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## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

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Memo No. 6

TO: MEMBERS OF THE SPECIAL COMMITTEE ON ELECTION LAW REVIEW

FROM: Robert J. Conlin, Senior Staff Attorney, and Nicholas Zavos, Staff Attorney

RE: Post-Election Issues from the November 17, 2004 Meeting

DATE: February 23, 2005

This Memo summarizes and gives background information regarding the post-election issues that have been raised by the committee members and summarizes the suggestions for addressing these issues made by committee members. These issues were previously identified in Memo No. 3, dated December 7, 2004. Where appropriate, possible alternatives are noted for committee discussion. This Memo is organized as follows:

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### **Reporting of Write-In Votes**

- **Background**

Under current law, the name of each person who receives a vote in an election is recorded on the returns for that election. When a county or state canvass of an election is performed, the names of write-in candidates who receive a comparatively small number of votes may be omitted and their votes designated on the returns as “scattering votes.” [ss. 7.51 (4) (a), 7.60 (4) (c), and 7.70 (3) (f), Stats.]

- **Suggestions for Modifications to the Law**

The committee should consider amending the law so that only votes for registered write-in candidates in partisan elections are counted, unless no person is on the ballot or if a candidate whose name appears on the ballot is deceased. In addition, municipalities could be authorized to report votes for write-ins as “scatterings” unless they receive a substantial number of votes or no candidates appear on the ballot. Finally, write-in candidates could be required to file a declaration of candidacy with the appropriate filing officer or agency no later than 5:00 p.m. on the Thursday before the election in which the candidate seeks office in order to have write-in votes recorded, unless there are no other candidates on the ballot or if a candidate on the ballot is deceased.

The above approach is similar to the one taken by 2003 Assembly Bill 115 which was introduced by Representative Freese and others and cosponsored by Senator Fitzgerald and others. Assembly Bill 115 would have allowed any write-in candidate to file a declaration of candidacy with the appropriate filing officer or agency no later than 5:00 p.m. on the day before the primary or other election in which the candidate seeks office. The bill would have provided that the name of any write-in candidate need not be recorded on the returns for an election unless the candidate has filed a timely declaration of candidacy for the office for which he or she receives such votes. The provisions of the bill would not have applied if a write-in candidate had sought an office for which there were no candidates whose name appears on the ballot or if there appears on the ballot the name of a deceased candidate for the office that the write-in candidate seeks. The Assembly passed Assembly Bill 115, with an amendment, on March 18, 2003, but the Senate failed to take the bill up.

### **Online Reporting of Election Results**

- **Background**

Current law does not require that election results be posted online. The Elections Board staff and some county clerks post election results on their websites at some point after an election.

- **Suggestions for Modifications to the Law**

The committee should consider creating a requirement for clerks to post election results on their websites as soon as they are available.

### **Inspectors' Statements in Duplicate**

- **Background**

Currently, s. 7.51 (4), Stats., requires that, after tallying the votes at the polling place, the poll workers must complete statements in duplicate.

- **Suggestions for Modifications to the Law**

The committee should consider amending current law to require the preparation of only an original statement be prepared on election day. The municipal clerk could make the appropriate duplicate copies.

### **Enforcement of Election Laws**

- **Background**

Currently, most violations of the Elections Law carry only criminal penalties and, generally, may only be prosecuted by district attorneys. It has been suggested that prosecutors are reluctant to bring criminal charges for many such violations.

- **Suggestions for Modifications to the Law**

The committee should consider the creation of more civil forfeiture penalties for such violation and authorize the Elections Board to prosecute said violations.

### **County Clerk Participation in Board of Canvassers**

- **Background**

Under current law, the county clerk and two qualified electors of the county appointed by the clerk constitute the County Board of Canvassers. The clerk must designate a deputy clerk who must perform the clerk's duties on the Board of Canvassers in the event that the county clerk's office is vacant, the clerk cannot perform his or her duties, or the clerk is a candidate at an election being canvassed. [s. 7.60 (2), Stats.] Generally, the Board of Canvassers is in charge of the recount process in the county.

