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## Election Law

Christopher R. Nolen  
*William Mullen, Richmond, Virginia.*

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# ELECTION LAW

*Christopher R. Nolen* \*

## I. INTRODUCTION

Advances in Virginia's election law happen incrementally. This year was typical in that regard. While over one hundred bills and resolutions pertaining to elections were introduced in the 2006 Regular Session of the General Assembly, the legislature was judicious in its approval of election related legislation.<sup>1</sup> This article surveys recent developments in Virginia's election laws by focusing on those legislative enactments and judicial decisions that are significant, interesting, or show some developing trend in the area of election law.

## II. LEGISLATIVE ENACTMENTS

### A. *Voter Registration*

#### 1. Citizenship

The General Assembly took steps to enhance the integrity of Virginia's voter rolls by enacting legislation to "[r]equire the general registrars to delete from the record of registered voters the name of any voter" who is not a United States citizen.<sup>2</sup> If the person is deleted from the voter registration list, the general regis-

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\* Partner, Williams Mullen, Richmond, Virginia. B.A., 1992, Virginia Polytechnic Institute & State University; J.D., 1999, George Mason University School of Law, *cum laude*.

1. For a list of all the bills and resolutions of the 2006 Regular Session, see Virginia General Assembly, Legislative Information System, <http://leg1.state.va.us/061/lis.htm> (last visited Sept. 28, 2006).

2. Act of May 18, 2006, ch. 926, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-404(A)(4) (Repl. Vol. 2006)); Act of Mar. 30, 2006, ch. 243, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-404(A)(4) (Repl. Vol. 2006)).

trar is now required to mail notice of such cancellation “to the person whose registration is cancelled.”<sup>3</sup>

## 2. Military Spouses

The General Assembly also enacted legislation to clear up questions regarding voter registration involving the spouse or dependent of a member of the military or merchant marine. To register to vote, Virginia law requires an individual to be a resident and have a domicile in Virginia.<sup>4</sup> Given the transitory status of members of the Armed Forces, a question was present whether the spouses of such individuals could establish the necessary domiciliary intent for voter registration purposes. To resolve this issue, the General Assembly passed legislation that presumes, for the purposes of determining residence as a condition of registering to vote, that a spouse or dependent of a member of the military or merchant marine who has a physical presence and place of abode in the state has established domicile in Virginia for the purposes of voting, “unless the spouse or dependent expressly states otherwise.”<sup>5</sup>

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3. VA. CODE ANN. § 24.2-427(B) (Repl. Vol. 2006).

4. VA. CONST. art. II, § 1 (“Residence, for all purposes of qualification to vote, requires both domicile and place of abode.”); *see also* VA. CODE ANN. § 24.2-400 (Repl. Vol. 2006) (pertaining to persons entitled to register to vote). Virginia Code section 24.2-101 provides that:

“Residence” or “resident,” for all purposes of qualification to register and vote, means and requires both domicile and a place of abode. In determining domicile, consideration may be given to a person’s expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits, employment, income sources, residence for income tax purposes, marital status, residence of parents, spouse and children, if any, leasehold, sites of personal and real property owned by the person, motor vehicle and other personal property registration, and other factors reasonably necessary to determine the qualification of a person to register or vote.

*Id.* § 24.2-101 (Repl. Vol. 2006).

5. Act of Mar. 31, 2006, ch. 391, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-417.1 (Repl. Vol. 2006)). House Bill 138 provides that “[o]nce residence has changed, the military or merchant marine spouse or dependent may not revert to any previous residence without re-establishing new physical presence and intent to remain or return.” H.B. 138, Va. Gen. Assembly (Reg. Sess. 2006) (enacted as Act of Mar. 31, 2006, ch. 391, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-417.1 (Repl. Vol. 2006))).

### 3. Age at Election

The General Assembly also clarified that a person must be “18 years of age on or before the day of the election” to be qualified to vote in the election or be qualified by law to vote in the special and primary elections held immediately before the general election day by which the person will be eighteen years of age.<sup>6</sup> This provision allows a person who is not eighteen at the time of a primary or special election, but will be eighteen at the next November general election, to nonetheless vote in such primary or special election.<sup>7</sup> Previously, the law provided that such a person was allowed to vote if he would be eighteen “at” the next November election.<sup>8</sup> This raised the question of whether a person who turned eighteen the day “of” the election could take advantage of these provisions to vote in the nomination process or a special election prior to the general election. This legislative change resolves that issue.

#### B. Absentee Ballots

##### 1. Lost Ballot

Legislation was approved that allows a person who has applied for an absentee ballot, but claims that he did not receive or has lost that absentee ballot, to nonetheless vote on the day of the election at his proper polling precinct.<sup>9</sup> This vote, however, is cast on a provisional ballot after signing a statement, “subject to felony penalties for making false statements,” that he did not receive his absentee ballot or has lost such ballot.<sup>10</sup> If a person exercises his rights under this section, he is given a provisional ballot in accordance with the current procedures for casting provisional ballots, and that ballot is processed the day after the election just as any other provisional ballot pursuant to Virginia Code section 24.2-653.<sup>11</sup>

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6. Act of Mar. 24, 2006, ch. 205, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-101, -403, -544 (Repl. Vol. 2006)).

7. VA. CODE ANN. § 24.2-403 (Repl. Vol. 2006).

8. *Id.* (Repl. Vol. 2003).

9. Act of Mar. 30, 2006, ch. 283, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-653.1, -708, -711 (Repl. Vol. 2006)).

10. VA. CODE ANN. § 24.2-653.1(A) (Repl. Vol. 2006).

11. *Id.* § 24.2-653.1(B) (Repl. Vol. 2006).

## 2. Uniform Deadline

The General Assembly also enacted legislation to provide a uniform statewide deadline for the return of absentee ballots to the electoral board or general registrar by eliminating differing deadlines based on whether a locality had a central absentee ballot precinct.<sup>12</sup> Prior to this change, Virginia law provided that an absentee ballot

[S]hall be counted only if the ballot is received by the electoral board (i) prior to noon on the day of the election in any county, city, or town which does not have a central absentee voter election district, or (ii) prior to the closing of the polls in any county, city, or town which has a central absentee voter precinct.<sup>13</sup>

With this change, the absentee ballots shall be counted as long as they are delivered prior to the close of the polls to the appropriate precinct.<sup>14</sup>

## 3. Processing of Applications

The General Assembly also enacted legislation requiring an application for a mailed absentee ballot to be received by the general registrar by 5:00 p.m. on the seventh day before the election.<sup>15</sup> Prior to this change, the application could be received up until five (5) days before the election.<sup>16</sup> Lengthening the time period allows for more time to receive the application, process it, and send the ballots by mail to the voter who then casts his ballot and returns the same to the registrar.

## 4. Assistance with Ballot

Virginia law provides that assistance may be given to particular voters under certain procedures who require it due to blindness, physical disability, inability to read or write, or by virtue of

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12. Act of Mar. 30, 2006, ch. 297, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-705, -709, -710, -712 (Repl. Vol. 2006)).

13. VA. CODE ANN. § 24.2-705 (Repl. Vol. 2003).

14. *Id.* (Repl. Vol. 2006).

