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MEMORANDUM

TO: Debbie Irvine
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FROM: David Hanna
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DATE: December 22, 2010

SUBJECT: Election Contest Procedures for Office of State Representative

This memorandum summarizes the statutory and constitutional provisions relating to a contest of an election for the office of state representative. All citations in this memorandum are to the Election Code unless otherwise noted. The procedures described by this memorandum apply to a contest of a general or special election, but do not apply to a contest of a primary or runoff primary election.

Section 8, Article III, Texas Constitution, provides that each house is the judge of the qualifications and election of its own members but that contested elections are determined in the manner provided by law.

Chapter 241 contains provisions that apply specifically to a contest of an election for the office of state representative or senator. Chapter 221 contains general provisions that apply to all election contests. Various other provisions of the code apply as well.

A. Filing and Delivery of Contest Papers; Security for Costs

(1) Petition. The contestant must file a petition stating the grounds of the contest with the secretary of state not later than the seventh day after the date of the official canvass. (Secs. 241.003(a), (b).) A petition filed by mail is timely if it is deposited in the mail, properly addressed with postage prepaid, before the deadline. (Sec. 1.008.) The contestant must also deliver a copy of the petition to the contestee by the same deadline. (Sec. 241.003(b).)

(2) Answer. The contestee must file an answer to the contestant's petition with the secretary of state not later than the seventh day after the date the contestee receives the copy of the petition. (Secs. 241.004(a), (b).) The contestee must deliver a copy of the answer to the contestant by the same deadline. (Sec. 241.004(b).)

(3) Method of delivering contest papers to contestant and contestee. The copies of the petition and answer must be delivered to the parties by personal delivery or registered or certified mail. (Sec. 241.005(a).) See Section 241.005 for further details on the method of delivering the copies.

(4) Delivery of contest papers to speaker of house of representatives. The secretary of state must deliver the petition to the speaker of the house of representatives as soon as possible but not later than the day after the date it is received. The answer must be delivered by the same deadline after its receipt. (Sec. 241.006(b).) The secretary of state must deliver with the petition the certified statement of the total votes cast for each candidate for the contested office as shown by the final canvass. If the final canvass has not been completed, the secretary of state shall deliver the statement as soon as practicable. (Sec. 241.006(c).)

(5) Security for costs. Not later than the third day after the date the answer is received by the speaker of the house of representatives, the contestant must file with the chief clerk of the house of representatives a \$5,000 cost bond, payable to the house of representatives and the contestee, that has sufficient sureties approved by the speaker and is conditioned that the contestant will pay all costs assessed against the contestant. In the alternative, the contestant may file a cash deposit in lieu of the bond or an affidavit of inability to pay costs. (Sec. 241.0061(a).)

The security for costs must be filed in the manner generally applicable to a civil suit in district court, subject to any changes imposed by the master or by house rules. (Sec. 241.0061(b).)

B. Referral of Contest to Committee; Master of Discovery

(1) Master of discovery. As soon as practicable after receiving the contestee's answer, the speaker of the house of representatives must appoint a master of discovery (who must be a house member) to supervise discovery proceedings and the taking of depositions, to issue any necessary process, to receive and report evidence, and to perform any other duties assigned by the speaker or by the committee to which the contest is referred by the speaker. (Secs. 241.009(a), (b).)

The master may on his or her own motion, or shall on the motion of the committee, determine whether the contestant's petition is frivolous or otherwise does not state the grounds necessary to maintain the contest. (Sec. 241.0091(a).)

The master's rulings are subject to review by the committee unless otherwise provided by house rules. (Sec. 241.009(e).)

See Sections 241.009 and 241.0091 for further details on the master's authority. See Section 241.010 on the conduct of discovery and the taking of depositions.

(2) Referral to committee. As soon as practicable after receiving the contestee's answer, the speaker of the house of representatives must refer the contest to a special committee, a standing committee, or a committee of the whole. (Sec. 241.011(a).) Current house rules make no special provision for referral of the contest.

The committee must promptly set a time and place for hearing the contest. (Sec. 241.011(b).) If the contest is brought near the end of the term of the legislature and the committee does not finish its proceedings during that term, the speaker of the house should cause to be introduced a resolution to continue the committee as a special committee of the new legislature to finally report to the house of representatives its recommendations on the contest.

C. Committee Hearing

(1) Scope of inquiry. The committee must attempt to ascertain whether the outcome of the contested election is not the true outcome because:

(A) illegal votes were counted; or

(B) an election officer or other person officially involved in the administration of the election:

(i) prevented eligible voters from voting;

(ii) failed to count legal votes; or

(iii) engaged in other fraud or illegal conduct or made a mistake. (Sec. 221.003(a).)