- **Suggestions for Modifications to the Law**

The committee should consider changing the law so that a county clerk who appears on the ballot at an election ought to be able to serve on the Board of Canvassers if the clerk is unopposed on the ballot. This will avoid deputy clerks having to run the Board of Canvassers during high profile elections. In addition, an uncontested county clerk ought to be able to run a recount as long as the recount is not for the county clerk's office.

## **Recall Petitions**

- **Background**

The State Constitution and statutes combine to authorize voters to petition for the recall of any incumbent elective official. The State Constitution, in art. XIII, s. 12, provides for the recall of any congressional, judicial, legislative, or county elective officer. The statutes additionally authorize the recall of other local elected officials. To initiate the recall process, voters must file a petition demanding the recall of the officeholder. [s. 9.10 (1) (a), Stats.]

Generally, a petition for recall of a state, congressional, legislative, judicial or county officer must be signed by electors equal in number to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. [art. XIII, s. 12 (1), Wis. Const., and s. 9.10 (1) (b), Stats.] A petition for the recall of a city, village, town or school district officer must be signed by electors equal in number to at least 25% of the vote cast for the office of President of the United States at the last election within the same district or territory as that of the officeholder being recalled. [s. 9.10 (1) (b), Stats.] Recall petitions must be filed with the same official or agency with whom nomination papers or declarations of candidacy for that office are filed. That official or agency is required to determine and certify to any interested person the number of signatures required on a recall petition. If no statistics are available to calculate the required number of signatures on a petition for recall of an officer, the number of signatures are determined according to a formula specified in the statutes. [s. 9.10 (1) (c) to (d), Stats.]

Although the form of all recall petitions must generally meet the same statutory requirements, e.g., each recall petition must have the words “RECALL PETITION” at the top in bold print, only a recall petition for a city, village, town or school district office must contain a statement of a ***reason*** for the recall which is related to the official responsibilities of the official for whom removal is sought. [s. 9.10 (2) (a) to (c), Stats.]

Before a petitioner can circulate or file a recall petition, the petitioner must file a registration statement applicable to political committees, groups and individuals under s. 11.05 (1) or (2), Stats. The petitioner must also include a statement indicating his or her intent to circulate a recall petition, the name of the officer for whom recall is sought and, where applicable, a statement of a reason for the recall. [s. 9.10 (2) (d), Stats.]

A recall petition for the recall of a state, congressional, legislative, judicial or county officer must be offered for filing by 5 p.m. on the 60th day commencing after registration. A recall petition for the recall of a city, village, town or school district officer may be offered for filing no later than 5 p.m. on the 30th day commencing after registration. After the recall petition has been offered for filing, no name may be added or removed and no signature may be counted unless the date of the signature falls within the applicable periods identified above. [s. 9.10 (2) (d), Stats.] In addition, no recall petition may be filed prior to the expiration of one year after commencement of the term of office for which the officer is elected. [s. 9.10 (2) (s), Stats.]

The official against whom the recall petition has been filed may challenge the sufficiency of the petition after the petition is offered for filing. The filing officer or agency is responsible for reviewing a verified challenge to a recall petition if it is made prior to certification of the petition. However, a

person challenging the petition bears the burden of proving its insufficiency. [s. 9.10 (2) (f) and (g), Stats.] A petitioner may file a rebuttal to the challenge. [s. 9.10 (3) (b) and (4) (a), Stats.]

The statutes identify a number of specific items that may be challenged such as the sufficiency and validity of the signatures, but the statutes do not provide an exhaustive list. [s. 9.10 (2) (q), Stats.]

If the official with whom the petition is filed determines that the petition is sufficient, the official must schedule a recall election for the Tuesday of the sixth week following the date of filing the petition, or the day after that if Tuesday is a holiday. [art. XIII, s. 12 (2), Wis. Const., and s. 9.10 (3) (b) and (4) (a).] If the official finds the petition to be insufficient, the petitioner has five days to remedy the insufficiency. [s. 9.10 (3) (b) and (4) (a), Stats.]

