

ELECTION LAW WAR GAME

December 7, 2012

**Civil Law Seminar
Neenah, WI**

SCENARIO OVERVIEW

On Tuesday, November 4, 2014, Wisconsin voters will go to the polls to elect a new Governor.¹ However, in the weeks preceding the election many of the state's voters have cast their ballots via absentee ballot. Wisconsin allows "no excuse" absentee voting, and ballots may be cast in person at the municipal clerk's office or via mail.

Observers expect a close election between the Democratic and Republican candidates, who have been tied in the polls. In Wisconsin, recent gubernatorial elections have been especially heated. Parties, unions, corporate interests, and super PACs with various affiliations have spent nearly \$80 million on this race. These groups have launched massive get-out-the-vote operations throughout the state. Election officials expect a large turnout and a close margin of victory. People across the state – and country – are paying attention to this election. In light of the import of this race, several third-party candidates are running as well.

Two weeks before the election, employees in the municipal clerks' offices throughout the state observe that due to the design of the ballot, they are issuing many new ballots to voters who have spoiled the ballots by "over voting" and selecting two candidates for the position of Governor. Although the Democratic, Republican, and the Green Party candidate each have their own line on the ballot, a single box includes the names of three additional third-party candidates. Consequently, many voters voted for one of the three "line candidates" and one of the three "box" candidates.

When some voters recognized their error and brought the ballots to their municipal clerk's office, the voters requested to spoil their ballots and vote new ballots. Other voters recognized their over vote only after having already cast their ballots.

After consulting with the Government Accountability Board (G.A.B.), the election officials in most areas of the state have permitted voters in this second group—those who have already cast their ballots—to spoil the over voted ballots and vote new

¹ This hypothetical scenario derives from teaching and scholarship conducted at William & Mary Law School with the assistance of Edward Foley of Moritz College of Law of the Ohio State University. The two attorneys arguing each side of the hypothetical cases are doing so as part of the exercise and do not actually represent clients in this hypothetical matter. True to their commitment to professional norms and to the spirit of this exercise, for purposes of this war game, the attorneys will argue zealously as if the fictional parties were in fact real clients.

ballots, citing the authority of Wis. Stat. §6.80(2)(c): “Any elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all.”

However, the municipal clerks in Stone County have told voters that if the voters have already submitted their absentee ballots, they are not entitled to ask for new ballots, citing the authority of Wis. Stat. §6.86(6): “[I]f an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector. An elector who mails or personally delivers an absentee ballot to the municipal clerk at an election is not permitted to vote in person at the same election on Election Day.” In Stone County, 247 voters returned to municipal clerks’ offices to request new ballots because they over voted, but were denied the opportunity to do so.

Carey Kleinman, a voter in Stone County, is one such affected voter. She cast an absentee ballot via mail three weeks before the election, erroneously over voted. Kleinman wants to spoil the over voted ballot and vote a new one. Relying on Wis. Stat. §6.86(6), her municipal clerk refused her a new ballot. She asks the Stone County Circuit Court and the G.A.B. for an injunction and/or writ of mandamus requiring that the Clerks allow voters to recast all spoiled absentee ballots assuming they request so within the statutory deadlines and that election officials should then destroy the previously cast but spoiled absentee ballots.