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OPLA~Notes

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for the Maine State Legislature

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Casting Our Vote: State Legislatures Take a Closer Look

The closeness of the November 2000 presidential election has brought renewed interest in our nation's federal electoral process. Nationwide, states are reviewing election reform legislation aimed at reducing errors in the voting process, providing uniform election recounting procedures, and increasing training for state election officials.

I. Election Reform: A Look Back in History

Over the past 200 years, the right to vote in the United States has undergone four constitutional amendments, as well as considerable reform at both the judicial and legislative level.¹ In some of the first elections in this country, voters selected their candidate by a show of hands, or by placing beans or grain into a box to determine the winner. Until the late 19th century, voters had to use straight ticket ballots, made and distributed by the political parties with the names of the candidates already selected.² Voters were given more autonomy in their selection of candidates with the "Australian Secret Ballot," which was adopted by Massachusetts in 1888 and by California in 1891.³ The "Australian Secret Ballot" was paid for by the public and listed all nominated candidates up for election. The ballot was given to voters only at the polls, and voters were allowed to vote in secret.⁴ There have been many changes in the presidential voting process in various states since that time, including voter registration by

Newsletter Greetings

Welcome to this edition of OPLA~Notes. This edition includes an article that provides an overview of state and national efforts to reform election procedures, an update of the Fairer Pricing for Prescription Drugs Law and court rulings affecting the Act, and information on major substantive rules authorized during the Second Regular Session of the 119th Legislature. In addition, the newsletter includes useful websites and a listing of recent OPLA publications.

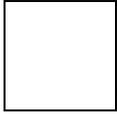
¹ California Internet Voting Task Force, *A Report on the Feasibility of Internet Voting*, January 2000.

² Id.

³ Id.

⁴ Id.

mail, voting by absentee ballot and voting through the Internet.



II. Changes in 5 Major Voting Technologies

Voting machines have undergone many transformations since their creation in 1869 by Thomas Edison.⁵ Voting machines have established a more accurate voting process and have helped to reduce fraud and mistakes made by election officials. In the majority of states, county election officers make the determination as to which type of voting technology to use. However, in some states, such as Massachusetts, Michigan, Maine, New Hampshire and Vermont, municipalities and individual precincts determine the type of voting technology utilized.⁶ The five major voting technologies are: paper, mechanical lever, punch cards, optical scanners, and direct recording electronic devices (DREs).

In the 19th century, paper ballots were used almost without exception as the chosen method to cast votes.⁷ In the late 1800's, the mechanical lever machine⁸ was introduced in New York and by 1930 it was used in almost all of the larger cities. By the 1960's, punch card machines utilizing computerized counting technology were introduced. Punch cards consist of thick, paper ballots that have either the candidates' names printed on them (the DataVote punch card), or they are blank and inserted into a slot accompanied by a booklet that has the candidates' names listed (VotoMatic punch card).⁹ In the case of the Votomatic, the voter selects a candidate by punching out the rectangle next to the candidate listed in the booklet, and finishes by removing the card. Election officials place all ballot cards into a computerized sorter that counts the number of punches next to each candidate.

More recently was the introduction of the optically scanned ballot, which is also counted electronically. The optically scanned ballot consists of a paper ballot with the candidate's names listed and a circle next to each name for the voter to fill in to make their selection. In some voting areas, voters are able to scan their ballots

immediately after voting in order to ensure that their vote is recorded accurately. Direct recording electronic devices (DREs) are similar to lever machines, yet they are computerized, using touch-sensitive screens.¹⁰ The voter makes a selection by touching the screen where the candidates' names are listed, and may review the selected choices when finished voting. Both lever machines and DREs prevent voters from picking more than one candidate for the same office. Over the past twenty years, optically scanned ballots and electronic voting machines have been used more than paper ballots, due in part from an effort to reduce costs associated with printing paper ballots.

