwide, FedEx First Overnight, FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Next Flight Out, FedEx International Priority, FedEx International First, FedEx International Economy, UPS Next Day Air Early AM, UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, UPS 2nd Day Air A.M., UPS Worldwide Express Plus, UPS Worldwide Express.

Rehearing

Once the board has made a determination on the petition objections, it may not reopen a hearing even if it receives new evidence after the hearing is closed (*Schneeberg v New York State Board of Elections*, 78 AD2d 559 [3d Dept 1980], *rev'd on other grounds*, 51 NY2d 814 [1980]).

Service of Objections on the Candidate

Failure to adhere to a rule of the board of elections which requires service of the objections upon the candidate “. . . deprived the board of jurisdiction to properly consider the objections and thereafter to rule to invalidate the petition” (*Young v Thalman*, 286 AD2d 550 [3d Dept 2001]). Such rules can apply to both general and specific objections (*Matter of Zalocha v Donovan*, 120 AD3d 994 [4th Dept 2014] [relying on Election Law § 6-1549(2); 9 NYCRR 6204.1]; *Matter of Grancio v Coveney*, 60 NY2d 608, 610])

If a board of elections has no rule requiring service of objections, service is not required (*Wilson v Davis*, 131 AD3d 655 [2d Dept 2015]; *Boniello v Niagara County Board of Elections*, 131 AD3d 806 [4th Dept 2015]).

Hatch Act

The Hatch Act generally prevents federal government employees from seeking office as a candidate in a partisan election (5 USC §1502 [a] [3]).

The 2012 amendments to the Hatch Act reduced the number of state and local government employees within the Hatch Act's reach. Today, only state or local government employees whose salaries are completely paid with federal funds are not

permitted to seek office in partisan elections.

Information on the Hatch Act is provided at <http://www.osc.gov>. Requests for Hatch Act advisory opinions may be made by e-mail to: hatchact@osc.gov

Joinder in Special Proceeding

In *Atwood v. Pridgen*, 37 N.Y.S.3d 164 [4th Dept 2016], objectors properly joined multiple candidates in special Election Law proceeding to invalidate the designating petitions of candidates for office of political party committee member in primary election. There existed the same series of transactions or occurrences, and there were common questions of law or fact, as candidates all sought to run for the same office and objectors sought to invalidate their designating petitions based on fraud, error, and misrepresentation in the collection of signatures on designating petitions.

LOCAL REFERENDA

Under Election Law §§ 4-108 and 16-104, a ballot proposal or abstract may be challenged on the basis that it is “misleading, ambiguous, illegal or inconsistent with existing law” (*Gruskoff v County of Suffolk*, 132 AD3d 923 [2d Dept 2015]). The Appellate Division, Fourth Department, had occasion to rule on the actions of a county board in refusing to place a local referendum on the ballot, underscoring that the board of elections’ authority to reject a ballot proposal is ministerial, and minor procedural or technical defects in the statutory procedures to place a referendum question on the ballot are not to be overstressed. (*Gaughan v Mohr*, 77 AD3d 1475 [4th Dept 2010]). The *Gaughan* Court used the following language in overruling the determination of the county board:

Respondents contend that they properly rejected the referendum question from the ballot because it violated County Law §§ 100 and 102. We reject that contention. The revised form of the referendum question transmitted to the Erie County Board of Elections on September 27, 2010 complied with the procedural requirements set forth in County Law § 102 [1]. “This [C]ourt will not ... discourage the efforts of public officials by declaring some minor step omitted in the statutory procedure fatal[] or by overstressing the importance of some technical defect” (*Crell v O'Rourke*, 88 AD2d 83, 86 [4th Dept 2010], *aff'd* 57 NY2d 702 [2010]).

We thus conclude that respondents abused their ministerial authority in rejecting the referendum question from the ballot (*see generally Matter of Lenihan v Blackwell*, 209 AD2d 1048, 1049, *lv denied* 84 NY2d 808; *Crell*, 88 AD2d at 85-86).