15. Act of Mar. 31, 2006, ch. 438, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-701, -703, -706, -707 (Repl. Vol. 2006)).

16. VA. CODE ANN. § 24.2-701(B)(2) (Repl. Vol. 2003).

being over sixty-five years of age.<sup>17</sup> In an effort to enhance the integrity of the absentee ballot process, the General Assembly also made the punishment a Class 5 felony for a violation of the statutory procedures that govern giving assistance to certain persons voting by absentee ballot.<sup>18</sup>

### C. *Conduct of Elections*

#### 1. Certification of Candidate

The General Assembly enacted several provisions regarding the conduct of elections to address problems that arose during the previous year. For instance, one member of the General Assembly was challenged in a primary by his local political party chairman.<sup>19</sup> Upon winning the primary, the incumbent was in the awkward situation of having his primary opponent, as local party chairman, certify his nomination to the State Board of Elections. In an effort to eliminate any opportunity for abuse in such situations, legislation was enacted to prohibit an “individual who is a candidate for an office” to (1) “be the person who certifies the name of the party candidate for that same office” or (2) “be the person who certifies the names of candidates for a primary for that same office.”<sup>20</sup> When such a situation arises in the future, state law now provides that the political party “shall designate an alternate official to certify its candidate.”<sup>21</sup> Accordingly, the selection of such an individual is a matter left to the local party committee and its by-laws absent some direction in the party’s state party plan.

#### 2. Special Elections to Fill Vacancy

The General Assembly also brought uniformity to the use of special elections to fill vacancies in constitutional offices. Prior to

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17. *Id.* § 24.2-649 (Repl. Vol. 2006).

18. Act of Mar. 30, 2006, ch. 242, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-649, -704, -1012 (Repl. Vol. 2006)).

19. See Tyler Whitley, *Candidate Certification Process Questioned*, RICH. TIMES-DISPATCH, Feb. 25, 2006, at A6.

20. Act of Mar. 23, 2006, ch. 83, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. §§ 24.2-511(E), -527(B) (Repl. Vol. 2006)).

21. VA. CODE ANN. §§ 24.2-511(E), -527(B) (Repl. Vol. 2006).

the legislative enactment, Virginia law provided that a “vacancy in any elected constitutional office, whether occurring when for any reason an officer-elect does not take office or occurring after an officer begins his term, shall be filled by special election.”<sup>22</sup> In order to clarify that this provision overrides any local charter that provides otherwise, the General Assembly enacted legislation that explicitly overrides the specific provisions of any local charter to the contrary.<sup>23</sup> Thus, when there is a vacancy in a constitutional office, regardless of the locality in which that office is located, such vacancy shall be filled by special election.

### 3. Vacancy in Constitutional Office

The General Assembly enacted legislation to overturn a Supreme Court of Virginia decision involving a dispute between Commonwealth’s Attorney Gordon E. Hannett, who was called up for service in the Armed Forces, and a Floyd County judge.<sup>24</sup> Specifically, legislation was approved to clearly provide that when a constitutional officer is absent from his post due to his service in the Armed Forces of the United States, such absence shall not create a vacancy in the office unless the constitutional officer tenders his resignation in writing.<sup>25</sup>

The dispute that led to this legislation centered on whether a circuit court had the power to appoint an acting commonwealth’s attorney due to the current officeholder being called up for active duty in the Armed Forces.<sup>26</sup>

At the center of the conflict were two statutes that each side relied upon in asserting his position. The Commonwealth’s Attorney relied on Virginia Code section 2.2-2802,<sup>27</sup> which provides, in part, that “[n]o state, county or municipal officer or employee shall forfeit his title to office or position or vacate the same . . . when called to active duty in the armed forces of the United

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22. *Id.* § 24.2-228.1 (Repl. Vol. 2003).

23. Act of Mar. 30, 2006, ch. 253, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-228.1 (Repl. Vol. 2006)).

24. See *In re Hannett*, 270 Va. 223, 619 S.E.2d 465 (2005).

25. Act of Mar. 23, 2006, ch. 120, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-228.1 (Repl. Vol. 2006)).

26. *In re Hannett*, 270 Va. at 228–31, 619 S.E.2d at 466–67.

27. *Id.* at 233, 619 S.E.2d at 469.

States.”<sup>28</sup> The judge relied on Virginia Code section 19.2-156, which addresses prolonged absences by commonwealth’s attorneys. Specifically, section 19.2-156 provides, in part, that:

If it shall be necessary for the attorney for the Commonwealth of any county or city to absent himself for a prolonged period of time from the performance of the duties of his office, then, upon notification by such attorney for the Commonwealth, or by the court on its own motion, and the facts being entered of record, the judge of the circuit court shall appoint an attorney-at-law as acting attorney for the Commonwealth to serve for such length of time as may be necessary.<sup>29</sup>

The dispute first made its way to the Attorney General for an official opinion.<sup>30</sup> The Attorney General opined that there was no conflict between the two statutes at issue, that the Commonwealth’s Attorney was not required to resign his post, and that he had “the sole discretion to appoint an assistant Commonwealth’s attorney to perform [the] duties” of the office while he was away.<sup>31</sup>

The Commonwealth’s Attorney appointed a part-time assistant attorney who would serve as the acting officer until he returned and asserted that there was no authority for the court to appoint an acting commonwealth’s attorney.<sup>32</sup> The Floyd County Circuit Court determined that it had the authority under Virginia Code section 19.2-156 to appoint an acting commonwealth’s attorney and did so at a hearing to which the current office holder was not notified.<sup>33</sup>

The Commonwealth’s Attorney petitioned the Supreme Court of Virginia to issue a writ of mandamus asserting that he had been “wrongfully deprived of the office of Commonwealth’s Attorney of Floyd County.”<sup>34</sup> Specifically, he argued that Virginia Code section 19.2-156 did not give the circuit court jurisdiction to “appoint an acting Commonwealth’s Attorney merely because the elected Commonwealth’s Attorney is called to active duty in the

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28. VA. CODE ANN. § 2.2-2802 (Repl. Vol. 2005 & Supp. 2006).

29. *Id.* § 19.2-156 (Repl. Vol. 2004 & Cum. Supp. 2006).

30. 2005 Op. Va. Att’y Gen. 9.

31. *See id.*

32. *In re Hannett*, 270 Va. at 229–30, 619 S.E.2d at 467.

33. *Id.* at 230, 619 S.E.2d at 467.

34. *Id.* at 233, 619 S.E.2d at 468–69.



