

STATE OF NEW HAMPSHIRE  
Before the  
BALLOT LAW COMMISSION

MEMORANDUM OF LAW  
OF  
STEPHEN T. DeSTEFANO

**I. INTRODUCTION**

The ballots before the Ballot Law Commission were cast by voters who, in a variety of ways, did not follow the rules. For example, these voters cast their votes with marks not included in the instructions printed on the ballots; they filed absentee ballots without complying with each technical requirement; and they made their intention *not to vote* for either candidate for Senator from District 16 by neither voting for a candidate whose name was printed on the ballot nor inserting a write-in candidate. Strict adherence to the voting procedures would result in the disenfranchisement of these voters in the selection of their State Senator.

In two areas the Secretary of State adopted too narrow an interpretation of the election laws. When reviewing ballots where voters opted not to vote for any person to be the District 16 Senator, the Secretary of State would impute these disputed ballots as votes for Ms. Krueger because these voters marked "Republican" under the straight ticket section of the ballot. Also, the Secretary of State did not review the absentee ballots in question because they were not included with the ballots counted on November 3, 1998.

The strict "form over substance" review by the Secretary of State was misguided. The RSA 659:66 provision for counting of straight party vote can not preclude, on review, the determination that a voter intended his vote to be counted in a different way. Accordingly, the Secretary of State erred in his application of RSA 659:66 at the expense

disenfranchising voters in the selection of their Senator. Similarly, other errors were made in the review of challenged ballots.

## II. THE INTENT OF THE VOTER MUST CONTROL

Under New Hampshire law, whenever a ballot is challenged because it deviates from the statutorily prescribed form for voting, the intent of the voter controls how that ballot is counted. The search for that intent is required for the right to vote is a cherished right, not a privilege.

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

*Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378 (1964).

The courts have repeatedly recognized that votes must be counted, even when voters do not follow voting instructions. Uniformity in voting is not required. *Barr v. Stevens*, 79 N.H. 192 (1919). Each mark is to be examined to determine what is "an unexecuted intention", a stray mark, or indication of voter intent. *Stearns v. O'Dowd*, 78 N.H. 358 (1917). Minor deviation from the voting instruction and technical irregularities should not be used to defeat voter intent. *Kibbe v. Town of Milton*, 700 A2d 1224 (1997). Statutes regulating the form of ballots should never be applied to disenfranchise voters because of technical irregularities. *Keene v. Gerry's Cash Market, Inc.* 113 N.H. 165 (1973), 304 A2d 873 (1973). The guiding concern in review of voting disputes is that the right to vote includes the right to have one's vote counted. *Werme v. Merrill*, 84 F3d 479 (1996).

The need to seek out the intent of the voter is recognized in RSA 659:64 and by the courts, the seminal case being *Murchie v. Clifford*, 76 N.H. 99 (1911), reaffirmed in *Nekerson v. Aimo* 110 N.H. 348 (1970). In the *Murchie* case thirteen ballots were marked with a cross in the party circle and one in the box next to the name of the opposing candidate for solicitor. The court held that the voter had expressed his wish in two ways, both of which were sanctioned by statute. Accordingly, the court held that the ballot could not be counted for either candidate. In *Murchie* the court confirmed that when it comes to determining how a ballot was cast, voters are not to be held to a strict application of the provisions of the statutes.

But the statute and ballot are not used entirely by those whose minds are trained to such a nicety of reasoning. They are for the use of the masses. They must be given a construction capable of being understood by ordinary men. The intent expressed by them is only such as those expressing it could entertain. In construing action taken by electors, the court takes into consideration that most voters are neither lawyers nor casuists.

*Murchie* at 104.

The legislature is charged with the responsibility of providing for orderly elections, but in fulfilling that duty may not restrict how voters express their intention to vote, or not vote, for a candidate.

'The real and unchangeable fact in issue' being the choice of the voter, and more than one way of expressing that choice being permitted, it is not within the power of the legislature to declare that in determining that choice the court shall only consider evidence of (voting) method A, to the exclusion of the evidence of (voting) method B.... The right of the voter, being a constitutional one, cannot be abridged in this way. *In other words, the legislature may enact the method by which a man shall vote but cannot direct how the ballot he casts shall be counted.*

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When a voter complies fully with the provisions of the act as to the expressions of his intent, the evidentiary facts from which his choice is to be found are capable of but one construction; but when he fails to comply with some provisions of the act (as in the case here), it can be found from the facts shown by the ballot that he did not intend to vote as the statute says his vote shall be counted. That is, upon the whole evidence it does not appear he intended to vote for A, yet the statute says his vote shall be counted for A. If the legislature may provide that, when ballots are marked like those in dispute, a tribunal charged with the duty of ascertaining the intention of the electors shall consider the failure to erase the name in connection with the cross in the circle, it cannot prescribe that such facts shall conclusively establish the intent of the electors.