ELECTION LAW §3-300

The Court of Appeals, in *County of Erie v. CSEA Local 815* (19 NY3d 1070 [2012]) reaffirmed the principle, established in *County of Chautauqua v Chautauqua County Employees' Unit 6300 et al* (181 AD2d 1052 [4th Dept 1992]) and *Matter of Board of Elections of the County of Westchester v O'Rourke* (210 AD2d 402[2d Dept 1994]) that Election Law §3-300 requires that the county boards of elections have autonomy with the amount appropriated by the legislature with respect to salaries of employees and exclusive control of their personnel and the performance of their duties. The county may not bind the board by a collective bargaining agreement which infringes upon the prerogative of the commissioners under Election Law § 3-300 (*but see* Preemption of Election Law)

PREEMPTION OF ELECTION LAW

Applying a standard pre-emption analysis, the First Department held Article 14 of the Election Law does not preempt local contribution limits and source limits that are stricter than those contained in article 14 (*McDonald v New York City Campaign Finance Bd.*, 117 AD3d 540 [1st Dept 2014]).

The Election Law includes a statutory preemption provision. Election Law § 1-102 provides “[w]here a specific provision of law exists in any other law which is inconsistent with the provisions of [the Election Law], such provision shall apply....” In *Castine v Zurlo*, Supreme Court addressed whether a local law adopted by a county can preempt the Election Law pursuant to Election Law § 1-102 (46 Misc. 3d 995 [Clinton County Sup Ct 2014]). Upon extensive review of the legislative history, the Court held the legislature intended only to permit other state laws to preempt the Election Law (*cf Castine v Zurlo*, 938 F Supp 2d 302, 313 [NDNY 2013] [reaching a different conclusion] *overruled in part by* 756 F3d 171, 178 [2d Cir. 2014] [describing application of Election Law §1-102 here as a “novel, complex matter involving the interplay between state and local law” and suggesting the District Court decline to exercise supplemental jurisdiction on the question—advice the District Court followed]).

CAMPAIGN FINANCIAL DISCLOSURE

Contribution Limit Constitutionality

United States Supreme Court

Citizen United v Federal Election Com'n, (558 US 310 [2010]).
(RE: Federal Limit on Corporate Expenditures)

“Government may regulate corporate political speech through identification and disclosure requirements, but it may not suppress that speech altogether” (*Id.* at 319). The government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity. The federal statute barring corporate and union independent expenditures for express advocacy or electioneering communications violated the First Amendment. The disclaimer and disclosure provisions of Bipartisan Campaign Reform Act of 2002 (BCRA) did not violate the First Amendment.

McCutcheon v Federal Election Com'n, (134 S Ct 1434 [2014]).
(RE: Federal Individual Aggregate Contribution Limit)

The federal statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violates the First Amendment. “[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association,” and “[w]hen an individual contributes money to a candidate, he exercises both of those rights” (*Id.* at 1448). According to the Supreme Court, in order to be valid, any regulation of campaign contributions must target “quid *pro quo*’ corruption or its appearance,” that is, the “direct exchange of an official act for money,” or “dollars for political favors” (*Id.* at 1441). The court held aggregate limits do not further this purpose.

United States Court of Appeals for the Second Circuit

Vermont Right to Life Committee, Inc. v Sorrell, (753 F3d 1189 [2nd Cir 2014]).
(RE: Vermont Contribution Limit on Coordinating Entities)

Vermont Right to Life (VRTL) created and is the umbrella organization for VRTL-Political Committee and VRTL- Fund for Independent Political Expenditures. VRTL-Political Committee makes direct contributions to candidates and is not an independent-expenditure-only group. There is no operational or structural barrier between the two

entities that share staff, resources and a fluidity of funds. VRTL- Fund for Independent Political Expenditures is enmeshed completely with and not distinguishable from VRTL-Political Committee.

The Second Circuit held the Vermont statute setting \$2,000 limit on contributions to political committees from single source in any two-year general election cycle is not unconstitutionally vague and does not violate First Amendment. VRTL- Political Committee gives contributions to and coordinates with candidate campaigns, is not an independent-expenditure-only group and is subject to the limit. VRTL-Fund for Independent Political Expenditures is indistinguishable from VRTL-Political Committee and is therefore subject to the limit.