The Federal Election Commission (FEC) established a Guide to Voting System Standards in 1990 with the goal of creating uniform voting standards across the country and to improve the reliability of state voting systems.¹¹ The FEC and the National Association of State Election Directors are updating the guide to reflect new voting technology, and will release it to the states by the end of 2001.¹²

The California Institute of Technology (CalTech) and Massachusetts Institute of Technology (MIT) have worked together to perform the most extensive study to date on the 5 major voting technologies in the country and the percentage of residual votes they have produced over the past four presidential elections. Residual votes are the number of votes not counted for the following reasons: ballots were marked for more than one candidate, ballots had no vote marked, or the votes were marked in a way that causes it not to be counted.¹³ The CalTech/MIT study found that paper ballots, lever machines, and optically scanned ballots had the lowest residual rates, between 1 to 2 percent, with punch card and electronic devices producing a residual rate almost 50 percent higher.¹⁴ While the focus of the study was not on the causes of varying residual rates, it is noted that human error, not mechanical error, is believed to be the primary cause. This is due to the fact that prior to certifying voting machines at the state and federal level, the machine must pass strict machine failure rates. In order for a voting machine to be federally certified, the machine can have a failure rate of no more than 1 vote in 250,000, and

⁵ Id.

⁶ Caltech/MIT Voting Project, *Preliminary Assessment of the Reliability of Existing Voting Equipment*, February 2001.

⁷ Id.

⁸ Mechanical lever machines require the voter to use a card that lists all candidates and referenda options, with a switch that they flick to make a selection, followed by pulling a lever to register their vote.

⁹ Id.

¹⁰ Id.

¹¹ Council of State Governments, *State Trends*, Winter 2001, Volume 7.

¹² Id.

¹³ Caltech/MIT Voting Project, *Preliminary Assessment of the Reliability of Existing Voting Equipment*, February 2001.

¹⁴ Id.

some states require a failure rate of no more than 1 in 1,000,000.¹⁵

III. State and Federal Election Reform Legislation

The Governors of Florida, Pennsylvania and Maryland convened study commissions immediately after the 2000 presidential election to review election procedures in their respective states. During this legislative session, many other states are considering similar actions. There are currently 1,200 election reform bills before state legislatures across the nation, many of which recommend study commissions or task forces to examine these issues.

Nationwide, these 1,200 election reform bills can be classified as addressing 7 major issues:¹⁶

- ◆ 35 states have bills that address absentee voting: improving voting procedures for military and overseas citizens, postmarking ballots, no-excuse absentee voting, and early voting/in-person absentee voting;
- ◆ 34 states are proposing changes in voting ballots: changes in ballot design, having multilingual ballots, prohibiting certain types of ballots (punch card, butterfly ballots), and creating uniform ballots;
- ◆ 32 states are proposing upgrading their voting technology: establishing study commissions to look at various voting technology, creating uniform statewide voting technology, providing financial assistance to localities to improve their equipment, and prohibiting punch card voting technology;
- ◆ 31 states are reviewing changes to vote counting procedures: creating a statewide standard for counting votes, reviewing recounting procedures and the number of overvotes and undervotes, and establishing a uniform criteria for counting hanging and dimpled chads on punch card ballots;
- ◆ 21 states are focusing on election results: specifically preventing election result announcements until after all polls are closed, restricting the release of election results until all polls are closed nationwide, and placing limits on the media's predictions of voting results and exit polling;
- ◆ 29 states are addressing issues with the electoral college: establishing procedures for the Legislature to appoint electors, binding electors' votes, converting to a district system for allocating votes, and punishing "faithless" electors; and

- ◆ 29 states have bills proposing changes in voter registration: creating a statewide registration system, implementing Internet and election day registration, and issuing voter registration cards.

In Maine, similar legislation has been introduced that proposes to change the election process in the following ways:

- ◆ Altering the rules on party enrollment;
- ◆ Establishing a central voting list/ absentee voting list;
- ◆ Amending the laws on presidential primaries; creating an instant run-off voting method;
- ◆ Altering residency requirements and voter registration deadlines;
- ◆ Studying and changing voting ballot designs;
- ◆ Allowing/restricting campaigning at the polls and requiring political workers to wear name tags;
- ◆ Studying election procedures statewide;
- ◆ Increasing the training for voter registrars/clerks;
- ◆ Revoking voting privileges for convicted murderers and class A criminals; and
- ◆ Providing an election guide for voters.

