



STATE OF KANSAS

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September 21, 1984

ATTORNEY GENERAL OPINION NO. 84- 99

The Honorable Jack H. Brier
Secretary of State
State Capitol, 2nd Floor
Topeka, Kansas 66612

Re: Elections -- Voting Procedure -- Write-In Candidates;
Use of Stickers Bearing Name of Candidate

Synopsis: Although two Kansas statutes contained in the chapter dealing with elections provide that electors wishing to vote for a write-in candidate shall "write" the vote in the provided space (K.S.A. 25-213, 25-2903), other statutes in the same chapter allow electors to "insert" (K.S.A. 25-612, 25-2021, 25-2116) or "affix" such votes. (K.S.A. 25-1330). No statute specifically prohibits the use of prepared stickers or labels which contain the name of a candidate who is conducting a write-in campaign. Where such a sticker or label is attached to a ballot in such a manner as to make the intent of the voter clear, a valid vote has been cast and the expression of the voter's will should be given effect. Cited herein: K.S.A. 25-213, 25-612, as amended by L. 1984, ch. 139, §2, 25-1330, 25-2021, 25-2116, 25-2903.

* * *

Dear Mr. Brier:

As Secretary of State for Kansas, you are the chief election officer of the state. In this capacity, you request our opinion on a question involving the use of labels or stickers in the general election. The stickers would contain the name of a candidate

who is running a write-in campaign and would be attached to the official ballot by those persons wishing to vote for such person. In the absence of any Kansas statutes or case law on this subject, you inquire whether the use of labels or stickers would be legal (i.e. could any votes cast using this procedure be included in the candidate's total).

Our research has revealed no less than five statutes which are contained in the chapter of the Kansas Statutes Annotated which deals with elections (Chapter 25) that speak to the casting of write-in votes. Two of the five, K.S.A. 25-213 and 25-2903, use only the word "write" in describing the manner by which a voter may indicate his or her choice of a candidate whose name is not printed on the ballot. The latter statute is contained in the article entitled "Voting Procedure," and states:

"Except as otherwise provided by law, if a voter desires to vote for a person whose name is not on the ballot, the voter shall write the name of such person in the blank space, if any is provided, under the appropriate title of the office. Failure to make a cross or check mark in the square to the right of such name shall not invalidate that portion of the ballot unless it is impossible to determine the voter's intention. If no blank space is provided for writing in the name of a person whose name is not on the ballot, voters may not vote for any person whose name is not on the ballot."

However, a third statute, K.S.A. 25-612, as amended by L. 1984, ch. 139, sec. 2, contained in the article entitled "Official Ballots," states in part as follows:

"Except for presidential candidates and governor and lieutenant governor, blank spaces shall be left at the end of the list of candidates for each different office equal to the number to be elected thereto, in which the voter may insert the name of any person not printed on the ballot for whom the voter desires to vote for such office." (Emphasis added.)

Other statutes which also employ the broader term "insert" include K.S.A. 25-2021 (school board elections) and K.S.A. 25-2116 (city elections). Even more latitude is provided by K.S.A. 25-1330, which concerns the casting of write-in votes using a voting machine. Therein, it is provided that write-in ballots shall be "deposited, written or affixed" by the elector. While it is not

clear that the use of the word "affix" was intended to specifically permit the use of labels or stickers, it is obvious that something besides the casting of a hand-written vote was at least contemplated, for otherwise the language would be surplusage, a result to be avoided if possible. American Fidelity Ins. Co. v. Employers Mutual Casualty Co., 3 Kan.App.2d 245 (1979), Appeal of Armed Forces Co-op Insuring Assn., 5 Kan.App.2d 787 (1981).

The question of whether write-in votes which employ the use of stickers or labels should be considered valid has arisen on numerous occasions in other states, with a number of appellate decisions rendered. Our research has indicated that in almost every case in which the use of labels or stickers was disallowed, the basis for the denial lay either in the failure of the voter to properly apply the label or sticker in accordance with a specific statute [Petition of Keogh-Dwyer, 211 A.2d 778 (N.J. 1965), In re Election of Supervisor in Springfield Twn., Mercer Cnty., 399 Pa. 37, 159 A.2d 901 (1960)], or because of a statutory prohibition against the use of such items. Bayne v. Board of Elections, 396 N.Y.S.2d 690, 58 A.D.2d 863 (1977). Only in a very few cases has the use of stickers or labels been prohibited as a matter of public policy, or their usage strictly controlled. McFarland v. Spengler, 248 Pac. 521 (Cal. 1926), State ex rel. v. District Court, 3rd Judicial District, 167 Mont. 477, 539 P.2d 1182 (1975).