United States District Courts in New York

NY Progress and Protection PAC v Walsh, (17 F Supp 3d 319 [SDNY 2014]).
(RE: New York Individual Aggregate Contribution Limit)

The individual aggregate contribution limit of \$150,000, as provided for in Election Law § 14-114(8), is unconstitutional as applied to contributions to independent expenditure committees because it violates the First Amendment.

Hispanic Leadership Fund, Inc. v Walsh, (42 F.Supp3d 365 [NDNY 2014]).
(RE: New York Limit on Corporate Contributions and Independent Expenditures)

Plaintiff Hispanic Leadership Fund, Inc (HLF), is a 501(c)(4) tax exempt social welfare organization and Plaintiff Freedom New York (FNY) is registered with the New York State Board of Elections as an independent expenditure committee. The Court held Election Law § 14-116 (2), which imposes a \$5,000 limit on HLF, Inc.'s contribution to Freedom New York is unconstitutional because it violates the First Amendment. Election Law § 14-114 (8), which imposes an individual aggregate contribution limit of \$150,000 on contributions made by individuals to FNY, was held unconstitutional because it violates the First Amendment.

New York State Board 2016 Opinion # 1

The State Board of Elections issued formal guidance and a formal opinion concluding: (1) “[T]he \$150,000 aggregate contribution limit found in EL § 14-114 (8) is not enforceable,” and (2) “[T]he \$5,000 Corporate Limit, as relates to contributions from a corporation to an independent expenditure committee, is not enforceable” (NYBOE 2016 Opinion # 1)

Party Money in a Primary

The former Election Law § 2-126 prohibited a political party from spending money in a primary election; either its own (intra) or another party's (inter). This provision was declared unconstitutional, and the legislature repealed it in 2017 (see, *infra*, Notable Legislation).

In a State Court case which involved one party spending money in another party's primary (inter-party spending), the trial court found that the Working Families Party violated Election Law § 2-126 by spending money relative to the Democratic Party Primary for District Attorney. The Appellate Division agreed with the Trial Court that the statute was violated by the Working Families Party. However, the Appellate Division found the statute, which is a blanket prohibition on party funds in a Primary, as applied, was unconstitutional, and reversed the decision of the Trial Court. The Appellate Division, held that the Election Law § 2-126 expenditure limits, as applied to the Working Families Party, unconstitutionally burdened its First Amendment rights of political expression and association (*Avella v Batt*, 33 AD3d 77 [3d Dept 2006]).

In a separate case, the Federal District Court agreed that Election Law 2-126 violated First Amendment protections afforded speech, expression and association (*Kermani v New York State Board of Elections*, WL 2190716 [NDNY 2006]). On a motion for a preliminary injunction, plaintiffs stated that they wanted to spend party funds within their own primary election (intra party spending). They claimed that they were unconstitutionally prohibited by Election Law § 2-126 and feared enforcement of the statute by the State Board of Elections. The District Court found that the plaintiffs established a likelihood of success on its claim that Election Law 2-126 violated their First Amendment protections of speech, expression and association. The Court prohibited and enjoined the State Board from enforcing the provisions of Election Law § 2-126 as to independent expenditures by political parties in primary elections and stayed application of the preliminary injunction for one year until July 25, 2007 as it applies to coordinated expenditures and contributions (transfers). The State Board is prohibited from enforcing Election Law § 2-126 as to independent expenditures by a political party in a Primary and after July 25, 2007, the State Board is prohibited and from enforcing the provisions of Election Law § 2-126 regarding coordinated expenditures and contributions (transfers) by political parties in a Primary.

NOTABLE RECENT LEGISLATION

2019 Laws **(as of July 2019)**

Chapter 2

Allows pre-registration of 16 and 17-year-olds.

Chapter 3

Provides for statewide transfer of voter registrations.