After the official makes a final determination on the sufficiency or insufficiency of a recall petition for state, congressional, legislative, judicial, and county officers, the petitioner or the officer against whom recall is sought may file a petition for a writ of mandamus or prohibition with the circuit court for the county where the recall petition is offered for filing to determine whether the petition is sufficient. The court must give the matter precedence over other matters not given similar precedence by law. [s. 9.10 (3) (bm), Stats.]

The official against whom the recall petition is filed must be a candidate at the recall election without nomination unless the official declines or resigns within 10 days after the original filing of the petition. [art. XIII, s. 12 (4), Wis. Const., and s. 9.10 (3) (c) and (4) (c), Stats.] Other candidates for the office must file nomination papers not later than 5 p.m. on the fourth Tuesday preceding the election to have their names placed on the ballot at the recall election. [s. 9.10 (3) (c) and (4) (e), Stats.] All candidates for any town or village office, other than the official against whom the recall petition is filed, must file nomination papers, even if the town or village normally uses a caucus process for nomination. [s. 9.10 (4) (h), Stats.]

For state, congressional, legislative, judicial, and county offices, if more than two persons compete for a nonpartisan office, a recall primary must be held. The names of the two persons receiving the highest number of votes in the recall primary are then certified to appear on the ballot in the recall election, but if any person receives a majority of the total number of votes cast in the recall primary, a recall election may not be held. If the incumbent receives a majority of the votes cast, the incumbent is retained in office for the remainder of the term. If another candidate receives a majority of the votes cast, that candidate is elected to serve for the residue of the unexpired term of the incumbent. [art. XIII, s. 12 (4) (b), Wis. Const., and s. 9.10 (3) (d), Stats.] For any partisan office, a recall primary must be held for each political party that is entitled to a separate ballot and from which more than one candidate competes for the party's nomination in the recall election. Independent candidates may only be shown on the ballot for the recall election. [art. XIII, s. 12 (4) (b), Wis. Const., and s. 9.10 (3) (e), Stats.]

For other municipal and school district officers, if more than two persons compete for an office, a recall primary is required. The names of the two persons receiving the highest number of votes in the primary are certified to appear on the ballot in the recall election. However, if any person receives a majority of the total number of votes cast in the primary, the recall election may not be held. If the incumbent receives a majority of the votes, he or she retains the office for remainder of the term. If another candidate receives a majority of the votes, that candidate is elected to serve for the remainder of the unexpired term of the incumbent. [s. 9.10 (4) (f), Stats.]

If a recall primary is necessary, the primary is held on the Tuesday of the sixth week after the recall petition is filed and the recall election is held on the Tuesday of the fourth week commencing after the recall primary. [s. 9.10 (3) (f) and (4) (g), Stats.]

A recall primary or election involving more than one official may be held on the same day. If more than one official of the same office designation elected at-large for the same term from the same district or territory is the subject of a recall petition, there is required to be a separate election contest for the position held by each official. Candidates must designate which position they are seeking on their nomination papers. Instructions must appear on the ballot to electors to vote for each position separately. [s. 9.10 (5) (a), Stats.]

An official being recalled may continue to perform the duties of his or her office until a certificate of election is issued to his or her successor. [s. 9.10 (5) (b), Stats.]

After one recall petition and recall election, no further recall petition may be filed against the same official during the term for which he or she was elected. [art. XIII, s. 12 (6), Wis. Const., and s. 9.10 (6), Stats.]

- **Suggestions for Modifications to the Law**

The committee should consider modifying the law so that recall petitions should state the grounds that constitute cause for a recall of officials, e.g., neglect of duty or official misconduct. Also, the number of signatures required on recall petitions should be increased.

### **Preferential Voting for Nonpartisan Offices**

- **Background**

Generally, a primary is required when there are more than two candidates who qualify to have their names on the ballot. If a primary is held, each voter selects a candidate for each office, and the two candidates who receive the most votes appear on the ballot at the ensuing general election. Preferential voting would eliminate the need for this primary. Instead, whenever there are three or more candidates for an office, the voter can rank the candidates in order of preference. If a candidate receives a majority of first-choice votes, that candidate is elected. If no candidate receives a majority of first-choice votes, the candidate with the fewest first-choice votes is dropped and the votes are reallocated. The second-choice votes for the dropped candidate are added to the first-choice votes of the remaining candidates, and the third-choice votes are added to the second-choice votes for the other candidates. This process is repeated until one candidate receives a majority.