Armed Forces of the United States during a time of war.”<sup>35</sup> Moreover, Hannett argued, “[T]he circuit court should have applied Code § 2.2-2802” and not section 19.2-156.<sup>36</sup> The supreme court ultimately concluded that there was no conflict between Virginia Code sections 2.2-2802 and 19.2-156.<sup>37</sup> Section 19.2-156 applied specifically to prolonged absences of commonwealth’s attorneys,<sup>38</sup> while section 2.2-2802 applied generally to officers called up for active service in the Armed Forces.<sup>39</sup>

The supreme court determined that the current Commonwealth’s Attorney had not vacated his office nor did the action by the circuit court deprive him of his office, but, given his prolonged absence, the circuit court had jurisdiction to appoint whomever it determined was suitable for the position.<sup>40</sup> Pursuant to Virginia Code section 19.2-156, the circuit court had appointed an acting commonwealth’s attorney vested with the full power of the office until the current office holder returned from duty.<sup>41</sup> Accordingly, the supreme court held that the circuit court had the power to appoint an acting commonwealth’s attorney under section 19.2-156.<sup>42</sup> The circuit court had made the requisite findings under the statute and, therefore, the Supreme Court of Virginia upheld the appointment of an acting commonwealth’s attorney.<sup>43</sup>

The legislature unanimously adopted legislation that overturned the supreme court’s decision.<sup>44</sup> Now, when a constitutional officer is absent from his post “by reason of his service in the Armed Forces of the United States,” such absence does not “create a vacancy in the office without a written notification by the officer of his resignation from the office.”<sup>45</sup> The legislature went on to make it emphatically clear that “[n]otwithstanding any other provision of law, including § 19.2-156, the power to relieve a

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35. *Id.*, 619 S.E.2d at 469.

36. *Id.*

37. *Id.* at 234, 619 S.E.2d at 469.

38. *Id.*, 619 S.E.2d at 470.

39. *See id.*, 619 S.E.2d at 469.

40. *Id.* at 235–36, 619 S.E.2d at 470.

41. *Id.* at 235, 619 S.E.2d at 470.

42. *Id.* at 238, 619 S.E.2d at 472.

43. *Id.* at 233, 619 S.E.2d at 469.

44. *See* Virginia General Assembly, Legislative Information System, H.B. 884 Status, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb884> (last visited Sept. 28, 2006).

45. VA. CODE ANN. § 24.2-228.1(D) (Repl. Vol. 2006).

constitutional officer of the duties or powers of his office or position during the period of such absence shall remain the sole prerogative of the constitutional officer unless expressly waived by him in writing.”<sup>46</sup>

#### 4. Use of Paper Ballots

The General Assembly created a new code section that outlines when a paper ballot is permitted to be used by a voter to cast his vote. A voter is allowed to cast his vote using a paper ballot only when: (1) paper ballots are the only ballots used in that precinct; (2) the voter is allowed to vote outside the polling place pursuant to Virginia Code section 24.2-649; (3) the voter is casting a provisional ballot; (4) “voting equipment is inoperable or otherwise unavailable;” (5) the voter is casting an absentee ballot; or (6) “[t]he voter is provided an official paper ballot for a presidential election pursuant to § 24.2-402.”<sup>47</sup>

#### 5. Election Contests

Legislation was enacted to make it more difficult to contest an election for the General Assembly or for any of the three statewide elected offices. Specifically, a losing candidate desiring to contest an election to the General Assembly is now required to “post a bond with surety with the Clerk of the House of Delegates or Senate, as appropriate, in the amount of \$100 per precinct contained in whole or in part in the district being contested.”<sup>48</sup> The bond is not forfeited if the contestant wins the contest.<sup>49</sup> Should the contestant lose the contest, “the bond shall be forfeited to the extent of the contestee’s actual and documented cost of defending against the contest, including, but not limited to, reasonable attorneys’ fees, expert witnesses’ fees, and such costs as would be taxable in an action at law.”<sup>50</sup> The statute also provides that if

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46. Act of Mar. 23, 2006, ch. 120, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-228.1(D) (Repl. Vol. 2006)).

47. VA. CODE ANN. § 24.2-646.1 (Repl. Vol. 2006). A voter may vote in a presidential election if he moved from the Commonwealth of Virginia less than thirty days prior to the presidential election. *Id.* § 24.2-402 (Repl. Vol. 2006).

48. *Id.* § 24.2-803(B) (Repl. Vol. 2006).

49. *Id.*

50. *Id.*

the allowable costs exceed the bond, the house hearing the contest, upon the recommendation of the appropriate committee, by two-thirds vote may assess the additional costs upon the losing candidate, provided it is determined the challenge was prosecuted in bad faith.<sup>51</sup> Additionally, a party's "failure to comply in [a] timely manner with the filing requirements" pertaining to such contests is "dispositive of the contest and [has] the effect of a finding for the opponent of the party failing to meet such requirements."<sup>52</sup>

For contests involving the election of Governor, Lieutenant Governor, or Attorney General, the contestant is now required to "post a bond with surety with the Clerk of the House of Delegates in the amount of \$10 per precinct in the Commonwealth."<sup>53</sup> Again, if the contestant wins the contest, he does not forfeit the bond.<sup>54</sup> If the contestant loses his challenge, then the bond is forfeited and costs are assessed in the manner described above.<sup>55</sup> Presumably, creating a significant monetary threshold such as this will assist in ensuring that only serious and meritorious contests are pursued.

## 6. Election & Recount Procedures

After the 2005 general election, Virginia experienced its first statewide recount since the 1989 recount for Governor. In the closest election for a statewide office in modern history, the winning candidate's margin of victory was a mere 333 votes.<sup>56</sup> Under Virginia law, when the difference between the winning and losing candidate is within one percentage of the total vote, the losing candidate is entitled to a recount.<sup>57</sup> The General Assembly enacted legislation to address some of the issues and concerns raised by the 2005 election and subsequent recount in the Attorney General's race.

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51. *Id.* § 24.2-803(B), (H) (Repl. Vol. 2006).

52. *Id.* § 24.2-803(G) (Repl. Vol. 2006).

53. *Id.* § 24.2-804 (Repl. Vol. 2006).

54. *Id.*

55. *Id.*

56. See Commonwealth of Virginia, November 8th 2005 General Election, Official Results, [http://www2.sbe.virginia.gov/web\\_docs/Election/results/2005/nov2005/html/](http://www2.sbe.virginia.gov/web_docs/Election/results/2005/nov2005/html/) (last visited Sept. 28, 2006).

57. See VA. CODE ANN. § 24.2-800(B) (Repl. Vol. 2006).

### a. Unobstructed View of Ballots

To address a concern related to observing election officials performing their canvass of the ballots to ascertain the results of the election,<sup>58</sup> the General Assembly enacted a provision to allow representatives of the political parties and independent candidates to “have an unobstructed view of the officers of election and their actions while the absentee ballots are cast, votes are counted, and returns are completed.”<sup>59</sup> Additionally, the requirement for an unobstructed view for representative observers now applies to observing recount officials perform their duties during the recount.<sup>60</sup> In either case, such representatives are “prohibited from interfering with the officers of election in any way.”<sup>61</sup>

### b. Presence of Campaign Representatives

The General Assembly made provisions for representatives of the political parties and independent candidates on the ballot to be present when there is an examination of voting devices that are sealed after the election. Specifically, when an authorized representative of the State Board of Elections requests to view the voting devices or the local electoral board does so at the direction of the State Board, each political party or independent candidate on the ballot may have a representative present to observe the inspection of the machines.<sup>62</sup> In each of these instances, “[t]he State Board or local electoral board shall provide such parties and candidates reasonable advance notice of the examination” or inspection.<sup>63</sup>

The legislation also provides that party representatives are entitled to be present when the local electoral board meets the day after the election to ascertain the results of the election.<sup>64</sup> In the instance where there is a meeting of the electoral board to ascer-

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58. Maria Glod & Michael Alison Chandler, *Still No New Attorney General*, WASH. POST, Nov. 11, 2005, at B4.