Congressional election reform bills are also proposing to create federal election commissions to review the federal election process for any needed improvements, with many including provisions for financial assistance to states to facilitate these changes (H.R. 430, H.R. 49, H.R. 263, H.R. 561, S. 218, H.R. 57, H.R. 60, H.R. 119, H.R. 829). Other federal legislation proposes eliminating punch card voting systems entirely (H.R. 775), encourages state and local governments to modernize their voting equipment (H.R. 354), and supports the idea of national news organizations waiting until all polls have closed before projecting a winner during presidential elections (H.Con. Res. 40).

IV. Nationwide Election Reform Task Force

The National Conference of State Legislatures has recently formed an Election Reform Task Force in collaboration with state legislatures across the country to address the following goals:

- ◆ Ensure the integrity of the ballot;
- ◆ Recommend best practices on election laws;
- ◆ Provide information to states on new voting technologies and standards; and
- ◆ Help states implement election reforms.

The Task Force anticipates conducting meetings over the next several months and completing its work by August of 2001. The Task Force will produce a report including

¹⁵ Id.

¹⁶ NCSL, *Election Reform: Overview of 2001 State Proposals*, PowerPoint slideshow.

its recommendations and model election laws for nationwide consideration.¹⁷

Did You Know?.....



Augusta is the most eastern capital city in the United States.



Maine's government entities are comprised of 16 counties with 22 cities, 435 towns, 33 plantations, 424 unorganized townships and 3 Indian reservations.

Recent Legal Issues



Maine's Fairer Pricing for Prescription Drugs Law Faces Legal Challenges

When the new Maine Rx program begins operating, 350,000 uninsured and underinsured Maine residents will become eligible for discounts on their drug purchases at participating retail pharmacies. This is the result of a new program for uninsured and underinsured persons that was enacted in Public Law 1999, chapter 786, An Act to Establish Fairer Pricing for Prescription Drugs. Under this law, the State of Maine will act as a pharmacy benefit manager and the Commissioner of Human Services will negotiate rebates from pharmaceutical manufacturers and labelers. The rebates paid by the manufacturers and labelers will fund the discounts, which will be passed along to consumers who lack health benefits coverage to pay for their prescriptions.

In August, 2000, the Pharmaceutical Research and Manufacturers of America (PhRMA) filed an action in the United States District Court challenging the new law and seeking a preliminary injunction so that the law

¹⁷ For further information on NCSL Elections Reform Task Force, please see the NCSL website at <http://www.ncsl.org/programs>

would not take effect. PhRMA sought relief on the grounds that the law violated the United States Constitution and federal Medicaid law.

The United States District Court for the District of Maine, Judge D. Brock Hornby presiding, issued a preliminary injunction on October 26, 2000 prohibiting full implementation of the Maine Rx program. Judge Hornby preliminarily enjoined Commissioner Concannon of the Department of Human Services from requiring that drugs of non-participating manufacturers be dispensed under the Medicaid program only after undergoing a prior authorization procedure. Judge Hornby also preliminarily enjoined enforcement of a law prohibiting profiteering in prescription drugs.

Oral arguments were heard before the 1st U.S. Circuit Court of Appeals in March, 2001. The Pharmaceutical Research and Manufacturers of America argued that Maine's law is unconstitutional because it would regulate transactions outside the state between drug manufacturers and wholesalers. The State of Maine argued that the Maine Rx program enables Maine to use market forces to encourage price reductions. The three-judge panel that heard the appeal gave no indication as to when it would rule on the case.

Meanwhile, implementation of the Maine Rx program is on hold. The Commissioner of Human Services has signed rebate agreements with 69 national prescription drug manufacturers and labelers and is continuing its efforts to reach agreement with still more. This would enable the Department of Human Services to begin a drug discount program this summer even while some provisions of the law are the subject of litigation.

Legislative Review Of Agency Rules 2000 Update

As it has since it began reviewing agency rules in 1997, the Legislature completed review of several major substantive rules under the Maine Administrative Procedure Act (MAPA) in the year 2000. Since amendments to the MAPA were enacted in 1995, certain agency rules known as major substantive rules may not be finally adopted or enforced by an agency until they have been reviewed by the Legislature. Review of major substantive rules was instituted to address the concern of legislators that agencies sometimes fail to comply with the intent of the Legislature in adopting rules and that the Legislative branch needs to exert sufficient oversight of Executive Branch rule-making activities.