- **Suggestions for Modifications to the Law**

The committee should examine the efficacy of preferential voting which may eliminate the need for primaries. It is noted that 2003 Assembly Bill 911 proposed allowing the governing body of each municipality, except a town or village where a caucus is used, to adopt this method for nonpartisan offices.

## **Recount**

- **Background**

Any candidate voted for at any election or any elector who voted upon any referendum question at any election may request a recount. The person seeking the recount is required to file a verified petition accompanied by the appropriate fee, if any, with the clerk or body with whom nominations papers are filed for that office. In the event of a recount involving a referendum, the petition must be filed with the clerk of the jurisdiction on which the referendum is called, and in the case of a statewide referendum, with the Elections Board. [s. 9.01 (1) (a), Stats.]

The Elections Board is required to prescribe standard forms and procedures for the making of recounts. [s. 9.01 (10), Stats.]

A recount petition may be filed no earlier than the time of completion of the canvass and no later than 5:00 p.m. on the third business day following the last meeting day of the municipal or county board of canvassers determining the election for the office or referendum question or, if more than one board of canvassers makes a determination, no later than 5:00 p.m. on the third business day following the last meeting day of the board of canvassers which makes a determination. If the Board of State Canvassers makes the determination, the petitioner may file the petition no earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum and no later than 5:00 p.m. on the third business day following the day on which the Elections Board receives the last statement from the county board of canvassers for the election or referendum. [s. 9.01 (1) (a), Stats.]

A recount petition must state the following: (a) that at the election, the petitioner was a candidate for the office in question or that he or she voted on the referendum question at issue; (b) that the petitioner is informed and believes that a mistake or fraud has been committed in the specified ward or municipality in the counting and return of the votes cast for the office or the question; or (c) that another defect, irregularity, or illegality in the conduct of the election occurred. The petition must also specify each ward, or each municipality where no wards exist, in which a recount is desired. [s. 9.01 (1) (a), Stats.]

At the time of receiving a recount petition, the clerk or body receiving the petition is required to calculate or estimate the requisite recount fee that is due. The fee must be paid at the time of the filing of the petition. The applicable fee is based upon the vote differential between the leading candidate and the petitioner or between the affirmative and negative votes cast upon a referendum question. The fee schedule is as follows:

- a. If the vote difference is less than 10 when 1,000 or fewer votes are cast, or not more than .5% if more than 1,000 votes are cast, no fee is due.
- b. If the vote difference is at least 10 when 1,000 or fewer votes are cast or is more than .5%, but not more than 2% when more than 1,000 votes are cast, the fee is \$5 per ward recounted (or \$5 for each municipality where no wards exist).
- c. If the vote difference is more than 2% when more than 1,000 votes are cast, the fee equals the actual costs of performing the recount.

The balance of any fee estimated based upon the actual costs of a recount is due within 30 days after the clerk provides the petitioner with a written statement of the actual amount due. If the petitioner has overpaid, the clerk must refund the amount overpaid within 30 days after the board of canvassers makes its determination in the recount. [s. 9.01 (1) (ad) and (ag), Stats.]

When the recount concerns an office, the clerk or body with whom the petition is filed must promptly prepare a copy of the petition for delivery to each opposing candidate for the same office whose name appears on the ballot. In a recount for a partisan primary, the clerk or body with whom the petition is filed must prepare a copy of the petition for delivery to each opposing candidate for the same party nomination for the same office, to each opposing candidate for the party nomination of each other party for the same office and to each independent candidate qualifying to have his or her name placed on the ballot for the succeeding election. A candidate or an agent designated by a candidate may personally accept delivery of a copy of the petition. Upon personal acceptance, the candidate or agent must sign a receipt for the delivery. If a candidate or agent does not personally accept delivery, the sheriff, must promptly serve copies of the petition to each candidate at the address given on the candidate's nomination papers, without fee. [s. 9.01 (2), Stats.]