Chapter 4

Applies \$5,000 aggregate annual contribution limits to Limited Liability Companies (LLC) contributions and provides other disclosure requirements.

Chapter 5

Provides for a June Primary Election and related changes.

Chapter 6

Provides for nine days of early voting before each primary, general and special election conducted by boards of elections, excepting village elections.

Chapter 17, 18 and 22

Relates to designating petition requirements in 2019 and reduces signature requirements on petitions for member of town committee to 3% of active enrollment through 2020.

Chapter 42

Party county and state committee organizational meetings to occur between September 17 and October 6 in 2019.

Chapter 46

Changes the deadline for new Parties to file certificates of nomination in their first year of existence to September 1.

Chapter 53 and 54

Provides for an early voting and e-poll book grant program.

Chapter 55

Part XX Provides for electronic poll books; part YY relates to time off for employees to vote; part AAA prohibits loans to candidates from lobbyists, PACs and independent expenditure committees; part BBB provides primary elections will be open between 6am and 9pm statewide beginning in 2020; part CCC provides for electronic voter registration system.

Chapter 63

Provides for alternative ballot accountability that does not include ballot stubs or perforated ballots.

Chapter 66

This legislation removes requirement that primary ballots be differentiated by party color.

****Many Election Law provisions passed by both houses in 2019 are pending executive action.*

As of July 23, 2019, these include Assembly Bill #s 111 (relates to publishing local campaign contribution limits), 112 (relates to ballot proposals appearing on ballot), 120 (relates to testimony of voter related to signature on petition), 163 (related to statewide candidate and contest information on State Board website), 202 (relates to special ballots for board employees issued up to close of polls), 219 (relates to special ballots for victims of domestic violence), 349 (relates to hours of Westchester Board of Elections for petition filings), 623 (relates to certain corporations participating in political campaigns), 837 (relates to voter notification of special election), 1108 (campaign funds for childcare expenses when related to execution of duties for public office or campaign), 1320 (relates to substantial compliance with affidavit ballot requirements), 1454 (allows flexible alternative poll site staffing plans), 1525 (relates to poll watchers), 1565 (relates to email addresses and notices to voters), 1641 (relates to consolidating all local campaign finance filings at State Board), 1740 (allows campaign finance board filings to meet state filing requirements thus eliminating duplication of filings), 2047 (prohibits independent bodies achieving party status from changing names), 2264 (enacts uniform election night procedure act), 2599 (relates to distribution of voter registration forms and assistance at SUNY), 2682 (enacts voter friendly ballot act), 2687 (requires absentee ballots include county committee members), 3543 (authorizes consolidation of certain small election days for administration purposes), 4668 (requires attribution on campaign materials), 4949 (relates to Buffalo School Board elections), 5219 (requires filing of acceptances by members of opportunity to ballot committee to receive notices), 6714 (committee to receive notices members have ability to act with regard to petition as a candidate), 7709 (ensures uniform primary hours will apply to April 2020 presidential preference primary), 8176 (provides for presidential primary on April 28), 8228 (change of enrollment deadline moved to February 14 preceding primary).

Change of enrollment effective date legislation.

A new voter both registers to vote and enrolls in a party (optional) simultaneously by submitting a voter registration application to the board of elections. Any registered voter may thereafter submit a *change of enrollment* to switch political parties at any time. The legislature has passed a bill (A.8228/S.6532) establishing a new waiting period for when such changes of enrollment take effect. At the time of publication this legislation was not acted upon by the Governor. If signed by the Governor, the bill would allow changes of enrollment to take effect immediately except that changes of enrollment received in the period between February 14 and seven days after the primary would be effective on the seventh day after the June Primary.

2018 Laws

Chapter 3

Provides for the 2018 primary to be held on Thursday, September 13, and makes conforming changes.

Chapter 59

Part JJJ enacts new requirements for independent expenditure reporting, particularly regarding paid internet digital advertisements. The legislation amends Election Law § 14-106 (filing of campaign materials), 14-107 (independent expenditures) and § 14-126 (penalties). The legislation adds a new § 14-107-b (independent expenditure verification).

