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MEMORANDUM

TO: Kathy Haddock, David Gehr, and Geoff Wilson

FROM: Joseph R. Rigney, Law Clerk

SUBJECT: Electronic Signatures in Elections

DATE: 1 February 2018

There are only three (3) cases in which the courts have considered electronic signatures in the context of election-related laws.

Anderson v. Bell, 2010 UT 47, 234 P.3d 1147 (Utah 2010) –

Mr. Anderson had submitted a petition seeking to be placed on the ballot as an unaffiliated candidate in the upcoming Utah gubernatorial race. Utah law required that an unaffiliated candidate collect the signatures of 1,000 registered voters before his or her name could be placed on the statewide ballot. Mr. Anderson's petition contained two (2) types of signatures: handwritten signatures, and electronic signatures entered through a computer website. The petition was rejected by the Office of the Lieutenant Governor of Utah on the ground that the electronic signatures did not constitute "signatures" as required under the Utah Election Code.

The Utah Supreme Court reversed, holding that electronic signatures met the requirements of the Utah Election Code. The Court held that Mr. Anderson has done exactly what section 46–4–201 permits. He used electronic signatures to satisfy the Election Code's demand that unaffiliated candidates collect and submit the signatures of 1,000 registered voters in order to get his name onto the statewide ballot.

Ni v. Slocum, 196 Cal.App.4th 1636, 127 Cal.Rptr.3d 620 (Cal.App. 1st Dist.2011) -

In this case, a number of registered voters had signed petitions seeking to put a Proposition (for legalization of marijuana) on the ballot. Some of the signatures were electronic, and the issue before the court was whether the California Election Code's requirement that a voter "personally affix" his or her signature was satisfied by electronic signature.

The court held that the Election Code required a "wet signature," not an electronic signature, for the following reasons:

1. The law governing Propositions requires that every voter's signature on a petition be witnessed and thereafter certified by a "circulator," a requirement that could not be met where voters utilized their phones, tablets and computers to sign the petition online;
2. In fact, allowing electronic signatures on a petition would completely eliminate the function of the "circulator," thus substantively changing the law;
3. The law requires election officials to verify the residence of every voter signing a petition, which would be impossible where the voter signed the petition electronically since electronic receipts contain identifying information but *not* a residential address;
4. The law requires more than a voter's signature; it requires that the voter "personally affix" that signature, words that have no meaning or application unless the voter has a pen in his or her hand; and
5. The law specifically states that its provisions are mandatory "notwithstanding any other provision of law ...," which means that the law governing Propositions, not the Uniform Electronic Transaction Act, controls.

Benjamin v. Walker, 237 W.Va. 181, 786 S.E.2d 200 (W.Va. 2016) -

In this case, Justice Brent Benjamin was seeking re-election to the West Virginia Supreme Court of Appeals. As a requirement, Benjamin needed to first obtain 500 qualifying contributions from registered voters. A challenger to Benjamin's seat argued that the electronic contributions he received (192 out of 500) did not fulfill the 'signature' requirement. The West Virginia Supreme Court of Appeals held that their law requires only the signature of a contributing voter, not that the voter "personally affix" that signature.

Justice Benjamin submitted documentation evidencing 192 electronic qualifying contributions made to his campaign and such documentation containing unique transaction identifiers tracing back to the respective contributors and satisfying the definition of an electronic signature. The Election Commission correctly concluded that the Benjamin campaign had obtained the requisite number of qualifying contributions and otherwise satisfied all statutory requirements to be certified for public funding under the Act.

Although the *Benjamin* court agreed with much of the reasoning of the *Ni* court, they found that the case was wholly inapposite to their case at bar. First, their code contained no requirement that signatures be witnessed and certified by anyone, let alone a "circulator" whose specific duties are set forth in the law. West Virginia law required only the signature of a contributing voter, not that the voter "personally affix" that signature. Nothing in the law required the Election Commission to verify every contributor's residence, in the absence of a challenge; and indeed, the law did not give the Commissioners enough time to undertake such a task even if they were inclined to do so. Additionally, the West Virginia Supreme Court Public Financing Program specifically seeks "to *encourage* participation in the program" and consistent therewith, the Act permits contributions to be made electronically. If the court were to effectively read the latter provision out of the Act by finding that an electronic signature is not a signature that would *discourage* many participating contributions.