In light of the number of decisions from other jurisdiction which reach the contrary result (i.e. the use of stickers or labels is permitted, absent some other fact which would call into question the intent of the voter), the preceding line of cases would appear to clearly be the minority rule. In Devine v. Wonderlich, 268 N.W.2d 620 (Iowa 1978), the court construed the words "insert in writing" to allow the use of stickers for a write-in candidate, even where there was some deviation in the placement of the sticker. Id., at 626. In the case of Pace v. Hickey, 236 Ark. 792, 370 S.W.2d 66 (1963), the Arkansas Supreme Court reaffirmed an earlier holding which had allowed the use of stickers or rubber stamps as merely another means of allowing electors to express their will. Yet another decision, Kamins v. Board of Elections, 324 A.2d 187 (D.C.App. 1974), concluded that, in the absence of a statutory prohibition, the use of stickers should be permitted, even when the voting machines which were in use could not physically handle them, thus requiring manual counting. See also, Burns v. Rodman, 342 Mich. 410, 70 N.W.2d 793 (1955), In re Manchester Town Election, 115 Vt. 230, 55 A.2d 612 (1947).

Although, as previously noted, no Kansas cases have dealt with the issue of the use of labels or stickers, Kansas courts have

traditionally reached results in election cases which favor giving effect to the ascertainable intent of the voter, rather than a strict construction of election laws. In the early case of Clark v. Comm'rs of Montgomery County, 33 Kan. 202 (1885), Justice Johnston stated for the court:

"The leading consideration, and the one on which the decision of the case must turn, is, what was the will of the electors casting these ballots? In determining the intention of voters, election boards as well as courts should be guided by the language of the ballots cast, interpreted in the light of the circumstances surrounding the election. If the terms used by the voter upon his ballot are so vague and uncertain as not to disclose his purpose, it should be rejected; but on the other hand, if the terms employed by him on his ballot, though not technically accurate, are such as to make known his will beyond a reasonable doubt, effect must be given to it."
202 Kan. at 204.

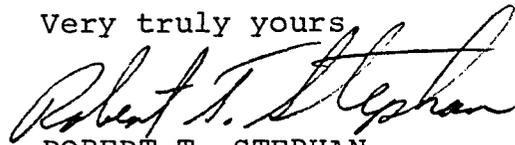
This emphasis on substance over form has been continuously present in Kansas decisions concerning challenges to elections. See, e.g., Wall v. Pierpoint, 119 Kan. 420 (1925), Johnson v. Russell, 160 Kan. 96 (1945), Kimsey v. Board of Education, 211 Kan. 618 (1973).

Based upon the above, it is our opinion that the use of labels or stickers by persons voting for write-in candidates should not invalidate either the person's vote in the particular race or the entire ballot which is cast. To be sure, the placement of a sticker or label must be close enough to the space designated for the write-in to show the elector's intention. If the sticker or label covers words on the ballot which are not material, is upside down, extends over the edge of the ballot, is too wide for the spot designated, or is out of alignment with the printed portion of the ballot, the intent of the voter should still prevail. However, if the sticker is affixed next to the wrong office or is placed in such a way that it is not clear which office is being referred to, the intent of the voter is not clear and the sticker should not be given effect, although the entire ballot is not voided. (For cases discussing each of these deviations in placement, see Devine v. Wonderlich, *supra*, 268 N.W.2d at 626.) Given the multiplicity of ways in which a label or sticker could be affixed, the legislature may well wish to provide guidance to your office and county election officials through an enactment in this regard at the next session.

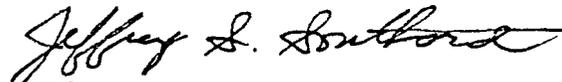
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In conclusion, although two Kansas Statutes contained in the chapter dealing with elections provide that electors wishing to vote for a write-in candidate shall "write" the vote in the provided space (K.S.A. 25-213, 25-2903), other statutes in the same chapter allow electors to "insert" (K.S.A. 25-612, 25-2021, 25-2116) or "affix" such votes. (K.S.A. 25-1330). No statute specifically prohibits the use of prepared stickers or labels which contain the name of a candidate who is conducting a write-in campaign. Where such a sticker or label is attached to a ballot in such a manner as to make the intent of the voter clear, a valid vote has been cast and the expression of the voter's will should be given effect.

Very truly yours,



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