2017 Laws

Chapter 106

This bill clarifies the witness requirements for designating and independent nominating petitions. The bill codifies a New York Court of Appeals decision and deletes the requirement that a witness to a party designating petition or an independent nominating petition must reside in the district of the office in the petition. The bill also clarifies that a witness to a petition must not have previously signed a petition for another candidate for the same office (Election Law §§ 6-132[2], [3]; 6-140[1][b]; [2]; 6-204[1]; 6-206[1]). The bill includes conforming changes for village petitions (Election Law § 15-108[3], [4]).

Chapter 173

This bill provides that boards of elections shall determine by lot whether to first print the context for male or female candidates and shall use the same order for all ballots in the entire county or city of New York (Election Law § 7-116[7]).

Chapter 176

This bill clarifies the requirements for designating and nominating petitions to include the directive to add a district number for the public office, if applicable (Election Law §§ 6-132[1]; 6-140[1][a]; 6-204[1]; 6-206[1]; 15-108[3], [4]).

Chapter 210

This bill removes Election Law § 2-126, which has been ruled unconstitutional.

Chapter 293

This bill authorizes poll workers to work split shifts in addition to full day shifts, providing boards of election for flexibility to staff poll sites on Election Day (Election Law § 3-400[7]).

Chapter 307

This bill requires the state board of elections and local boards of elections to publish the campaign website addresses of certain candidates for public office (Election Law § 4-123).

Chapter 106

This bill removes the requirement that a candidate's residence address be published in the legal notice along with the name of the candidate prior to an election (Election Law § 4-122[1]).

Chapter 106

This bill extends the polling hours in Dutchess County for primary elections to 6am to 9pm (Election Law § 8-100[2]).

PROOF ISSUES

Correcting Defects: Issues of Proof

When the witness statement on a designating petition contains unexplained and uninitialed alterations, the Third Department held that the signatures on the page need not be invalidated “where an explanation is provided by affidavit or testimony” (*Matter of VanSavage v Jones*, 120 AD3d 887 [3d Dept 2014]). However, the testimony offered must be reliable. When a designating petition contained “numerous instances of unexplained and uninitialed alterations to the dates on numerous signature lines, many of which were contained on petition sheets for which the [candidate] himself was the subscribing witness” and the candidate testified at the hearing in Supreme Court, the Second Department “decline[d] to disturb the Supreme Court’s finding that his testimony was “unreliable, not tenable, and not worthy of belief” (*Matter of Merrill v Fritz*, 120 AD3d 689 [2d Dept 2014]).

Permitting an *explanation* for a change after the petitioning period is different than permitting a *change*. An opportunity to ballot petition with an incorrect and invalid witness date could not be cured by the notary’s testimony offered after the petitioning

period. (*Matter of Stevens v Collins*, 120 AD3d 696 [2d Dept 2014]). Similarly, a subscribing witness statement dated before the date of the signatures was held not to be cured by an explanatory affidavit the witness failed to file before the end of the petitioning period (*Matter of Quinn v Erie County Bd. of Elections*, 120 AD3d 992 [4th Dept 2014]).

Proof Generally

Parties can chart their own procedural course and when parties stipulate to allow certain claims and admit certain evidence, there is no merit to a subsequent claim that such claim or evidence should not be considered by Supreme Court (*Matter of Rosenblum v Tallman Fire Dist.*, 117 AD3d 1064 [2d Dept 2014]).

ELECTION LAW VIOLATIONS

Election Law Violations

A conviction pursuant to Election Law § 17-122 (7) requires the subscribing witness to have “knowledge that the statement subscribed and sworn to by him or her was known by him or her to be false” (*People v Fonvil*, 116 AD3d 984 [2d Dept 2014]).

An alleged bribery payment made to secure a certificate of authorization can be the foundation of a bribery scheme charge (*People v Smith*, 985 F Supp 2d 547 [SDNY 2014]).

The Election Law § 17-102 [10] provision making it a misdemeanor for an election worker to knowingly permit electioneering in a polling place is not unconstitutionally vague (*People v Maldonado*, 2019 NY Slip Op 29078 [Dist Ct Nassau 2019]).

