

ELECTION CONTESTS & RECOUNTS

Iowa State Election Administrators Training

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Christie J. Scase

Assistant Attorney General



Presentation Summary

Review laws governing post canvass challenges to election outcome

- Statutes governing recounts and election contests
 - What, Who, When, Where, and How ?
- Judicial interpretations
- Rules for counting votes



Desired outcome

- ❑ An understanding of the context in which recounts and election contests are used.
- ❑ An understanding of the differences in procedures and standards governing recounts and election contests.
- ❑ A familiarity with resources available to assist you when a recount or contest is requested.

RECOUNTS -

□ What is a recount?

- A “recount” is a formal process for re-examining and **recounting the ballots which were voted and counted** for an office or public measure, including any disputed ballots returned under section 50.5 that were “objected to,” but counted.
- Iowa Code § 50.48 (general recount provisions)
- Iowa Code § 50.49 (recounts for public measures)



Recounts

- The recount process does not include:
 - examination of ballots which were rejected as double or defective reconsideration
 - or reconsideration of whether ballots should have been accepted or rejected.
- No additional evidence, beyond the ballots that were counted, is reviewed.



Recounts – Types

- There are three basic types of recounts:
 - Public office / candidate initiated
 - Public measure / petition initiated
 - Administrative recounts / Auditor initiated
- The procedures to initiate and conduct the recount vary depending upon the nature of the recount.

Recounts -

- Who may request a recount?
 - Public Office - Any person who received votes for an office, including:
 - any candidate whose name was on the ballot.
 - the person who received the most votes.
 - a write-in candidate, if legally qualified to hold the office.
 - note: an apparent winner may request a recount.
 - Public Measure – eligible electors by petition

Recount request - timing

- When? A recount shall be ordered by the board of canvassers for a particular office or public measure if:
 - A written request is received no later than 5:00 p.m. on the third day following the county board's canvass of the election.
 - Exception, for city primary and regular city election in cities with runoff provision, deadline is the day after the county canvass of votes.

Recount request - filing

- Where is request filed?
 - For county and local candidates or questions:
 - With the County Auditor in the county where the election was held.
 - If the recount is for a local office or public measure which appeared on the ballot in more than one county, request is filed with the control auditor.
 - For state or federal offices:
 - With the County Auditor in each county where the candidate wants the ballots counted again.

Recount request - content

□ Public office recount:

- Request must be in writing

- Request should include:

- Election and office for which recount is requested,
- Name and signature of requester,
- List of precincts included in request or indication that recount of entire county or election district is requested,
- Name of the requestor's designee for the recount board.
- Bond, if applicable.

Recount - notice to apparent winner

- Immediately upon receipt of a request for recount of a public office, the Auditor shall send a copy of the request via certified mail to the “apparent winner,”
- The Auditor shall also attempt to contact the apparent winner by telephone,
- If the apparent winner is not contacted within four days, the chairperson of the political party shall act on behalf of the apparent winner in the proceedings:
 - State party Chairperson for state and federal offices
 - County Chairperson for all other offices

Recount – “apparent winner”

- The apparent winner is the candidate who received the most votes for the office.
- The apparent winner for a statewide race is determined by the vote totals in the entire state, not by vote totals in individual counties or precincts.
- If a recount request is filed by the apparent winner, the person who received the next highest number of votes for the office is treated as the “apparent winner” and receives notice of the contest and designates the second member to the Recount Board.

Recount request - content

- Public measure recount petition:
 - Number of signers = the greater of 10 eligible electors or 1% of the total number of votes cast on the public measure.
 - Each signer must be a person who was entitled to vote on the public measure (i.e. registered voter).
 - Petition should identify the public question to be recounted, provide a list of precincts included to be recounted or state that recount of entire county or election district is requested, and name designee to serve on Recount Board.

Recount Bond:

- Bond requirements: Bond must be posted with the recount request or petition unless the difference between the total votes cast for the “apparent winner” and the votes cast for the candidate requesting the recount, or the vote spread on a public measure, is less than the greater of:
 - 50 votes, or
 - 1 % of the total number of votes cast

Bond Amount – fixed by statute

Office or Question	Amount
Statewide office or statewide question	\$1,000.00
U.S. Representative	\$ 500.00
State Senate	\$ 300.00
State Representative	\$ 150.00
Countywide office if county population > 50,000	\$ 200.00
All other offices and public measures	\$ 100.00

Recount Board – election for office

- Three – person board
 - One member is named by the person requesting recount the recount (if more than one person requests recount of same office, board member named by first filer serves);
 - One member is named by the apparent winner (see special rules if more than one person elected or if person with the most votes requests recount);
 - Third member is chosen by agreement of the first two members or the Chief Judge of the judicial district.
- A candidate **CAN NOT** serve as his or her own representative on the Recount Board



Recount Board – public measure

- Three – person board
 - One member is named in the petition requesting recount;
 - One member is named by the commissioner at or before the time the board is required to convene;
 - Third member is chosen by agreement of the first two members or the Chief Judge of the judicial district.

