

Marion County Election Board Minutes 09/19/03
(Emergency Meeting)

Members of the Board:

Chairman, Candace Marendt
Vice Chairman, Steve Eichholtz
Secretary Doris, Anne Sadler

Others present:

Election Board Administrator, Robert Vane
Election Board Warehouse Supervisor, David Woo
Election Board Attorney, Dan Ladendorf
ES&S Representative, Wendy Orange
Republican County Chairman, John Keeler
Democrat County Chairman, Ed Treacy
City Legal Representative, April Sellers

The meeting was called to order by Chairman Candace Marendt at the request of Vice Chairman Mr. Steve Eichholtz.

Mr. Eichholtz: On Wednesday afternoon, I received an email from Robert asking for input on the issue of split-ticket voting and instructions that we had to develop to describe split-ticket voting. We had a general conversation by telephone on that, and thereafter, I received another email from Robert indicating the number of people who emails have been received from dealing with the issue of split-ticket language had been approved and the language ought to be reviewed by candidates, the at large City County Council candidates since they would be ones most impacted by this. Per conversation, Mr. Vane indicated we really didn't have time and the ballot needed to be reviewed and done with.

Mr. Vane: I am also working through the parties.

Mr. Eichholtz: I have a number of concerns with the adoption of the new device filed by the Marion County Republican Party and was contacted yesterday by the Democrat Headquarters Chairman who had concerns as well about the device and ballot layout itself. To my understanding, the Republican Party ticket adopted a new device, which rather than their soaring eagle, wasn't apparently soaring too well, they have attempted to prop it up by adding the words "A-Team" to the device. I don't know if the furniture store marketing department came up with that, I don't know who did, but that's the device they are attempting to adopt now and apparently will be placed on the ballot. In addition, Mr. Treacy's concerns were expressed to me that the candidates names, in his belief, should be listed under the party name and logo before each party and as set forth the ballot is unnecessarily confusing. In light of the fact this is the first general election

that we will be utilizing this ballot, I think it's important that we adopt a ballot that all the parties are involved in the election and are convinced, not confusing to the voters, and I think it's very unfortunate, this being the first time that we have had these ballots in a general election, that this issue, for whatever reason, is not addressed by all concerned prior to almost the deadline for developing the ballot. I think in light of what happened in the Florida election, with respect to confusing ballots and not just the punch cards but the actual confusion of the ballot, I am somewhat disappointed that more thought did not go into this. I was not consulted on terms of designing of the ballot, and I don't know who was consulted in terms of the actual design and layout of the ballot. But I think that with an election with this great of importance, there should be input by all those affected so that we can minimize confusion number one, potential litigation number two. With that being said, I believe that there are those more prepared than I to address the legal issues with respect of the ballot placement and ask Chairwoman for them to speak.

Ms. Marendt : Before we get started, to make sure I am understanding what your concerns are, number one you want a public review of the ballot which obviously this forum will provide and secondly the questioning of the new device, and thirdly the layout of the ballot and those are the, I guess you could say now, the two issues you would like to address today.

Mr. Eichholtz: Correct, I just received a packet with a new (started reading off the page)

Mr. Vane: That was the cover letter that came with the new device and a CD-ROM styled August 20 at 11:36 a.m. before the deadline required for the new party device.

Mr. Eichholtz: I just received this and took a glance at this. I think it's invalid on its face referring to the statute 3-8-7-1: when a new device is adopted, the device selected by the political party to be used to designate candidates of the political party on the ballot for all elections throughout the state. This election device ballot signed by the Republican State Chairman with his consent. (read from paper) 'I hereby authorize use of this device as attached with the letter the use in Marion County only in the 2003 election.'

Ms. Sadler: Subsection (e) applies to county.