COURT ACTIONS

Judicial Review

Election matters are generally brought in the Supreme Court of the county involved. For our purposes, the Supreme Court is the lowest level court in the system. It is also the court with the broadest or widest jurisdiction and authority. Supreme Court is generally in session on a daily basis. Most election matters are started by filing and serving an Order-to-Show-Cause which requires the parties to appear before a judge on

a specific day. Usually, any hearing the judge is inclined to hold will happen on that date. Decisions are often delivered orally from the bench the same day, or, if written, within a day or two, depending upon the judge's schedule.

If the losing party is so inclined, they can appeal the decision to the appropriate appellate division. The appellate divisions have specific blocks of time when they hear appeals and will sometimes set aside specific days during that block of time for hearing elections cases. In the lower court, one judge hears the matter and makes the decision. At the appellate division, there is a five-judge panel which hears the matter and renders a written opinion as expeditiously as possible.

The last level of appeal within the state system is to the Court of Appeals, which is the court of last resort. The number of days set aside for elections matters by this court is very limited. There is a very formal procedure whereby parties ask permission to bring an appeal.

Relief Impossible

A court may determine that a party entitled to relief under the law will not receive such relief if it is a true impossibility for the relief to be provided. Always, such a determination of "impossibility" turns on the specific facts of a particular case (*Pidot v Macedo*, 141 AD3d 680 [2d Dept 2016]). The following cases demonstrate the application of this principle.

In an appeal regarding a designating petition for a candidate to appear on the September 2014 primary ballot, the Second Department held, on October 8, 2014, that "it would be impossible, if this Court were to entertain the merits, to render meaningful relief in accordance with the Election Law (*Matter of Semple v Laine*, 121 AD3d 798 [2d Dept 2014]).

A challenge to the configuration of the Suffolk County ballot was brought, and given the particularized facts and circumstances presented to the court, the court noted it would be "impossible to render[] petitioner any meaningful relief given that Election Day now is just eleven days away" (*Hensley v Matthews*, 2014 NY Slip Op 32742(U) [Sup Ct Suffolk County 2014]).

In *Pidot*, the Second Department held that adding petitioner to the primary ballot when the primary was four days from the date of Supreme Court's final order was impossible (141 AD3d at 681). The court also denied the petitioner's application for a new primary election because such relief was not sought in the petition. The Appellate Division also noted that though Supreme Court validated *Pidot's* designating petition, a valid petition is not always dispositive of "whether an election is held or not" (*Id.* quoting *Messina v. Albany Co. Bd. of Elections*, 66 AD3d 1111 [3d Dept 2009]).

Party Chair Standing

A town chairperson lacks standing to commence a proceeding pursuant to Election Law § 16-102 (1) to invalidate a petition (*Axelrod v Reda*, 120 AD3d 671 [2d Dept 2014]). However, a chairperson may challenge a petition, notwithstanding Election Law § 16-102 (1), when the party rules provide that a candidate could only be nominated by caucus, not a primary. *Anderson v. Scannapieco*, 54 Misc3d 242 [Sup Ct Nassau 2016].

Table Summarizing Actions

Election/ Proceeding	Who Can Bring	Time to Commence	Proper Court	Election Law Section
Primary/Invalidate designating or OTB Petitions	aggrieved candidate; objector; party chairperson in a contested primary	Within 14 days of last day to file petition	Supreme Court	§§16-100; 16-102(1)(2)
Primary/Validate designating or OTB Petitions	candidate; committee to receive notices on OTB	Within the later of 14 days of last day to file or 3 days of invalidation	Supreme Court	§§16-100; 16-102(1)(2)
Primary Results	aggrieved candidate; chairman of party committee	Within 10 days of primary	Supreme Court	§§16-100; 16-102(1)(2)
General/Caucus proceedings or certificate of nomination	aggrieved candidate; enrolled objector for proceedings challenge; objector for challenge to certificate	Within 10 days of filing of certificate of nomination	Supreme Court or County Court	§§16-100; 16-102(1)(2)
General/invalidate nominating petition	aggrieved candidate; objector	Within 14 days of last day to file	Supreme Court or County Court	§§16-100; 16-102(1)(2)
General/validate nominating petition	aggrieved candidate	Within the later of 14 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§16-100; 16-102(1)(2)
General/Judicial Convention proceedings or certificate of nomination	aggrieved candidate; enrolled objector if challenge to proceedings; party chairperson; objector if challenge to certificate	Within 10 days of holding of convention	Supreme Court	§§16-100; 16-102(1)(2)