59. Act of Mar. 23, 2006, ch. 177, 2006 Va. Acts \_\_\_ (codified as amended at VA. CODE ANN. § 24.2-655 (Repl. Vol. 2006)).

60. See VA. CODE ANN. § 24.2-802(C) (Repl. Vol. 2006).

61. See *id.* §§ 24.2-655, -659(A), -669 (Repl. Vol. 2006).

62. *Id.* § 24.2-659(A) (Repl. Vol. 2006).

63. *Id.*

64. *Id.* § 24.2-671 (Repl. Vol. 2006).

tain the results of the election the day after the election, “[e]ach such party and candidate shall be entitled to have at least as many representatives present as there are teams of officials working to ascertain the results.”<sup>65</sup> Moreover, the legislation requires that “the room in which the local electoral board meets shall be of sufficient size and configuration to allow the representatives reasonable access and proximity to view the ballots as the teams of officials work to ascertain the results.”<sup>66</sup> In all instances, the representatives and observers are “prohibited from interfering with the officials in any way.”<sup>67</sup>

### c. Changes to Election Results

To further add transparency to the vote certification and recount processes,

[A]ny changes made by the local electoral board to the unofficial results ascertained by the officers of election or any subsequent change to the official abstract of votes made by the local electoral board shall be forwarded to the State Board of Elections and the explanation of such change shall be posted on the State Board website.<sup>68</sup>

The State Board is also required to “post on the Internet any and all changes made during the recount to the results as previously certified by it.”<sup>69</sup>

### D. Political Campaign Advertisements

#### 1. Expansion of Stand By Your Ad

This past session, the General Assembly adjusted the requirements for political campaign advertisements. In 2002, Virginia adopted what is commonly referred to as “Stand By Your Ad” legislation to require certain disclosure statements for political advertisements in print, radio, and television media.<sup>70</sup> The disclo-

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* § 24.2-802(D)(5) (Repl. Vol. 2006).

70. See Act of Apr. 4, 2002, ch. 487, 2002 Va. Acts 624 (codified as amended at VA. CODE ANN. §§ 24.2-101, -622 (Repl. Vol. 2006) and VA. CODE ANN. §§ 24.2-941 to -944, -1013 (repealed 2006)).

sure statutes have undergone further revision since 2002, and the 2006 session produced even more changes. This year, the legislature broadened the definition of “print media” for the purposes of the political advertisement disclosure statutes.<sup>71</sup> For any advertisement in the print media used to affect the outcome of an election, the name of the person or entity paying for and authorizing the advertisement is required to be contained within the advertisement.<sup>72</sup> Under the prior law, “print media” was defined to include mass mailings of 500 or more pieces of mail.<sup>73</sup> If a mailing met this threshold, the disclosure requirements were triggered.<sup>74</sup> With the new changes, the law now provides that any printed material disseminated by mail, regardless of the quantity, is considered print media, and the disclosure requirements of Virginia Code sections 24.2-956 and 24.2-956.1 are applicable.<sup>75</sup>

## 2. Increased Penalties for Violations

In an effort to strengthen the enforcement of the political advertisement disclosure statutes, the legislature increased the maximum penalties that may be assessed for violating the disclosure requirements. Virginia’s basic disclosure requirements for political advertisements, whether in print, radio, or television, require the sponsor of such advertisement to include the name of the person or entity paying for the advertisement and whether it was authorized by any candidate in the election.<sup>76</sup> The maximum civil penalty for violating the basic disclosure requirements for campaign advertisements was raised from \$100 to \$1,000.<sup>77</sup> The General Assembly also created a second tier of punishment to provide that a violation of the basic disclosure requirements “occurring within the 14 days prior to or on the election day of the election to which the advertisement pertains” subjects the sponsor to “a civil penalty not to exceed \$2,500.”<sup>78</sup>

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71. Act of Apr. 6, 2006, ch. 787, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 24.2-955.1 (Repl. Vol. 2006)).

72. See VA. CODE ANN. §§ 24.2-956, -956.1 (Repl. Vol. 2006).

73. *Id.* § 24.2-942 (Repl. Vol. 2003).

74. *Id.* § 24.2-943 (Repl. Vol. 2003).

75. See *id.* § 24.2-955.1 (Repl. Vol. 2006).

76. See *id.* §§ 24.2-956 to -958.3 (Repl. Vol. 2006).

77. See Act of Apr. 6, 2006, ch. 787, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 24.2-955.3(A) (Repl. Vol. 2006)).

78. *Id.*

Virginia law also requires an “expanded” disclosure for radio and television advertisements.<sup>79</sup> For those media, the sponsor of the advertisement is required to include a spoken disclosure statement, the words of which are delineated in the Code.<sup>80</sup> The legislature increased the penalties for violating the expanded disclosure requirements pertaining to radio and television political campaign advertisements. Specifically, the maximum civil penalty for violating the expanded disclosure requirements was raised from \$500 per occurrence to \$1,000 per occurrence.<sup>81</sup> Like the penalty enhancement adopted for violating the basic disclosure requirements two weeks before the election, Virginia law now provides that when a violation of the expanded disclosure requirements for radio and television advertisements occurs “within the 14 days prior to or on the election day of the election to which the advertisement pertains,” the sponsor of the advertisement is subject to “a civil penalty not to exceed \$2,500 per occurrence.”<sup>82</sup> Finally, the legislature doubled the total penalty exposure cap so that in any event “the total civil penalties imposed for multiple broadcasts of one particular campaign advertisement” on radio or television that violates the expanded disclosure requirements may not exceed \$10,000.<sup>83</sup>

### E. Campaign Finance

In the area of campaign finance, the General Assembly enacted legislation ranging from simple housekeeping to addressing perceived loopholes in the campaign financing reporting requirements for out-of-state political committees making large contributions to candidates in Virginia elections.

#### 1. Independent Expenditures

In an effort to clarify what constitutes an independent expenditure for the purposes of the campaign finance disclosure statutes,

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79. See VA. CODE ANN. §§ 24.2-957 to -958.3 (Repl. Vol. 2006).

80. See *id.*

81. See Act of Apr. 6, 2006, ch. 787, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 24.2-955.3(B) (Repl. Vol. 2006)).