Mr. Eichholtz: And again it just would have been nice. I suppose as my duty as an Election Board member to come over every day and ask the chairman to show me things that may be of some significance, but apparently this has been floating around since August 20th, and I became first notified of it yesterday. So I am a little upset about that. Again, I haven't had a lot of time to prepare, but there are those here today that have researched some of the issues, and I ask that they be allowed to speak on those issues.

Ms. Marendt: Who would you like to speak on these issues today?

Mr. Eichholtz: Marion County Chairman is here and also someone from city legal that I think may be representing the Mayor's Office.

Ms. Sellers: I am April Sellers from the Mayor's Office.

Ms. Marendt: What capacity are you here in ?

Ms. Sellers: I am a lawyer and regional counsel on behalf of the administration.

Ms. Marendt: You're representing the Mayor in your official capacity with City Legal?

Ms. Sellers: Yes. The layout of the ballot, I feel, is sort of confusing, and obviously I would welcome counter legal arguments. But otherwise, it looks to me, underlining the statute, it's also unlawful that just in the sense the candidate names are supposed to follow with the party names, 3-11-2-5 and 3-11-2-6. And on the possibility of legality, I think, is a valid point and it's also just incredibly confusing. It's difficult to associate the names with the parties in a way that the device that being similar to the party. On the device point that I think Mrs. Sadler was noting to subsection (e) that makes this okay. But, I think, though it seems when I read this that the State party emblem under subsection (e) I agree, the chairman would have to had filed this by August 20th. But that that under (a) if its selected to designate throughout the state, and that the only other thing I would note about the device it seems like it might constitute electioneering in the sense that it's not really a symbol in 3-7-11, seems to call for enough words. It seems that words cannot qualify as the symbol. Those are things that I noticed.

Mr. Treacy: On the symbol, to go back to where the symbols came from in early parts of this country when we had a very large portion of illiterates and it was so they could identify the party preference, and it was simply an image so the people knew which party they were going to. I concur with council that I think what we are getting into here is a lot more than a symbol. It's electioneering on the ballot, on the space, and also on the other issue of arrangement of the ballot, 3-11-2-10 talks about the names or party or title of the political party shall be placed at the top of the ticket. The device of the political party or independent candidates should be placed immediately under the name of the political party or Independent party ticket. I think it therefore, calls for the name and symbol to be on top of each one of the political parties; so that people can follow and understand that you have Democrat, in our case a rooster, and then underneath it our candidates. The way this is set right now off to the side there is no way anybody is going to identify those symbols to the party. I think those need to be set up directly under the particular groups of candidates, that candidates need to be below the party, and, I think, the law is very clear on that. 3-11-2-10 (a).

Mr. Eichholtz: One other thing I wanted to follow up on what has indicated of the symbol. I was just made aware of Mr. Keeler's letter. But with respect to the symbol as being proposed, for those who haven't seen it, it is a circle with a small eagle inside with the words "A Team" grouped around the symbol, under 3-8-7-11 which talks about a device, it says a party may select a device subsection (b) except as provided in subsection (e) the device may be an appropriate symbol subsection (c) identifies things that are not appropriate symbols such as, a code of arms, a seal of the state, national or state flag or any other emblem common to the people. So the question I think we need to resolve is

what is actually a symbol. To my knowledge, Mr. Ladendorf, Mrs. Sadler, and Mr. Keeler can correct me, but I don't believe a symbol is defined in the Election Code. Does anyone know?

Ms. Marendt: I don't believe so.