Election/ Proceeding	Who Can Bring	Time to Commence	Proper Court	Election Law Section
Special Election/Certificate of Nomination by Party Committee	objector; aggrieved candidate	Within 10 days of filing of certificate	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Special Election/Invalidate nominating petition	aggrieved candidate; objector	Within 7 days of last day to file	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Special Election/Validate nominating petition	aggrieved candidate	Within the later of 7 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Village Elections/invalidate designating or independent nominating petition	aggrieved candidate; objector; party chairperson in a contested primary	Within 7 days of last day to file	Supreme Court or County Court	§§15-138; 16-100; 16-102(1)(2)
Village Election/validate designating or independent nominating petition	aggrieved candidate	Within the later of 7 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§15-138; 16-100; 16-102(1)(2)
Village Elections: Casting/Canvassing or refusal to cast/canvass ballots	candidate; chairman of party committee; voter whose ballot was not cast/canvassed	Within 10 days of the election	Supreme Court or County Court	§§16-100; 16-106(1)(5)
All other Elections: Casting/Canvassing or refusal to cast/canvass ballots	candidate; chairman of party committee; voter whose ballot was not cast/canvassed	Within 20 days of the election	Supreme Court	§16-106(1)(5)
General/Challenge return of canvass on statewide proposition	attorney general; chairman of party state committee	Within 20 days of election or alleged erroneous statement or determination	Supreme Court	§§16-100; 16-106(3)(5)

Election/ Proceeding	Who Can Bring	Time to Commence	Proper Court	Election Law Section
Right of individual to be registered	registered voter in subject county; the state board of elections	No limitation in the Election Law; within 4 months of the determination of the challenge to the registration pursuant to §5-218 and §5-220 under CPLR §217	Supreme Court or County Court	§16-108(1)
Challenge board's denial to register individual	aggrieved voter	No limitation in the Election Law except the aggrieved voter must petition the BOE within 2 weeks of the last day to register or within 5 days of the voter's receipt of the notice of rejection whereupon the BOE shall make of final determination within 1 week pursuant to Election Law §5-224 and the voter may judicially challenge within 4 months of the final denial under CPLR §217	Supreme Court or County Court	§16-108(1)
Challenge board's denial to issue absentee ballot or application for same	aggrieved voter	No limitation in the Election Law; the prime issue is mootness as the proceeding must be brought and concluded in time for the absentee ballot to be properly cast.	Supreme Court or County Court	§16-108(4)

Election/ Proceeding	Who Can Bring	Time to Commence	Proper Court	Election Law Section
Challenge denial of right to vote	aggrieved voter	No limitation in the Election Law; the prime issue is mootness as the proceeding must be brought and concluded in time for the voter to actually vote. See election Law §16-108(3) for Election Day applications to vote on the machine.	Supreme Court or County Court in First & Second Departments, supreme court justices must be assigned to sit at local BOEs or other locations for this purpose; it is discretionary in the rest of the state.	§16-108(3)(6)