Major substantive rules are agency rules that the Legislature has designated as such in the authorizing legislation. Ordinarily they will be rules that the Legislature, when granting rule making authority, anticipates will be controversial or complex or that will have a significant impact on the public. Since 1996 when the first major substantive rules were authorized by the Legislature, 99 agency rules have been designated as major substantive. Examples of major substantive rules requiring Legislative approval are rules for the issuance of large game shooting area licenses, school construction project preference standards, performance standards for timber harvesting in shore land areas and biomedical research. Rules that are not designated major substantive by the Legislature are considered routine technical rules and are not subject to legislative review.

Following review of major substantive rules, the Legislature may authorize final adoption as proposed by the agency, authorize adoption with specified changes to be made by the agency or deny authorization for final adoption. Prior to final adoption as authorized by the Legislature, major substantive rules are only provisionally adopted and may not be enforced by the agency. If the Legislature fails to act on major substantive rules during the session in which they are submitted for review, the agency may finally adopt and implement them without further legislative approval.

The review process for a major substantive rule by the Legislature consists of a referral of the rule in the form of a legislative resolve to the appropriate joint standing committee; review and consideration of the rule identified in the resolve by the committee; and issuance of a committee report recommending action on the resolve to the full Legislature. The committee's review includes consideration of whether the rule exceeds the scope of the agency's authority; conflicts with other laws; is necessary to accomplish the objectives of the authorizing legislation; and is reasonable in its impact on the public. Both chambers of the Legislature consider the committee report and, if passed, send it to the Governor for signature.

During the Second Regular Session of the 119th Legislature in 2000, the Legislature reviewed 10 major substantive agency rules submitted by agencies. The 10 rules were each presented to the Legislature in the form of a resolve. The resolves were referred to 7 different committees, most were scheduled for hearing, and all were discussed in committee work session and reported out. Three of the resolves were referred to the Committee on Agriculture, Conservation and Forestry and 2 were referred to the Health and Human Services Committee. All

committee reports were unanimous. Nine of the rules were approved for final adoption; one was not authorized to be finally adopted (a Criminal Justice Academy rule on the duties of part-time law enforcement officers). Seven of the rules were approved as submitted; 2 were approved with changes to be made by the agency.

In addition to review of provisionally adopted major substantive rules, the Legislature passed legislation in 2000 granting new rulemaking authority or amending rulemaking authority of certain agencies. In all, 13 new major substantive rules requiring legislative review were authorized by laws passed in 2000. By way of comparison, 73 routine technical rules not requiring legislative review were authorized by the Legislature that year. In addition, 2 major substantive rules authorized in prior years were re-designated routine technical in 2000.

Internet Intersection

Policy and Government



National Academy of Public Administration: The National Academy of Public Administration is an independent, nonpartisan organization chartered by Congress to assist federal, state, and local governments in improving their effectiveness, efficiency, and accountability. The website features information on current projects, program concentrations and publications. www.napawash.org

National Center for Public Policy and Higher Education: The National Center for Public Policy and Higher Education is a nonprofit, nonpartisan organization that promotes public policies that enhance the pursuit and achievement of high-quality education and training beyond high school. The website offers access to center news, reports and papers, links and a search engine. www.highereducation.org

Law and Legislative Reference Library: Provides access to the URSUS catalog, collections information, reference information, legislative history instructions and interlibrary loan information and lists of Justices for the Maine Supreme Judicial Court and Maine Attorney Generals. The Library's website also includes an in-house index to NCSL Legisbrief, a two-page issue brief published by the National Conference of State Legislatures (NCSL). The website also offers the submittal of research requests via e-mail and provides information of the library's move during renovations of the StateHouse. www.state.me.us/legis/lawlib

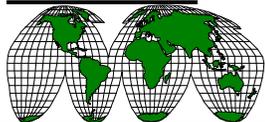
Technology



Researchville: This website offers access to selected online searches, including news, reference, and multimedia sites, from one location.