82. VA. CODE ANN. § 24.2-955.3(B) (Repl. Vol. 2006).

83. Act of Apr. 6, 2006, ch. 787, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 24.2-955.3(B) (Repl. Vol. 2006)).

the General Assembly enacted legislation to further define “independent expenditure” to include expenditures made by candidate campaign committees that meet certain requirements.<sup>84</sup> Specifically, it is now considered an independent expenditure if a candidate campaign committee expends funds that are “not related to the candidate’s own campaign and . . . that [are] not made to, controlled by, coordinated with, or made with the authorization of a different candidate, his campaign committee, or an agent of that candidate or his campaign committee.”<sup>85</sup>

## 2. Campaign Finance Disclosure Exemptions

Exemptions to complying with the campaign finance reporting requirements were expanded this year to include certain organizations based on tax filing status. Internal Revenue Service section 501(c)(4) and (6) organizations are now exempt from the campaign finance reporting requirements<sup>86</sup> when disseminating information to voters, provided the organizations do “not advocate or endorse the election or defeat of a particular candidate, group of candidates, or the candidates of a particular political party.”<sup>87</sup>

## 3. Statements of Organization

Candidates seeking election to a state or local office through a party nomination process, general primary, or special election are now required to “file a statement of organization within 10 days” of meeting any one of a number of conditions, including “[t]he ap-

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84. *Id.* (codified at VA. CODE ANN. § 24.2-945.1(A) (Repl. Vol. 2006)). This legislation was the result of a review of the Campaign Finance Disclosure Act undertaken by the State Board of Elections pursuant to H.J. Res. 667, Va. Gen. Assembly (Reg. Sess. 2005). See Virginia General Assembly, Legislative Information System, H.B. 972 Summary as Passed, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb972> (last visited Sept. 28, 2006).

85. VA. CODE ANN. § 24.2-945.1(A) (Repl. Vol. 2006).

86. See *id.* §§ 24.2-945 to -953.5 (Repl. Vol. 2006).

87. *Id.* § 24.2-945.1(B) (Repl. Vol. 2006). Organizations with § 501(c)(3) status were already exempt from the filing and reporting requirements. See *id.* § 24.2-902(B) (Repl. Vol. 2003). Section 501(c)(3) organizations are typically organized for charitable, religious or educational purposes. See 26 U.S.C. § 501(c)(3) (2000). Section 501(c)(4) organizations are typically organized for social welfare purposes. See *id.* § 501(c)(4). Section 501(c)(6) organizations are typically organized for entities such as business leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues. See *id.* § 501(c)(6).



pointment of a campaign treasurer, designation of a campaign committee, or designation of a campaign depository.”<sup>88</sup> Candidates seeking election to the General Assembly are now also required to file the form not only with the State Board of Election, as was the previous requirement, but also with the local electoral board of the county or city in which he resides.<sup>89</sup>

#### 4. Reporting of Large Pre-Election Contributions

The campaign finance disclosure laws generally impose an enhanced reporting requirement for certain contributions received by candidates within a twelve day window prior to the election.<sup>90</sup> The threshold monetary amount of the contribution that triggers the reporting requirements during this window of time was raised for certain offices. Candidates for Governor, Lieutenant Governor, and Attorney General are now required to report contributions of \$5,000 or more received during the enhanced disclosure window prior to the election.<sup>91</sup> Candidates for election to the General Assembly are now required to report contributions of \$1,000 or more received during the enhanced disclosure window.<sup>92</sup> For local offices, the threshold for enhanced reporting is \$500 or more.<sup>93</sup>

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88. VA. CODE ANN. § 24.2-947.1(A)(5) (Repl. Vol. 2006). Each candidate is still required to file a statement of organization upon accepting any contribution for his candidacy. *Id.* § 24.2-947.1(A)(1) (Repl. Vol. 2006).

89. *Id.* § 24.2-947.1(B) (Repl. Vol. 2006).

90. Virginia Code section 24.2-947.9(C) provides that candidates are required to report any single contribution meeting the monetary threshold amount received “(i) on and after the twelfth day preceding a primary and before the primary date, (ii) on and after the twelfth day preceding a general election and before the general election date, or (iii) on and after the eleventh day preceding any other election in which the individual is a candidate and before the election day.” *Id.* § 24.2-947.9(C) (Repl. Vol. 2006). House Bill 972 clarified that contributions required to be reported under the enhanced disclosure requirements of Virginia Code section 24.2-947.9 are to be reported to the “State Board [of Elections] or local electoral board, as appropriate, by 5:00 p.m. the following day or for a contribution received on a Saturday by 5:00 p.m. on the following Monday.” H.B. 972, Va. Gen. Assembly (Reg. Sess. 2006) (enacted as Act of Apr. 6, 2006, ch. 787, 2006 Va. Acts \_\_\_ (codified at VA. CODE ANN. § 24.2-947.9(C) (Repl. Vol. 2006))).

91. VA. CODE ANN. § 24.2-947.9(C) (Repl. Vol. 2006).

92. *Id.*

93. *Id.*

## 5. Penalties for Incomplete Campaign Finance Disclosure Reports

The legislature also increased the civil penalty for filing an incomplete campaign finance report. Prior to this change, the maximum civil penalty assessed for filing an incomplete report could not exceed \$500.<sup>94</sup> In an effort to deter the filing of reports that do not properly inform the public of the financial transactions of the candidate or political committee pertaining to election related activities, the Code now provides that the maximum penalty remains \$500 “unless the total of the filer’s reportable contributions or the total of the filer’s reportable expenditures is \$10,000 or more.”<sup>95</sup> Presumably, the establishment of the \$10,000 threshold represents the determination by the legislature that the public’s interest in knowing such information is greater as the amount of money influencing the electoral process increases.

The law now provides a more detailed process for candidates and political committees to receive notification of the failure to comply with the campaign finance disclosure requirements and details the process for the assessment of penalties. Prior to any penalty being assessed for filing an incomplete finance report, the State Board of Elections, general registrar, or secretary of the local electoral board, as appropriate, is required to “notify, by certified mail, the candidate and treasurer, or person or political committee required to file a report with that board, that a filed report” is incomplete and detail “omissions from the report.”<sup>96</sup> If the entity provides the requested information within ten days of the date of the written notice of noncompliance, no penalty is assessed.<sup>97</sup> If the entity does not provide the requested information within the ten-day period, a civil penalty not to exceed \$500 is assessed against the “candidate and treasurer, who shall be jointly and severally liable, or person or political committee required to file a report.”<sup>98</sup> In making a determination of the civil penalty, the Code now details factors for the assessing official to consider. These factors include: “the number of omissions, the amount of money involved, and the proportion of contributions or expendi-

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94. *See id.* § 24.2-929(A)(1) (Repl. Vol. 2003).

95. *Id.* § 24.2-953.3(A) (Repl. Vol. 2006).

96. *Id.* § 24.2-953.3(B) (Repl. Vol. 2006).