Service of Process

In an Election Law proceeding the petitioner has an obligation to file the initiating papers and serve them on the named respondents, including the board of elections, before the end of the limitations period. The method of service described in the Order to Show Cause is jurisdictional and must be strictly complied with (*Streng v Westchester County Board of Elections*, 131 AD3d 652 [2d Dept 2015]; *Fonvil v Audain*, 131 AD3d 630 [2d Dept 2015] [citing Election Law Section § 6-116 requiring proceeding to be brought "upon such notice to such...persons...as the court or justice shall direct"]). The Court of Appeals held in *Angletti v Morreale*, that where an Order to Show Cause provides for service by "nail and mail", the mailing prong of service is satisfied by putting the papers in the mail stream on the last day of the limitations period (25 NY3d 794 [2015]). "[T]here is no sound reason to adopt a rule that would effectively shorten the very brief period of limitations applicable to election cases—ranging from 3 to 14 days...where the proceeding has already been timely commenced by filing, respondent has notice thereof by the nailing method of service, and imminent delivery of the mailing made within the limitations period can be expected" (*Id.* at 798).

Affirmative Relief--A Separate Proceeding

Currently, there is a split in the Appellate Divisions as to whether a separate validating proceeding is necessary where the respondent wishes to challenge in court determinations of the board invalidating any portion of a designating or nominating petition. In *Aguirre v Hernandez*, the petitioners brought a proceeding challenging an opponent's designating petition (131 AD3d 716 [2015]). After the matter was commenced, the board of elections declared the subject designating petition invalid. After the limitations period to bring a validating proceeding had passed, the candidate removed from the ballot then served his answer containing a crossclaim for

reinstatement to the ballot. The petitioner withdrew the underlying proceeding and argued the cross claim was improper. The court agreed, noting permission was not obtained to bring the cross claim and holding that the cross claim was “in actuality, an improper and untimely attempt to commence a proceeding to validate [the] designating petition” (*Id.* at 717 *see also MacKenzie v Gharney*, 131 AD3d 638 [2d Dept 2015]; *Nagubandi v Polentz*, 131 AD3d 639 [2d Dept 2015]).

However, in *Sheldon v Bjork* (142 A.D.3d 763 [4th Dept 2016]), the Appellate Division concluded that the trial Court properly entertained the respondent's challenge to a Board of Elections' determination invalidating certain signatures, even though a separate action was not commenced, reasoning that the affidavit in opposition to the petition “was adequate to alert the petitioner [] that the signatures previously declared invalid would be contested” (*Id. citing Halloway v Blakely*, 77 AD2d 932, 932 [2d Dept 1980]).

Notice to Attorney General of Constitutional Challenge

Failure to provide notice to attorney general of constitutional challenge as required by Executive Law § 71 and CPLR 1012 [b] [1] is grounds for dismissal of constitutional claims but not basis for dismissal of other election law claims raised in the pleadings (*Luthman v Gulino*, 131 AD3d 636 [2d Dept 2015]).

Table Summarizing New York Court System

NYS COURT OF APPEALS
Highest level state court, also called court of last resort.

APPELLATE DIVISION

The statewide appellate court is the Appellate Division, which is divided into four departments. Each department is made up of several judicial districts. The departments, and the districts and corresponding counties are listed in the following table.

First Department	Second Department
<p>1st JD New York [Manhattan]</p> <p>12th JD Bronx</p>	<p>2nd JD: Kings [Brooklyn]</p> <p>9th JD: Dutchess Putnam Orange Westchester Rockland</p> <p>10th JD: Nassau Suffolk</p> <p>11th JD: Queens</p> <p>13th JD: Richmond [Staten Island]</p>

Third Department	Fourth Department
<p>3rd JD: Albany Rensselaer Ulster Columbia Schoharie Greene Sullivan</p> <p>4th JD: Clinton Hamilton Schenectady Essex Montgomery Warren Franklin St. Lawrence Washington Fulton Saratoga</p> <p>6th JD: Broome Delaware Tioga Chemung Madison Tompkins Chenango Otsego Cortland Schuyler</p>	<p>5th JD: Herkimer Lewis Onondaga Jefferson Oneida Oswego</p> <p>7th JD: Cayuga Ontario Wayne Livingston Seneca Yates Monroe Steuben</p> <p>8th JD: Allegany Erie Orleans Cattaraugus Genesee Wyoming Chautauqua Niagara</p>

SUPREME COURT
Located in each county, this is a court with general, or wide jurisdiction or authority