www.researchville.com/

Reference



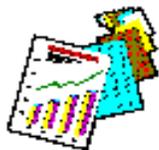
PubList: This website offers a searchable database of print and online publications and periodicals.

www.publist.com

EditorsWeb: This website is a portal to news releases that are posted daily by hundreds of federal government agencies and Capitol Hill offices.

www.EditorsWeb.org

General Interest



Savvy Traveler: The website is offered by the Federal Trade Commission and each state's Attorney General as a guide to help Internet users avoid fraud and deception while surfing the Net.

www.ftc.gov/bcp/conline/pubs/online/sitesee/index.html

As part of the renovations to the State House made last Fall and Winter, the 119th Legislative Council re-allocated space on the first floor (our former office space) to make better use of the limited space in the Capitol. The Legislative Council authorized moving OPLA offices to the second floor of the Cross Building, a building that also is being fully renovated. Thanks to the Legislative Council, our new offices are well designed, fully functional and have the advantage of being adjacent to the committee rooms for 9 joint standing committees.

With the move to the Legislative Floor of the Cross Building, we have all OPLA staff in the same location, for the first time in more than 2 decades! We encourage you to stop by and tour our new offices at your convenience.



OPLA Publications

Study Reports - A listing of study reports of legislative committees and commissions categorized by year from 1973 on is available from OPLA. For printed copies of any of these reports, please contact the Office of Policy and Legal Analysis. The first copy of a report is free; additional copies are available at a nominal cost. In addition, many of the recent legislative studies staffed by OPLA are available on the OPLA website at the following address:

<http://www.state.me.us/legis/opla/reports2.htm>

The following recent publications are currently available:

1. Final Report of the Blue Ribbon Commission to Establish a Comprehensive Internet Policy
2. Final Report of the Citizens Advisory Committee to Secure the Future of Maine's Wildlife and Fish
3. Final Report of the Commission on the Study and Prevention of Child Abuse
4. Final Report of the Commission to Recognize Vietnam Veterans in the State House Hall of Flags
5. Final Report of the Commission to Study Equity in the Distribution of Gas Tax Revenues Attributable to Snowmobiles, All-Terrain Vehicles and Watercraft
6. Final Report of the Commission to Study Foreign Investments and Foreign Purchasing by the State
7. Final Report of the Commission to Study the Needs and Opportunities Associated with the Production of Salmonoid Sport Fish in Maine

OPLA Office in New Location



The Office of Policy and Legal Analysis has moved to its new location in the Cross Building (formerly State Office Building) adjacent to the State House.

8. Final Report of the Committee on Gasoline and Fuel Prices
9. Final Report of the Committee to Develop a Compensation Program for Victims of Abuse at the Governor Baxter School for the Deaf
10. Final Report of the Committee to Study Access to Private and Public Lands in Maine
11. Final Report of the Joint Select Committee to Study the Creation of a Public/Private Purchasing Alliance to Ensure Access to Health Care for All Maine Citizens
12. Final Report of the Joint Select Committee on School-based Health Care Services
13. Final Report of the Joint Select Committee on the Psychiatric Treatment Initiative
14. Final Report of the Joint Study Committee to Study Bomb Threats in Maine Schools
15. Final Report of the Task Force on the Maine Learning Technology Endowment
16. Final Report of the Task Force to Study Educational Programming at Juvenile Correctional Facilities
17. Final Report of the Task Force to Study Growth Management
18. Interim Report of the Task Force to Study Market Power Issues Related to the Solid Waste Hauling and Disposal Industry

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We welcome your comments and suggestions.

Contact the Office of Policy and Legal Analysis by writing to 13 State House Station, Augusta, Maine 04333; calling 287-1670; or stopping by Room 215 of the Cross Office Building. The newsletter is available on the Internet at: www.state.me.us/legis/opla/newslet.htm

A Word About OPLA

The Office of Policy and Legal Analysis (OPLA) is one of several nonpartisan offices of the Maine State Legislature. It operates under the auspices of the Legislative Council. The office provides professional staff assistance to the joint standing and select committees and study commissions, including providing policy and legal research and analysis, coordinating the committee process, drafting bills and amendments, analyzing budget bills in cooperation with the Office of Fiscal and Program Review and preparing legislative proposals, reports and recommendations.

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