Recount Board – selection procedure

- ❑ The Commissioner shall convene the two designated Board members no later than 9:00 a.m. on the 7th day following the canvass.
- ❑ The designated members chose the third member or notify the Chief Judge of the judicial district if they are unable to agree by 8:00 a.m. on the 9th day following the canvass.
- ❑ Chief Judge must name third member no later than 5:00 p.m. on the 11th day following the canvass.

Conducting the Recount

- Recount must be conducted “as expeditiously as possible.”
- Recount Board is to count the votes on **the ballots which were voted and counted** for the particular office or public measure named in the recount request or petition.
- Only ballots from the precincts identified in the recount request or petition are initially included.
- However, any member of the Recount Board may extend the recount to other precincts in the same county.



Recounts – handling ballots

- ❑ The Auditor, or Auditor's designee, is responsible for supervising the security and handling of the ballots.
- ❑ The Board should work with ballots from only one precinct at a time.
- ❑ Ballots for precincts which not included in the recount should be kept sealed.
- ❑ When the recount is completed, the ballots must be re-sealed in the same manner that they are sealed on election night.

Recounts – optical scan ballots

- The recount board, alternatively:
 - May request that the ballots be recounted by the machine,
 - May count the ballot by hand, or
 - May conduct both types of counts.
- If a machine recount is conducted, the Auditor or Auditor's designee shall operate the tabulation equipment, using the same program used on election day (unless the program is known or believed to be flawed).

Recounts – DRE with VVPAT

the paper audit trail is the “official ballot”

- Effective for the 2008 General election, each DRE machine must have a voter-verifiable paper audit trail (VVPAT) that contains a copy of every ballot case on the machine.
- The VVPAT shall constitute the ballots for purposes of recount, unless the Auditor knows or believes it is defective.
- If the VVPAT record is reel-to-reel:
 - The Auditor shall not provide the Recount Board members any record that may be used to determine the identity of any voter in connection with any ballot,
 - Only one reel shall be provided to the Recount Board at a time.

Administrative Recounts

- The Auditor who is responsible for conducting an election may ask the Board of Supervisors to order an administrative recount if the Auditor suspects that:
 - The voting equipment malfunctioned; or
 - Programming errors affected the outcome; or
 - Precinct election officials report counting errors after the precinct canvass is finished.



Administrative Recounts

- Request – by Auditor in writing with explanation of reason, including: nature of the problem and the precincts, offices, or public measures to be recounted. No bond is required.
- Timing – within 3 days of the county canvass.
- Recount Board – members of the absentee and special voters precinct board conduct the recount.



Election Contest

- An “election contest,” is a challenge to the outcome of the election, which may include:
 - Challenges to the legality of holding the election.
 - Challenges to the qualifications of the apparent winner.
 - Allegations that ballots were wrongly rejected or accepted – “Recount plus . . .”
 - Allegations of fraud or misconduct by election officials, candidates or others.

Election contest – who may initiate

- The general provisions governing election contests are found in Iowa Code chapter 57.
- Who may initiate a contest?
 - Any eligible person who received votes for the office in question.
 - A public measure contest may be contested by a petition of qualified electors equal to the greater of:
 - 10 eligible electors or
 - 1% of the total number of votes cast on the question
 - **Note**, petitioners may be eligible electors **or** people who would have been eligible if registered to vote.

Election contest – who may initiate

- Poe v. Central Lyon CSD, 515 N.W.2d 1 (Iowa 1994)
 - Non-resident landowners / taxpayers who were not entitled to vote in school bond election and who lacked standing to initiate contest, tried to challenge successful school bond election through equity action filed with the district court.
 - Court held that even though the landowners were affected by the election, they could not challenge the election either through a contest or direct district court proceeding.

Election Contest - grounds

- Allowed grounds for contesting all types of elections are listed within Iowa Code § 57.1:
 - a) Misconduct, fraud or corruption on the part of election official or board of canvassers of sufficient magnitude to change the outcome.
 - b) Incumbent (person declared the winner) was not eligible to the office.
 - c) Prior to election, incumbent had been convicted of a felony and citizenship rights were not restored at time of the election.

Election Contest – grounds (cont.)

- ❑ d) Incumbent has given or offered any elector or election official a bribe or reward for purpose of procuring the incumbent's election.
- ❑ e) Illegal votes have been received or legal votes have been rejected, in sufficient number to change the result of the election.
- ❑ f) Any error of board of canvassers in counting the votes or declaring result, if the error would affect the result.