(2) Hearing procedure. After notice to the parties, the committee must investigate the issues raised by the contest, hearing all legal evidence presented by the parties, in accordance with the procedure prescribed by house rules. (Secs. 241.011(b) and 241.012.) However, the committee may refuse to hear testimony or other evidence presented in person by the parties if the master determines that the contestant's petition is frivolous or otherwise groundless. (Sec. 241.011(c).)

The rules of evidence generally applicable to a civil suit in the district court apply to the hearing of an election contest, although the house of representatives by rule may provide alternative rules of evidence. (Sec. 241.013.)

The committee may subpoena witnesses and documents (Sec. 241.014) and may examine secured ballots and equipment. (Sec. 221.008.)

(3) Committee report. As soon as practicable after completing the hearing, the committee must make to the house of representatives a written report of its findings of fact and conclusions of law with respect to the contest. The report may include any recommendation the committee considers appropriate. (Sec. 241.015(a).) The report is accompanied with all contest papers and the evidence presented to the committee. (Sec. 241.015(b).)

Any committee member dissenting from the views of the majority may file a minority report. (Sec. 241.016.)

(4) Withdrawal of contest. A contestant may withdraw the election contest at any time before the filing of the committee report. (Sec. 241.017(a).) See Section 241.017 for details on a withdrawal.

D. Disposition of Contest

(1) Action on contest. As soon as practicable after the committee report on the contest is filed, the house of representatives must set a date for consideration of the report. (Sec. 241.018(b).) The contestee may not vote on any matter involving the contest. (Sec. 241.018(d).)

If the house of representatives can ascertain the true outcome of the election after considering the report, the house must declare the outcome. (Secs. 241.018(c) and 221.012(a).) In this case, either the contestant or the contestee is seated, as appropriate.

If the house of representatives cannot ascertain the true outcome of the election, the house must declare the election void. (Secs. 241.018(c) and 221.012(b).)

(2) Delivery of copies of judgment. After the judgment in the contest is rendered, the chief clerk of the house of representatives delivers a copy of the judgment to the secretary of state. (Sec. 241.021(a).)

If a new election is necessary, the chief clerk of the house of representatives delivers a copy of the judgment to the governor. (Sec. 241.021(b).)

(3) Costs of contest. Subject to Section 221.013(a) (assessment of costs when the election is declared void), the house of representatives may assess costs in the contest against either party, except that costs may not be assessed against a prevailing contestee. (Sec. 241.025.)

E. New Election If Contested Election Declared Void

(1) New election ordered. If the contested election is declared void, the house of representatives must include in its judgment an order directing the governor to order a new election. (Sec. 241.020.)

(2) Accelerated election schedule. The new election must be held on a Tuesday or Saturday occurring not earlier than the 21st day or later than the 45th day after the date the governor orders the election. (Secs. 241.023 and 203.013(c).) The election is not required to be held on a uniform election date. (Secs. 241.023 and 41.001(b)(5).) However, any nonuniform date chosen for the election must be approved by the U.S. Department of Justice under Section 5 of the federal Voting Rights Act of 1965.

See Section 203.013 for provisions relating to candidates' filing deadlines and the dates and deadlines applicable to a runoff election.

(3) Candidates in new election. The candidates in the new election are the same candidates who were in the contested election, subject to certain exceptions such as providing for replacement candidates in the event of a candidate's death or disqualification. (Secs. 241.024(a) and 232.042.) See Section 241.024 and Subchapter B, Chapter 232 (Sec. 232.041 et seq.), for details on determining the candidates in the new election.

(4) Procedures for new election. The new election is held in the same manner as the contested election, except as otherwise provided by Chapter 241. (Sec. 241.022(a).)

F. Right to Occupy Office Involved in Contest

The contestee is entitled to be sworn in and to occupy the office pending the determination of the contest. (Sec. 221.015(a).)

If the judgment in the contest does not change the official result, the contestee continues in office without again qualifying for the office. (Sec. 221.015(a).)

If the judgment declares the contestant to be elected, the contestant is sworn in and assumes the office as soon as practicable after the judgment is entered. (Sec. 221.015(b).)

A contestee occupying the office is entitled to the emoluments of the office that accrue during the period of occupancy. A contestant who gains the office is not entitled to emoluments for any period before the contestant assumes office. (Sec. 221.015(c).)

If the judgment declares the contested election void, the vacancy is created as of the date of the judgment. The previous incumbent holds over from the prior term under Section 17, Article XVI, Texas Constitution, until the successor qualifies for the office after the new election. (Sec. 221.015(d).) The holdover occupant could of course be the contestee or contestant. The

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holdover occupant is entitled to receive the emoluments of office until the successor is sworn in. (Sec. 221.015(d).) The person elected at the new election must qualify for the office as if no contest had occurred. (Sec. 221.015(e).)

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