The petitioner, all opposing candidates, and interested persons are entitled to be present in person or by counsel to observe the recount proceedings. [s. 9.01 (3), Stats.]

When a valid petition and the required fee is received, the proper board of canvassers is notified. Generally, the board of canvassers must convene for the recount no earlier than 9:00 a.m. on the day following delivery of the recount notice to all candidates and no later than 9:00 a.m. on the day following the last day for filing a recount petition. [s. 9.10 (1) (ar) 3., Stats.]

The recount process, which is specified in s. 9.01 (1) (b), Stats., is to proceed as follows:

- a. First, the board of canvassers must compare the poll lists and determine the number of voting electors.
- b. The board of canvassers must next examine the absentee ballot envelopes. Defective envelopes are to be laid aside, properly marked, and carefully preserved. The number of voters must be reduced by the number of envelopes set aside. [An absentee ballot is considered "defective" only if it is not witnessed, if it is not signed by the voter, or if the certificate accompanying an absentee ballot that the voter received by fax transmission or email is missing.]
- c. Next, the board of canvassers must examine the container of ballots to be certain that it has not been tampered with, opened, or opened and resealed. Any irregularities or possible tampering must be noted.
- d. After the container has been checked, the board of canvassers must open it and remove its contents. The number of ballots must be counted without examining the votes. For each defective absentee ballot envelope laid aside, the board of canvassers must randomly, and without inspecting the vote, draw one absentee ballot from the container. [The law presumes that ballots in the container initialed only by the municipal clerk, executive director of the board of election commissioners, or a deputy clerk or secretary is an absentee ballot.] If there are more defective absentee ballot envelopes than there are probable absentee ballots in the container, all of the probable absentee ballots must be removed. Additional ballots are to be removed only if the number of remaining ballots still exceeds the



number of voters reduced by the number of defective absentee ballots set aside. Removed ballots may not be counted and must be marked with the reason for their removal, set aside, and carefully preserved.

If the number of ballots still exceeds the number of voters, the board of canvassers must place all of the ballots face up to check for blank ballots. If blank ballots are found, they must be marked as such, set aside, and carefully preserved. If the number of ballots still exceeds the number of voters, the board of canvassers must then place all of the ballots face down to check the initials. Any ballots not properly initialed by election officials are to be temporarily set aside and ballots randomly drawn so as to reduce the number of ballots to equal the number of voters. Ballots removed for lack of the requisite initials are to be marked, set aside, and carefully preserved.

If the number of ballots still exceeds the number of voters, the remaining ballots must be returned to the container and the excess number of ballots must be randomly withdrawn from the container. These ballots may not be counted and must be marked, set aside, and carefully preserved.

When the number of ballots and voters agree, or after noting that the number of voters exceeds the number of ballots, the board of canvassers must place the ballots back into the ballot box and must turn the box to thoroughly mix the ballots. At this point, the recount may begin.

Generally, the recount is to be conducted according to the procedures governing the original canvass. In recounting the votes cast on a voting machine in which the record of the votes cast is contained in the machine, the board of canvassers must make a record of the number of the seal, if any, the number of the protective counter or other device, if one is provided, and must then open the recording compartment of the machine and, without unlocking the machine against voting, recount the votes on the machine. If the machine is an electronic machine utilizing a detachable record of votes cast, the record must be retabulated under s. 5.90, Stats.

When a machine is recounted, the board of canvassers must inspect and examine the machine showing the votes cast and make a record of the votes as shown on the machine. This must be done in the presence of at least one witness. If the recount establishes that the original canvass from a machine was correct but that a discrepancy still remains, the board of canvassers must publicly unlock the voting and counting mechanism of the machine and must examine and test the machine to determine the cause of the discrepancy. A similar test must be conducted on electronic voting machines to determine whether the machine has a malfunction. A statement explaining the results of the test must be prepared by the board of canvassers and witnessed by at least one witness.