97. *Id.*

98. *Id.* § 24.2-953.3(C) (Repl. Vol. 2006).

tures containing omissions.”<sup>99</sup> Should an entity not comply with the request for additional information within the initial ten-day period and provide sufficient reason to the proper authority, there may be granted an additional period for compliance not to exceed two weeks.<sup>100</sup>

In order to address the chronic filing of incomplete campaign finance reports, Virginia Code section 24.2-953.3(E) provides that the penalty “shall be increased by \$500 every 60 days following the date for compliance established . . . until compliance is complete.”<sup>101</sup> If noncompliance continues for more than 120 days, then “there shall be a rebuttable presumption that the violation was willful, and the matter shall be forwarded to the appropriate attorney for the Commonwealth.”<sup>102</sup> The legislation also provides for an enhanced penalty should the offending entity file another incomplete report more than twenty days after notice was given of the violation or for incomplete reports that are “filed during the 60 days prior to the elections for which the person is a candidate.”<sup>103</sup> The penalty in both cases is \$1,000.<sup>104</sup> Finally, the statute provides that the State Board of Elections shall post on its website those candidates seeking election to one of the three statewide offices and those candidates for election to the General Assembly that have submitted incomplete reports, provided the candidate does not produce the requested information during the time of requested compliance.<sup>105</sup>

## 6. Regulation of § 527 Committee Contributions

In an effort to close a perceived loophole in Virginia’s campaign finance disclosure laws, the General Assembly adopted comprehensive legislation addressing contributions to Virginia campaigns by federal and out-of-state political action committees. The legislation is one of the more significant campaign finance reform proposals since the original enactment of the campaign finance disclosure statutes.

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99. *Id.*

100. *Id.* § 24.2-953.3(D) (Repl. Vol. 2006).

101. *Id.* § 24.2-953.3(E) (Repl. Vol. 2006).

102. *Id.*

103. *Id.* § 24.2-953.3(F) (Repl. Vol. 2006).

104. *Id.*

105. *Id.* § 24.2-953.3(G) (Repl. Vol. 2006).

Late in the 2005 campaign for the three statewide elected offices, complaints were filed with the State Board of Elections regarding contributions made by an out-of-state organization to a candidate for Attorney General.<sup>106</sup> The contributions from the organization totaled approximately \$2.1 million.<sup>107</sup> The organization had not filed any disclosure reports in Virginia detailing its contributors.<sup>108</sup> Although the organization was required to file a list of its contributors with the Internal Revenue Service, that filing was not required until after the Virginia election.<sup>109</sup> This created a situation where a significant amount of money was being contributed and expended in a Virginia race, but without contemporaneous disclosure to the public. The State Board of Elections declined to investigate the complaints claiming it did not have the authority to perform such investigations.<sup>110</sup> Consequently, it referred the matter to the Commonwealth's Attorney for the City of Richmond for whatever action he deemed appropriate.<sup>111</sup>

To address this issue, the General Assembly adopted legislation that requires registration of such committees and disclosure of contributions in certain circumstances. Specifically, Virginia Code section 24.2-945.1(A) now defines two new types of committees, "federal political action committee" and "out-of-state political committee" for the purposes of the campaign finance disclosure statutes.<sup>112</sup>

Virginia campaign and political committees now have a duty to require a federal political action committee or out-of-state com-

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106. Tyler Whitley, *Parties' Campaign Complaints Flying*, RICH. TIMES-DISPATCH, Nov. 1, 2005, at B3.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. VA. CODE ANN. § 24.2-945.1(A) (Repl. Vol. 2006). Pursuant to Virginia Code section 24.2-945.1(A), "*Federal political action committee*" means any political action committee registered with the Federal Election Commission that makes contributions to candidates or political committees registered in Virginia," and:

"*Out-of-state political committee*" means an entity covered by § 527 of the United States Internal Revenue Code that is not registered as a political committee or candidate campaign committee in Virginia and whose contributions made to political committees and candidate campaign committees registered in Virginia are 75% or less of their total expenditures in any calendar year. The term shall not include a federal political action committee.

*Id.*

mittee to provide to them a State Board of Elections registration number before accepting a contribution of "\$10,000 or more in the aggregate in any calendar year" from either type of entity.<sup>113</sup> Moreover, campaign and political committees have an obligation to verify the number given to them by one of these types of organizations.<sup>114</sup> This provision is a check to ensure that the federal and out-of-state committees have registered as now required by law, and it subjects Virginia campaign and political committees to the penalties for violating the statutes if they fail to use due diligence in the acceptance of these contributions.

The new provisions require federal political committees "that make[] expenditures for the purpose of influencing the outcome of any election in Virginia,"<sup>115</sup> to file a statement of organization with the State Board of Elections detailing its contact information for the committee and treasurer and its Federal Election Commission registration number.<sup>116</sup>

Out-of-state political committees that contribute to Virginia candidates or political committees "\$10,000 or more in the aggregate in a calendar year" are now required to also file a statement of organization and register with the State Board of Elections.<sup>117</sup> The statement contains all the basic information that a Virginia committee would disclose, but also requires the out-of-state political committee to disclose "(i) its taxpayer identification number, (ii) the federal and state agencies with which it is required to file financial disclosure information, and (iii) the registration number assigned to it by each agency listed under clause (ii)."<sup>118</sup> Upon filing its statement of organization, the out-of-state political committee is required to file two additional items. First, it is required to file a list of those contributors that have given it "\$2,500 or more in the aggregate between the immediately preceding January 1 and the date on which the statement of organization is filed."<sup>119</sup> Second, out-of-state political committees are required to

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113. *Id.* § 24.2-949.9:4 (Repl. Vol. 2006).

114. *Id.*

115. *Id.* § 24.2-949.2(C) (Repl. Vol. 2006). "[A]ny election" does not include elections for federal offices held in Virginia. *See id.*

116. *Id.*

117. *Id.* § 24.2-949.9:1(A) (Repl. Vol. 2006).

118. *Id.* § 24.2-949.9:1(C) (Repl. Vol. 2006).

119. *Id.* § 24.2-949.9:1(D) (Repl. Vol. 2006). The information required to be disclosed for each contributor includes the name, address, occupation, employer, and place of business

file a list of contributions it has made to candidates or political committees registered with the State Board of Elections “between the immediately preceding January 1 and the date on which the statement of organization is filed.”<sup>120</sup> An out-of-state political committee is required to periodically update its disclosure of contributors of \$2,500 or more in the aggregate and its contributions to Virginia candidates and political committees until it ceases to contribute to such committees.<sup>121</sup>

The new disclosure requirements also include a provision designed to make it more difficult to “wash” large amounts of money by contributing to an organization that in turn contributes to an out-of-state committee registered in Virginia and then having that committee contribute to a Virginia campaign. Specifically, if an out-of-state political committee reports receiving a contribution of \$50,000 or more from a “political organization as defined in § 527 of the United States Internal Revenue Code,” that triggers a reporting requirement by the contributing § 527 organization.<sup>122</sup> The § 527 organization is then required to “file a statement of organization and the lists of its contributors and its contributions” just like any other out-of-state political committee.<sup>123</sup>

The new disclosure provisions also require out-of-state political committees, before accepting a contribution of “\$10,000 or more in the aggregate in any calendar year from any other out-of-state political committee,” to request the State Board of Elections registration number of the other political committee and to verify that number with the Board.<sup>124</sup> Like the similar requirement for Virginia campaign and political committees, this provision is designed to insure that out-of-state political committees perform the necessary due diligence to verify that the registration and disclosure requirements are being fulfilled.

In order to put significant teeth in the enforcement of the new campaign finance reporting requirements, the new law penalizes

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of the contributor, as well as the dates and amounts of the contributor’s contributions during the report period. *Id.*

120. *Id.*

121. *Id.* § 24.2-949.9:2 (Repl. Vol. 2006).