Election Contest – grounds (cont.)

- g) The public measure or office was not authorized or required to appear on the ballot.
- h) Any other cause or allegation which, if sustained, would show that a person other than the incumbent was duly elected or that the outcome of a public measure was different than declared by the board of canvassers.

Election contest

- When / where? The place and deadline for filing varies for different offices:
 - Governor/Lt. Gov. – file with presiding officer of each house within 30 days after the proclamation of result,
 - Iowa General Assembly – serve notice on the incumbent prior to 20 days before the 1st day of the session **and** file with Secretary of State within 5 days of service.

Election Contest

- When/where? (cont.)
 - Presidential electors and U.S. Senate & Congress – file with Secretary of State within 2 days from the day on which the returns are canvassed by the state board of canvassers **and** serve notice on incumbent.
 - State offices, except Governor/Lt. Gov. – file with secretary of state (or clerk of supreme court if contest of secretary of state race) within 30 days from the day when the incumbent declared elected.

Election Contest

- When/where? (cont.)
 - County / city / school and other local offices – file with County Auditor within 20 days after the board of supervisors declares a winner from the canvass,
 - Exceptions:
 - if recount was held **and** outcome changed, file within 20 days after the board of supervisors declares winner from recount.
 - if Auditor is party, notice of intent filed with County Treasurer.

Election Contest – what filed

- For county and local office, a “notice of intent to contest election,” which includes:
 - Name of the contestant and statement of qualification to hold the office contested,
 - Name of the incumbent,
 - Office contested,
 - Date of the election,
 - detailed statement of causes of the contest, and
 - Affidavit of contestant or another elector of the county affirming causes set forth.



Election Contest – what filed

- Content of notice of intent to contest (cont.)
 - If contest is based upon an allegation that illegal votes were received or that legal votes were rejected, a statement shall be included in the notice setting forth the name of persons whose votes were improperly received or rejected and the precinct where they voted or offered to vote.

Election contest – Bond

- For county and local office and public measure contest, the contestant must also file “a bond with security to be approved by the Auditor, conditioned to pay the all costs in case the election is confirmed.”
- If the bond is not filed by the deadline for initiating the contest, no jurisdiction exists and contest should be dismissed.

Election contest – Bond

- In re: AHST Comm. School Dist. Public Measure “B”, 735 N.W.2d 605 (Iowa 2007)
 - Court reaffirmed prior decisions holding that the failure to file the bond within the time allowed to initiate the contest is a basis for dismissal of contest,
 - Court refused to vary rule or excuse the failure based on Auditor’s failure to set the level of bond,
 - Court noted that that bond required by section 62.6 “is merely a written promise to pay the expenses of the election challenge and does not involve a separate calculation of monetary sum.”

Election Contest – Cost calculation

- **721—21.20(62) Election contest costs.** In determining the amount of the bond for election contests, the commissioner shall consider the following aspects of the cost of the election contest proceedings:
 - 1. Fees as provided in Iowa Code section [62.22](#).
 - 2. Fees for judges as provided in Iowa Code section [62.23](#).
 - 3. The cost of making an official record of the proceedings.

Election contest - Bond

- If the results of the election are upheld by the contest or the proceeding is dismissed, the costs of the contest shall be paid by the contestant.
- Walters v. Bartels, 254 N.W.2d 321 (Iowa 1977)
Costs of the proceeding include compensation for the judges (\$100.00/day) and witness fees. Attorney fees of the incumbent are not included in “costs” chargeable to the contestant.



Election Contest – outcome delayed

- If a contest is filed before the certificate of election has been delivered or before the duplicate abstract and declaration for the public measure outcome has been certified, the certificate or duplicate abstract is withheld until determination of contest.
- If certificate or duplicate abstract and declaration have been issued, the Auditor shall send notice to person or political subdivision affected advising them of the contest and informing them that the results are not valid until the election contest is resolved.



Election contest – “Contest Court”

- The court for contested county or local office elections consists of:
 - One person named by the contestant,
 - One person named by the incumbent,
 - Third person selected within three days by agreement of the first two, or named by the chief judge of the district court if they cannot agree.



Election contest – “Contest Court”

- The court for contested public measures consists of:
 - One person designated by the petitioners in the writing when the petition is filed,
 - One person designated by the County Auditor to represent the interests adverse to the petitioners,
 - Third person chosen jointly by the first two, or by the chief judge of the judicial district absent agreement.



Election contest – Proceedings

- ❑ Judges shall be sworn in the same manner as trial jurors.
- ❑ Auditor shall serve as the clerk of the court, and keep all papers, and record the proceedings in the election book.
- ❑ If the Auditor is a party, the court appoints an alternate person to serve as clerk.