In the case of voting machine or electronic voting system and a clearly apparent error in the vote total shown on the machine or system, the board of canvassers may change the vote total and may certify or use a different vote total to certify a different result if there is evidence of a specific malfunction in the machine or system, if the malfunction could reasonably have caused the error, and if clear and convincing evidence exists which indicates the exact actual total number of votes cast. The burden to demonstrate that a vote total shown on a machine or record of votes cast is incorrect rests with the party seeking to change the recorded result on the basis of clear and convincing evidence.

If the recount shows that the original canvass was incorrect, the statement and determinations of the board of canvassers must be corrected accordingly.

Recounts at polling places utilizing an electronic voting system in which ballots are distributed to electors must generally be performed in accordance with the procedures for recounting paper ballots, to the extent applicable. Generally, recounts at polling places using electronic voting machines must be performed in accordance with the procedures for recounting votes cast on mechanical voting machines.

All steps of a recount must be performed publicly. Generally, all materials and ballots may be viewed and identified by the candidate, the person demanding the recount, and their authorized representatives and counsel. However, only members of the board of canvassers and tabulators assisting them may actually touch any of the materials or ballots. The candidates, the person demanding the recount, and their authorized representatives and counsel may object to the counting of any ballot. Any errors must be corrected. [s. 9.01 (1) (b), Stats.]

County boards of canvassers are required to convene no later than 9 a.m. on the second day after receipt of an order and may adjourn for not more than one day at a time until the recount is completed in the county, except that the Elections Board may permit extension of the time for adjournment. Returns from a recount ordered by the Elections Board must be transmitted to the office of the Elections Board as soon as possible, but in no case later than 13 days from the date of the order of the board directing the recount. [s. 9.01 (1) (ar) 3., Stats.]

Whenever a recount petition for part of the wards within a jurisdiction or district, or for part of the municipalities within a district where there are no wards, is filed, the opposing candidate, or any voter or other interested party, including a municipality if the recount concerns a referendum question, is permitted to file a petition for recount in any or all of the remaining wards or municipalities in the jurisdiction or district. The petition must be filed no later than 5:00 p.m. two days after the board of canvassers completes the first recount. [s. 9.01 (4), Stats.]

The board of canvassers is required to keep complete minutes of all recount proceedings. The minutes must include a record of objections and offers of evidence. If the board of canvassers receives exhibits from any party, the exhibits must be numbered and preserved. The board of canvassers must make specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount. Any member of the board of canvassers may administer oaths, certify official acts, and issue subpoenas for purposes of the recount. Witness fees are to be paid by the county, or by the Elections Board in the case of a state recount. [s. 9.01 (5) (a), Stats.]

The board of canvassers conducting a recount may select and employ tabulators to assist in the recount. However, only the members of the board of canvassers may make any determination as to the validity of any vote counted. [s. 9.01 (5) (b), Stats.]

Upon completing the recount, the board of canvassers must deliver to the Elections Board one copy of the minutes from the recount. In addition, in the case of a recount of an election for a state or national office, the board of canvassers must deliver one copy of the minutes to the state committee of the political party for each candidate whose name appears on the ballot for the recounted office. If the recount is of an election for county office, the board of canvassers must provide a copy of the minutes to each county political party of each candidate whose name appears on the ballot for the recounted office. [s. 9.01 (5) (bm), Stats.]

If the recount is made by a municipal or county board of canvassers and the result is required to be reported to a county board of canvassers or to the Elections Board, the board of canvassers making the initial recount must immediately certify the results to the county board of canvassers or to the Elections Board. If a county board of canvassers receives such results, it must then convene no later than 9:00 a.m. on the next business day following receipt to examine the returns and determine the results. If the Elections Board receives such results, the returns must be publicly examined and the results determined not later than 9:00 a.m. on the third business day following receipt, but if that day is earlier than the latest day permitted for the state canvass for that office, the chairperson of the board may examine the returns and determine the results no later than the day permitted for the state canvass for that office. [s. 9.01 (5) (c), Stats.]