122. *Id.* § 24.2-949.9:1(E) (Repl. Vol. 2006).

123. *Id.*

124. *Id.* § 24.2-949.9:3 (Repl. Vol. 2006).

the making and acceptance of certain contributions by unregistered federal and out-of-state political committees. In particular, the law penalizes the “[a]cceptance of contributions of \$10,000 or more in the aggregate in any calendar year from an unregistered federal political action committee or out-of-state political committee.”<sup>125</sup> Specifically, acceptance of such contributions from unregistered committees will “result in a civil penalty equal to the amount of the contributions made to a candidate campaign committee or political committee.”<sup>126</sup> Similarly, federal political action and out-of-state political committees that make contributions without complying with the registration and reporting requirements of the new law are subject to “a civil penalty not to exceed the amount of the contribution made to the candidate campaign committee or political committee.”<sup>127</sup> Additionally, a successful candidate to office that is assessed a civil penalty for accepting non-compliant contributions from federal political action committees or out-of-state political committees are prohibited from assuming office until “he has paid any civil penalty and returned any contribution required to be returned.”<sup>128</sup>

### III. JUDICIAL DECISIONS

#### A. *Open Primary Law*

In a suit for declaratory relief, the chairman of the Eleventh Senatorial District Republican Committee challenged the constitutionality of Virginia’s “open primary” law which allows Republicans, Democrats, and Independents to vote in any political party’s primary.<sup>129</sup> The plaintiff argued that the open primary law violated the associational rights of the political parties under the First Amendment to the United States Constitution.<sup>130</sup> Essentially, the plaintiff argued that the inability to exclude members of other political parties from his political party’s nomination contests infringed on his right to freely associate with those of his party’s own choosing.<sup>131</sup>

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125. *Id.* § 24.2-953.5(A) (Repl. Vol. 2006).

126. *Id.*

127. *Id.* § 24.2-953.5(B) (Repl. Vol. 2006).

128. *Id.* § 24.2-948.2(A) (Repl. Vol. 2006).

129. *Miller v. Brown*, 394 F. Supp. 2d 794 (E.D. Va. 2005).

130. *Id.* at 796.

131. *Id.*

In 2004, a state senator selected a primary for his method of nomination for the senatorial race scheduled for 2007.<sup>132</sup> The senator used a form for the 2003 election cycle and struck through the year and indicated the form was for 2007.<sup>133</sup> The form was submitted to the State Board of Elections.<sup>134</sup> Prior to this, the Republican Party of Virginia amended its state party plan to include a provision to exclude members of other political parties from its nominating contests, unless the individuals complied with certain requirements.<sup>135</sup> After the senator submitted his request for a primary to the State Board of Elections, the chairman of the Republican Committee for the senate district sent the Board a letter indicating that he planned to “implement the amendment to the [Republican Party of Virginia] Party Plan and to exclude past Democratic voters from the primary.”<sup>136</sup> The Secretary of the State Board of Election acknowledged receipt of the letter and replied that the Board did not have the authority to implement provisions of party plans for political parties that “restricts the manner in which a voter may participate in the political party’s primary.”<sup>137</sup> The Secretary indicated the Board would comply with the law in effect at the time of the primary.<sup>138</sup>

The plaintiffs contended that the open primary posed a continuing threat to them because of the potential for diluting or distorting the party message by allowing non-members that might not share their political views to participate in their nomination process.<sup>139</sup> Accordingly, this access to the nomination process significantly interfered with the plaintiffs’ “constitutionally protected associational rights, in that a commonly shared political philosophy is central to the association.”<sup>140</sup>

The defendants countered that the suit was not ripe for adjudication because the senator could “change his mind about seeking reelection” before officially declaring his candidacy, he might not

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132. *Id.* at 796–97.

133. *Id.*

134. *Id.* at 797.

135. *Id.* at 796.

136. *Id.* at 797.

137. *Id.*

138. *Id.*

139. *Id.* at 799–800.

140. *Id.* at 800.



face any opponent in the primary, and the General Assembly could change the law before the primary is conducted.<sup>141</sup>

The United States District Court for the Eastern District of Virginia dismissed the plaintiff's action because it determined the claims were not justiciable at that time.<sup>142</sup> The court found the alleged injury was not either actual or eminent and there was not an actual issue for judicial review.<sup>143</sup> Specifically, the State Board of Elections had not determined what type of primary was to be conducted in 2007, the General Assembly had two opportunities prior to the primary to change the law, the amendment to the Republican Party plan that was a basis in the alleged harm was not effective at the time of the suit, and there were no other announced candidates vying for the senate seat, which is a requirement to conduct a primary.<sup>144</sup> Additionally, the senator had a nomination method available to him, i.e. party canvass, that could be closed to members of other political parties.<sup>145</sup> Moreover, the State Board of Elections had not made a formal decision, and therefore, there was no adverse decision felt in a "concrete way by Plaintiffs."<sup>146</sup> Thus, the issue of whether there is a legitimate challenge to be made against Virginia's open primary law is left open until 2007 when several of the contingencies present in this case will be gone.

### B. *Election Fraud*

The Court of Appeals of Virginia addressed a particular issue of election fraud in *Williams v. Commonwealth*.<sup>147</sup> Specifically, Mr. Williams was found guilty by the trial court of violating Virginia Code section 24.2-1016,<sup>148</sup> which provides that "[a]ny willfully false material statement or entry made by any person in any statement, form, or report required by" the election code is punishable as a felony and "constitute[s] the crime of election

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141. *Id.* at 799.

142. *See id.* at 802-03.

143. *Id.* at 802.

144. *Id.*

145. *See id.* at 802-03.

146. *Id.* at 802.

147. 43 Va. App. 1, 595 S.E.2d 497 (Ct. App. 2004).

148. *Id.* at 4, 595 S.E.2d at 498.

fraud.”<sup>149</sup> The statute also provides that “[a]ny preprinted statement, form, or report shall include a statement of such unlawful conduct and the penalty provided in this section.”<sup>150</sup>

The charges against Mr. Williams arose from his registering to vote through the Department of Motor Vehicles.<sup>151</sup> The form he signed to register included an attestation clause that provided “subject to the penalties for false statement set forth above,” he was offering himself as qualified to register to vote.<sup>152</sup> Mr. Williams subsequently voted in a city council election.<sup>153</sup> In completing his application, Mr. Williams also checked a box indicating he had not been convicted of a felony.<sup>154</sup> Mr. Williams admitted at trial that he had previously been convicted of nineteen felonies.<sup>155</sup> Mr. Williams was convicted by the circuit court of election fraud.<sup>156</sup>

On appeal, Mr. Williams argued that “the Commonwealth was required to prove the voter registration form he signed contained a warning that a willfully false material statement on that form constituted election fraud and was punishable as a Class 5 felony.”<sup>157</sup> The circuit court determined that proof that such a statement was included on the form was not an element of the offense.<sup>158</sup>

The court of appeals concluded that regardless of whether the use of “shall” in the second sentence of the statute was directory or mandatory to public officials to include such a statement on election forms,<sup>159</sup> the requirement was not an element of the offense.<sup>160</sup> Had the legislature wanted to make only false statements made on an election form a crime, it could have clearly provided in the statute that such statements were election fraud “only if the . . . form . . . include[d]” a statement that such con-

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149. VA. CODE ANN. § 24.2-1016 (Repl. Vol. 2006).

