

**THE ASSOCIATION OF THE BAR
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COMMITTEE ON ELECTION LAW

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June 17, 2004

Hon. Thomas P. Morahan
Co-Chair
Joint Legislative Conference Committee on
HAVA
New York State Senate
Room 848
Legislative Office Building
Albany, New York 12247

Hon. Keith L.T. Wright
Co-Chair
Joint Legislative Conference Committee on
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New York State Assembly
Room 749
Legislative Office Building
Albany, New York 12248

Re: Joint Legislative Conference Committee on HAVA

Honorable Sirs:

The Special Committee on Election Law of the Association of the Bar of the City of New York has been following the progress of the Joint Legislative Conference Committee on HAVA which you co-chair in enacting legislation implementing the federal Help America Vote Act of 2002 (“HAVA”), PL 107-252, in New York with great interest. We are aware of your familiarity with our 2003 report entitled *New Voting Technology*, 58 *Record of the Association of the Bar of the City of New York* 266 (2003). We write to offer you our further thoughts with respect to one issue that we understand remains open in your deliberations: the procedures and criteria for permitting an election recount using a manual tabulation of the voter-approved paper recordings of votes.

The Special Committee first wishes to acknowledge the serious and good faith efforts that the members of your Conference Committee have been making to enact realistic legislation that will modernize the voting process in New York while protecting the process from tampering of any sort. Significantly, both Houses of the Legislature have adopted a requirement

that new voting machines provide a paper record of each vote that is approved by the voter before that vote is recorded, which we recommended in *New Voting Technology*. We also note that, since the date of our report, technology has apparently become more generally available (and more affordable) that will permit a full-face ballot on a touch-screen voting machine, a problem that was a major factor in our recommendation that the full-face ballot requirement (Election Law § 7-202) be eliminated. Encouraged by your progress and continuing efforts, we offer our thoughts on an issue that is not the subject of partisan-based differences of opinion based on our experience in that field and in the hope that it will be of assistance to you.

The issue arises out of the provisions of two bills that are before you: A 08847 which has been passed by the Assembly and S 06207 which has been passed by the Senate. Both bills mandate the use of touch-screen computerized voting machines which provide a paper record of each vote to be approved by the voter before the machine records the vote. Both would add a new section 9-211 to the Election Law in order to address when and how the paper record may be examined in order to protect against computer error or fraud or tampering with the machines. Under A 08847, a random audit would be conducted of 2% of the voting machines. A 08847 further requires the State Board of Elections to promulgate regulations governing under what circumstances a full audit should be required. S 06207 would provide for a random audit of 3% of the voting machines and contains a similar provision directing the Board of Elections to promulgate pertinent regulations. Both bills require that the audit be conducted at the offices of the applicable Board of Elections on notice to all candidates and that candidates and political parties shall have the right to attend and appoint poll watchers to review the process. Neither bill expressly delineates the standards under which a court may order a manual recount based on the paper voter records. We believe that the legislation should further address the situation under which a candidate believes that the tally of the voting machines does not accurately report the correct vote count, whether in administrative proceedings before the Board of Elections or in court. While it may prove impracticable to address every possible situation, the guidance that courts, candidates, and practitioners can draw from clear legislative standards will simplify the overall litigation process, narrow the issues to be determined, and make it easier for parties and counsel to conduct the proceedings in an orderly and professional manner.

We understand that the Board of Elections has voiced concern about the time and effort that would be required to conduct a full audit of the paper records in connection with an election. This concern has validity and stands on a well-founded, factual basis. A full recount of the paper records would require substantial time and effort on the part of Board personnel, who would have to supervise every count or examination as a safeguard against tampering. The task would take on massive proportions in connection with a statewide or a New York City citywide election. The expense would not be insignificant. We sympathize with these concerns and do not wish to see any undue burdens arbitrarily imposed on the boards of election around the State. As a result, the legislation should not permit frivolous or baseless requests for a full paper-ballot recount that will serve no purpose other than to burden the boards of election.

At the same time, these concerns must be balanced against the overriding goal of HAVA of ensuring election results in which the electorate will have confidence. The existence of a paper record by itself cannot bestow that confidence should the paper record be locked away without a reasonable opportunity for review and audit. In addition, permitting only random audits may permit potential tampering or irregularities to go undetected -- for example tampering with fewer machines more drastically rather than with more machines on a smaller scale. We therefore urge that you adopt rigorous standards that will permit a full recount based on paper voting records under circumstances that would cause reasonable members of the electorate to question any result in the absence of a full, paper record recount but will not open the process to speculative grievances that have no basis in fact. Our proposal is as follows:

1. **Random manual auditing.** Maintain the current mandatory random audit provisions as proposed, whether at 2% or 3%. Provide that the Board of Elections shall report to the legislature on the results of these random audits and any other matters relating to the security and accuracy of the new voting machines within a reasonable time after the fourth general election after the legislation becomes effective in order to determine whether and to what extent this audit should continue.
2. **Extremely close elections.** A full recount should be permitted when the margin of victory in any election is so close that its veracity may reasonably be called into question in the absence of a full recount of the paper voting records. The criteria for this provision should be numerical based on the size of the district in which the election was held (*e.g.*, 100 votes for Assembly, 250 for Senate, 10,000 for statewide races with intermediate levels for county-wide and city-wide elections (the figures are for illustrative purposes only)).
3. **Limited manual audit of election districts selected by candidate challenging result.** A defeated candidate may request an audit of the paper voting records of a specified percentage (2% or 3%, perhaps 2% for statewide or New York Citywide, 3% for county and legislative races) of the voting machines in the pertinent district. The defeated candidate may select the machines to be audited. If the audit raises evidence of material (i.e., reasonably likely to affect the results) irregularity, a full audit would be held.
4. **Court or Board ordered manual audit.** If a defeated candidate offers factual evidence of fraud or irregularity, such as testimony by a fact witness based on personal knowledge, demonstrating a *prima facie* case that material irregularities may have altered the election result, a full recount may be ordered. The parties may have access to the actual software and hardware from the voting machines, subject to appropriate safeguards for the confidentiality of proprietary information of the manufacturer and to protect against an examination for the purpose of future tampering. The test should expressly exclude speculation based on differences between the actual result and polling data (including exit polling) or differences between the performance of one candidate and others running

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on the same ticket. Factors for consideration may include the margin of the victory under challenge.

It should be borne in mind that a review of the paper voting records will involve time and expense on the part of candidates and parties and that those considerations may well temper any impulse to demand such a review except under circumstances that may reasonably warrant one. As a practical matter, volunteer efforts cannot continue indefinitely even under such extraordinary circumstances of the Bush-Gore recount in 2000, which involved the Presidency of the United States. Nor can it be expected that a campaign running in a close election will have unlimited funds on hand at the end of the day to pay for a sustained effort by paid professionals.

We remain keenly interested in seeing your efforts come to fruition. If we can be of assistance in connection with this or any other issue, please do not hesitate to call on us.

Yours very truly,

Henry T. Berger
Chair

cc: Hon. Helene E. Weinstein
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