Within five business days after completion of a recount, any candidate, or any elector when for a referendum, aggrieved by the recount may appeal to circuit court. The appeal is commenced by serving a written notice of appeal to the other candidates and persons who filed a written notice of appearance before each board of canvassers whose decision is appealed, or in the case of a statewide recount, before the Elections Board. The appealing party must also serve notice on the Elections Board if the board is responsible for determining the election. The notice must be served by certified mail or in person and must be filed with the clerk of circuit court. A surety in the amount approved by the court, conditioned upon the payment of all costs taxed against the appealing person, must also be filed. [s. 9.01 (6) (a), Stats.]

If an appeal is filed from a recount determination in an election which is held in more than one judicial circuit, the chief judge of the judicial administrative district in which the election is held must consolidate all appeals relating to that election and appoint a circuit judge to hear the appeal. If the election is held in more than one judicial administrative district, the Chief Justice of the Supreme Court must make the appointment. [s. 9.01 (6) (b), Stats.]

When an appeal is filed, the court must immediately direct each affected county or municipal clerk to transmit all ballots, papers, and records affecting the appeal to the clerk of court, or to impound and secure such materials, or both. [s. 9.01 (7) (a), Stats.]

The appeal is heard by a judge without a jury. Following filing of an appeal, the court must promptly hold a scheduling conference to adopt procedures permitting it to determine the matter as expeditiously as possible. Within the time ordered by the court, the person who filed the appeal must file a complaint listing with specificity every alleged irregularity, defect, mistake, or fraud committed during the recount. Within the time ordered by the court, the other parties to the appeal must file an answer and all the parties to the appeal must provide the court with any other information ordered by the court. The matter is to be summarily heard and determined by the court. Provisions of the law relating to civil procedure which are inconsistent with a prompt and expeditious hearing do not apply to recount appeals. [s. 9.01 (7) (b), Stats.]

Unless the court finds reason for setting aside or modifying the recount determination, it must uphold the determination. Generally, the court may not receive evidence not offered during the recount, except for evidence that was unavailable to a party at the time of the recount or newly discovered evidence that could not have been obtained during the recount. However, the court may receive evidence not offered at an earlier time because a party was not represented by counsel in all or part of a recount proceeding. A party who fails to object or fails to offer evidence of a defect or irregularity

during the recount waives the right to object or to offer evidence to the court except in the case of evidence that was previously unavailable or newly discovered evidence or evidence received by the court due to unavailability of counsel during the recount.

The court must set aside or modify the recount determination if it finds that the board of canvassers erroneously interpreted a provision of law and the correct interpretation compels a particular action. If the determination depends on any fact found by the board of canvassers, the court may not substitute its judgment for that of the board of canvassers as to the weight of the evidence on any disputed finding of fact. The court must set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence. [s. 9.01 (8), Stats.]

Within 30 days after entry of the order of the circuit court, an aggrieved party may appeal to the court of appeals. If an appeal is filed with respect to an election which is held in more than one court of appeals district, the Chief Justice of the Supreme Court must consolidate all appeals relating to that election and designate one district to hear the appeal, except that if an appeal is filed in respect to an election for statewide office or statewide referendum, the appeal must be heard by the 4th District Court of Appeals in Madison. The court of appeals must give precedence to the appeal over other matters not accorded similar precedence by law. [s. 9.01 (9), Stats.]

The above-described recount procedures constitute the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect, or mistake committed during the voting or canvassing process. [s. 9.01 (11), Stats.]

- **Suggestions for Modifications to the Law**

The following suggestions for changes to the recount laws were made by committee members:

- The committee should consider requiring clerks responsible for leading boards of canvassers in multi-district recounts to meet prior to the start of a recount to discuss common procedures to be used in the recount.
- The committee should consider adopting recount standards that vary depending on the type of voting technology employed.
- The committee should explore the adequacy and clarity of the 13-day completion period for recounts.
- The committee should examine the appropriateness of and alternatives to the “draw-down” process. [See Memo No. 8, dated February 23, 2005, *Recount Draw Down Procedures*, for more information on this subject.]
- The committee should examine the adequacy of rules governing the safekeeping of unused ballots after an election.