150. *Id.*

151. *Williams*, 43 Va. App. at 3, 595 S.E.2d at 498.

152. *Id.*

153. *Id.*

154. *Id.* at 3–4, 595 S.E.2d at 498.

155. *Id.* at 3, 595 S.E.2d at 498.

156. *Id.* at 4, 595 S.E.2d at 498.

157. *Id.*

158. *Id.*

159. *Id.* at 5, 595 S.E.2d at 499.

160. *Id.* at 7, 595 S.E.2d at 500.

duct is unlawful and punishable as a Class 5 felony.<sup>161</sup> The legislature did not, and consequently the court of appeals held that “a conviction under Code § 24.2-1016 requires proof only that the accused made a willfully false material statement on the specified form and does not require proof that the form apprised him such a statement would constitute election fraud.”<sup>162</sup>

### C. *Attorney General Opinions*<sup>163</sup>

#### 1. Absentee Ballot Statements

The Secretary of the State Board of Elections asked the Attorney General to resolve a perceived conflict between state law and the federal Voting Rights Act of 1965.<sup>164</sup> Virginia Code section 24.2-706 requires absentee ballot voters to complete a preprinted statement that details the procedure the voter must follow in completing his ballot.<sup>165</sup> This section is intended to “preserve the integrity of the absentee voting process in every election and prevent possible voter fraud by requiring the voter statement.”<sup>166</sup> Virginia Code section 24.2-707 requires local election officials to void the ballot if a voter does not correctly complete the voter statement required by section 24.2-706.<sup>167</sup> Federal law provides that:

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.<sup>168</sup>

The Attorney General noted that in the context of the statute, the phrase “other act requisite to voting” in the federal statute re-

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161. *Id.* at 6, 595 S.E.2d at 499.

162. *Id.* at 7, 595 S.E.2d at 500.

163. Although the Attorney General’s opinions are not binding on a court, “[t]he construction of a statute by the Attorney General is persuasive and entitled to considerable weight.” *Andrews v. Shepherd*, 201 Va. 412, 415, 111 S.E.2d 279, 282 (1959). As such, the Attorney General’s opinions are listed in the judicial section of this article.

164. Op. to Hon. Jean R. Jensen (Aug. 1, 2005).

165. VA. CODE ANN. § 24.2-706 (Repl. Vol. 2006).

166. Op. to Hon. Jean R. Jensen (Aug. 1, 2005).

167. VA. CODE ANN. § 24.2-707 (Repl. Vol. 2006).

168. 42 U.S.C. § 1971(a)(2)(B) (2000).

ferred to “every action that is taken leading up to the actual casting of a vote by means of marking a ballot.”<sup>169</sup> The language of Virginia Code section 24.2-706, however, “pertains to the act of casting an absentee ballot . . . as opposed to the process of taking action to vote or any other ‘act requisite to voting.’”<sup>170</sup> Consequently, no conflict existed because the two statutes in question were directed at different parts of the voting process.<sup>171</sup> In determining that no conflict existed, the Attorney General also relied on the fact that the Department of Justice had previously reviewed section 24.2-706 and interposed no objection to the statute.<sup>172</sup> Accordingly, the Attorney General surmised that the Department of Justice must also believe there is no conflict between the federal and state statutes.<sup>173</sup> Finally, the Attorney General opined that the State Board of Elections had the authority to “adopt necessary standards and instructions for use by local election officials to determine what constitutes an error or omission in completion of the voter statement that is not material in determining whether such individual is qualified to vote in such election.”<sup>174</sup>

## 2. Private Cause of Action—Political Advertisement Disclosures

At the request of a legislator, the Attorney General was asked to opine “whether a private right of action exists for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act . . . and the Disclosure Requirements for Political Campaign Advertisements”<sup>175</sup> (collectively, “the Acts”). The Campaign Finance Disclosure Act sets forth the reporting requirements for the acceptance of contributions and expenditure of funds to affect elections in the commonwealth.<sup>176</sup> Disclosure re-

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169. Op. to Hon. Jean R. Jensen (Aug. 1, 2005).

170. *Id.*

171. *See id.*

172. *Id.*

173. *Id.* The Attorney General also determined that because there was no conflict between the two statutes, there was no issue of preemption. *Id.*

174. *Id.*

175. Op. to Hon. Ken Cuccinelli (Oct. 12, 2005).

176. *Id.*

quirements for political campaign advertisements detail the statements required to accompany political advertisements.<sup>177</sup>

The Attorney General followed the general rule that “a private right of action cannot be implied from statutory provisions.”<sup>178</sup> Specifically, the Attorney General pointed out that “[n]o civil right of action exists unless the Acts, by virtue of the terms used therein, so provide or unless proof of a statement of facts establishes a violation of these Acts also constitutes proof of an otherwise existing civil cause of action.”<sup>179</sup> Moreover, the Acts clearly contained civil penalties for the regulation of conduct to be administered and enforced by the State Board of Elections, general registrars, and local electoral boards.<sup>180</sup> Since the statutes in question did not provide for a private cause of action, and given the administrative enforcement scheme currently in place, there was no basis to find that a private cause of action existed for individuals to enforce the provisions of the Acts.<sup>181</sup>

### 3. Access to Polling Places

The Attorney General was presented with the question of whether the Virginia Office for Protection and Advocacy is exempt from the state law requiring permission by local electoral boards to enter a polling place for only observation purposes.<sup>182</sup> The Virginia Office for Protection and Advocacy is charged with protecting the rights of persons with disabilities.<sup>183</sup> A person with a disability cannot be denied the opportunity to register to vote or vote merely because he is disabled.<sup>184</sup> Moreover, persons with disabilities have the same rights as those without disabilities to freely use public buildings, facilities, and places.<sup>185</sup> The Attorney General determined that nothing in the authorizing statutes for the Virginia Office for Protection and Advocacy or any other law

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177. *Id.*

178. *Id.* (citing *Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993)).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Op. to Dorothy B. Dockery* (Jan. 31, 2006).

183. *Id.* (citing VA. CODE ANN. § 51.5-39.2(A) (Repl. Vol. 2005)).

184. *Id.* (citing VA. CODE ANN. § 51.5-43 (Repl. Vol. 2005 & Supp. 2006)).

185. *Id.* (citing VA. CODE ANN. § 51.5-44(A) (Repl. Vol. 2005 & Supp. 2006)).

negated the specific requirement of Virginia Code section 24.2-604(I) to obtain written permission to be present as a neutral observer at a polling place on Election Day.<sup>186</sup>

#### IV. CONCLUSION

While this past legislative session was not a watershed year in election law reform, significant strides were made to address issues raised by the previous year's election. With each ensuing election, the deficiencies of Virginia's election laws come to light. Each subsequent session of the General Assembly attempts to correct such deficiencies. This past legislative session was no different. With each year, more improvements are made to promote fair and honest elections.

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186. *Id.*

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