Id. at 105 (emphasis added)

### III. REVIEW OF THE FORM OF THE BALLOT AND INTENT OF THE VOTER ARE NOT LIMITED BY RSA 659:66

There is no mechanical rule prescribing how a voter's intent is to be determined. Indeed, the Supreme Court clearly indicated that they would examine each individual ballot to see whether the voter had in fact expressed intent. *Stearns v. O'Dowd*, at 360-361. Stated simply, when assessing the exercise of the right to vote, form must not control over the intent of the voter. "Strict compliance with the technical form of a vote must yield to recognition of the voter's indication of intention." *Opinion of the Justices*, 114 N.H. 784, 786 (1974), citing *Keene v. Gerry's Cash Market, Inc.*, at 168.

'The real and unchallengeable fact in issue' being the choice of the voter, and more than one way of expressing that choice being permitted, it is not within the power of the legislature to declare that in determining that choice the court shall only consider the evidence of method A, to the exclusion of the evidence of method B. 2 Wig.Ev., s.1353. The right of the voter, being a constitutional one, cannot be abridged in this way. In other words, the legislature may enact the method by which a man shall vote, but cannot direct how the ballot he cast shall be counted.

*Attorney General v. Colburn*, 62 N.H. 70 (1889).

To determine the intent of the voter, the "ballot as a whole" must be examined. *Merchie* at 107. Moreover, except where a statute specifies that deviation will void a ballot, compliance with the statute regulating voting procedures is not mandatory. *Kibbe v. Town of Milton*, at 1227 (citation omitted). When examining the ballot in its entirety, the intent of the voter to cast a valid ballot can be established by the markings on the ballot. "When the ballot shows that the voter thought he was acting as directed by the statute, his intention is to be given effect, exactly as it would be in the case of a will or written contract. *Attorney General v. Colburn*, Id.

#### **IV. A VOTER'S DECISION TO NOT CAST A VOTE MUST BE HONORED**

The goal of preserving the right to vote and, accordingly, avoiding disenfranchisement of a voter must be balanced with not imputing a vote where one was not intended. The challenged ballots present the result of confusion by voters as to the meaning of a "straight ticket" check. Resolution of such confused ballots by imputing a vote to match the "straight ticket" check, as was done here, elevates the form of the ballot over the intent of the voter.

In the instant case, certain voters indicated a "straight ticket" ballot and proceeded to select candidates in races other than the State Senate race. On a number of ballots, the voter cast a vote in every opportunity, except the Senate race. On other ballots, there were no votes cast in the Senate race and other contests. With all of these contested ballots, the ballot, when considered in its totality, presents the voter's choice to skip voting in the Senate race, regardless of having indicated a straight ticket selection. Indeed, the challenged ballots show a pattern of voters checking straight ticket, and then voting for candidates from that same party. Clearly, these voters are confused as to the

meaning of a "straight ticket" designation. In these cases the pattern on the entire ballot should be took to. Otherwise, there must be an arbitrary determination that the voter was confused only after indicating "straight ticket", and not when that voter made deliberate votes -- and omissions -- elsewhere on the ballot.

At least one other jurisdiction has long recognized the illogic of resolving the question of voter intent and voter confusion by looking only to the "straight ticket" entry. In *Young v. Simpson*, 21 Colo. 460, 42 P. 666 (1895), the court held that "the particular designation of candidates [for an office] must be held to control the general designation" of a party. Accordingly, the court held that a vote would not be imputed where the voter did not vote for any candidate in a contest, even when the voter had checked the political party designation for a straight party vote. See also *Moran v. Carlstrom*, 775 P. 2d 1176, 1179 (1979).

Imputing a vote where the ballot presents a deliberate intention not to vote requires ignoring the voter's intent and resolving every concern about confusion by deference to the "straight ticket" check. This illogical conclusion is contrary to the established principal of deference only to the intent of the voter and not to the form of the ballot.

## V. CONCLUSION

New Hampshire law requires that voter intent control the determination of whether the voter intended to vote for an individual, or whether a voter elected not to vote for any

candidate. To require a voter to cast a vote where none was intended would be as egregious as the total disenfranchisement of a voter and should be rejected by the Ballot Law Commission.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law was this 23d day of November, 1998 given in hand to Charles G. Douglas, III, Esq.



Arpiar G. Saunders Jr., Esq.