Election Contest – “Recount Plus”

- Iowa Code section 57.5
- “The parties to any contested election shall have the right, in open session of the court or tribunal trying the contest, and in the presence of the officer having them in custody, to have the ballots opened, and all errors of the precinct election officials in counting or refusing to count ballots corrected by such court or tribunal.”

Election contest – Proceedings

- Trial
 - Presiding judge fixes a date for the trial no more than thirty days after notice filed,
 - Notice of trial date and copy of contestant's statement served on incumbent at least 10 days before trial.
 - If less than 20 days notice provided, delay shall be granted at request of either party.



Election contest – Proceedings

- Contest court has powers of a district court, including:
 - Subpoena authority to compel attendance of witnesses, swear witnesses, and direct examination.
 - May adjourn from day-to-day, as needed.
 - Is governed by rules of law and evidence applicable to the case.

Election contest – Proceedings

- Voter testimony – Code § 62.17:
 - “The court may require a person called as a witness, who voted at such election, to answer touching the person’s qualifications as a voter, and, if the person was not a registered voter in the county where the person voted, then to answer for who the person voted.”

Election contest – Judgment

- Court shall determine whether the incumbent or any other person was duly elected and that the person elected is entitled to the certificate.
- If the court finds the election was a tie, the outcome shall be determined by lot (§ 50.44).
- If the court finds that no person was elected, the judgment shall be that the election is set aside.

Election Contest – Appeal

- The party against whom judgment is rendered by the contest court may appeal within twenty days to the district court.
- Bauman v. Maple Valley CSD, 649 N.W.2d 9 (Iowa 2002)
 - Court ruled that time period for appeal of contest court judgment began when the court orally announced its decision at the conclusion of trial, not on later date when the written decision was signed by all judges and issued.

Counting votes

- Uniform standards for counting votes in Iowa are found in are found in 721 Iowa Admin. Code ch. 26.
- The rules are derived from Iowa Code sections 49.92 – 49.103 and Iowa case law.
- The rule apply any time people are counting votes, including:
 - precinct election officials during initial review of ballots,
 - Recount Boards, and
 - Contest Courts

Counting votes

- Why all the rules?
- Bush v. Gore, 531 U.S. 98 (2000)
 - During dispute regarding outcome of presidential election, Florida Supreme Court ordered hand tabulation of ballots in identified Florida counties.
 - Appeal was taken to the U.S. Supreme Court, the Issue: whether the use of standardless manual recounts violates the equal protection and due process clauses of the U.S. Constitution.

Counting votes

- Bush v. Gore, 531 U.S. 98 (2000)
 - The Court found that, as recount was proceeding, different counties, and sometimes different counting teams in a count, were using varying standards to determine what was a legal vote.
 - The Court held: a recount to determine “voter intent,” without uniform rules to determine intent based on recurring circumstances necessarily would result in arbitrary results, violating constitutional principles.

Counting votes

- Bush v. Gore, 531 U.S. 98 (2000) (cont.)
 - “Voter intent” as a starting principle for recount was found unobjectionable, the problem was the absence of:
 - Adequate statewide standards for determining what is a legal vote and
 - Practical procedures to implement the standards.
 - Recount could pass constitutional scrutiny with standards, procedures, and availability of judicial review of disputed matters.

Counting votes – Code section 49.98

- ❑ **Voter intent:** Ballots shall be counted according to the voters' marks on them.
- ❑ If the choice of the voter is clear from the marks for any office or question, the vote shall be counted as the voter has indicated.
- ❑ A vote for any office or question on a ballot shall not be rejected solely because a voter failed to follow instructions for marking the ballot, unless otherwise required by statute.
- ❑ If for any reason it is impossible to determine the choice of the voter for any office or question, the vote for that office or question shall not be counted.

Counting votes

- Response to Bush v. Gore:
 - Help America Vote Act of 2002, includes provision requiring each state to adopt “uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted for a vote for each category of voting system used in the State.” HAVA § 301(a)(6).
 - Iowa Code § 49.98 was amended in 2004 to incorporate HAVA requirement for adoption of rules.

Counting votes

- Specific guidelines and examples of possible marking errors are included in administrative rules and counting guides.
- Counting guides are available for:
 - The Absentee and Special Voters Precinct,
 - Precinct Count – Optical Scan Ballots
 - DRE Precincts & Emergency Paper Ballots

Counting votes

- Statutory provisions control, and are incorporated into the rules, where available.
- Examples representing common marking errors are included to provide a consistent standard for accessing voter intent.
- The “bottom line:” the rules are in place to ensure that every discernable vote is fairly and consistently counted.

Questions????