Mr. Eichholtz: That being the case, under rules of statutory construction, which I am familiar with as is Mr. Keller, Mrs. Sadler and Mr. Ladendorf, if we were to go to court under rules of statutory construction we would be required to interpret the term under its common usage of symbol. The courts, when faced with such an issue, will typically resort to the dictionary definition where it is not defined by statute. According to the American Heritage Dictionary of the English language, the term symbol is defined as something that represents something else by association, resemblance, or convention, especially a material object used to represent something invisible. A printed or written sign used to respect an operation, element, quantity, quality, or relation as in mathematics or usage. It seems clear to me that the concept of symbol, as defined in definition in plain meaning, does not include the use of words. It includes, for example, on the national level for the Republican Party, the symbol is thought to be an elephant. The symbol for the Democrat party is thought to be a donkey. The fact that you start adding words takes away the definition and concept of the word symbol, and then words are actually instructions. There is no place under the definition of symbol in common usage use of words. If such were the case then there would be no limitation on the types of words that could be used. You could use that the Republicans are all against Social Security for their symbol next year or things of that nature if we allow the start of using words. I think it's in keeping, as Mr. Treacy indicated, the original history behind the term of symbol was for party people who couldn't read. But that continued use of the word is a clear indication that a symbol is again to be a representation and is not to include the use of words for those reasons. I suggest that we do not adopt or approve the use of the symbol that has been tendered with the words "A-Team" on the device.

Ms. Marendt: Is there anything else that you would like to further add?

Ms. Sellers and Ed Treacy: No, thank you.

Ms. Marendt: At this point, we have heard the two specific requests of Judge Eichholtz to look at the device and then the layout, and I am going to now call on Marion County Chairman John Keeler to see if he would like to add how this came about and some of the timely filing of the device.

Mr. Keeler: I was first made aware of this provision of the statute in the 2003 Indiana Election Calendar, which is distributed by the Indiana Election Division. Under the month of August, there is a provision that reads: 'Deadline prevailing by noon, local time, that a county chairman of each political party on the municipal election ballot or a individual filing the petition of nomination for a candidate to file with the County Election Board, a camera ready copy of the ballot symbol under which the candidates of the political party or petitioner are to appear on the municipal election ballot and that

instruction.’ (went on to cite, IC 3-8-7-11 (e)). In examining that statute, it seems very clear to me that it provides the opportunity for local political parties to adopt an emblem. The emblem will only be used in the confines of one county where an election is taking place. In furtherance of that statute and after consultation with the State Election Division, I filed the letter you’ve seen here at the Marion County Election Board and at the State Election Division and approved by the State Chairman the use of the emblem, “A-Team,” for this particular election. It seems to me if you look at that particular part of the statute, it’s crystal clear that there is the right to do that, number one. Number two, if you look at the earlier subsections where certain items are forbidden to be included in the symbol if you will, that the camera ready art that was submitted does not include any of those. And lastly, I will argue and notwithstanding the comments of my good friend, Judge Eichholtz, that the statute by naming certain elements that couldn’t be seen, it by implication, certainly indicates that anything else is fair game. And for those reasons, I believe, the Marion County Republicans’ use of the logo, “A Team,” for this election only, is in compliance with the statute and the form of the ballot that is presented with it on there is appropriate. Thank you.

Ms. Marendt: Is there anyone else who would like to address the board concerning the device?

Ms. Sadler: I would like to make one comment about the device. Mr. Eichholtz suggested that we should reject the Republican party’s submission of the symbol. But as I read subsection (f), it states: ‘if a copy of the device is not filed in accordance with (c) or (d), or unless the device is designated in accordance with Section 26 the Election Division or county Election Board, is not required to use it. Are you suggesting that it’s not filed, and we are supposed to vote today that it’s not filed in accordance to (c)?

Mr. Eichholtz: I am suggesting to vote today that it’s not a symbol.

Ms. Sadler: So really that is the only thing in question because otherwise we would be required to use it.

Mr. Eichholtz: I do have one other question. I hope it won’t be taken in the wrong way, but I am going to ask the County Clerk to recuse herself from voting in the proceedings. These matters deal with matters with respect to the municipal election. There is a mayor’s race in this municipal election, and the County Clerk’s husband is the campaign chairman for the Republican candidate for mayor. I do not believe, under the circumstances, it is appropriate for her to vote in any matters dealing with the election process and any matters dealing with the election process in this election race. I ask that she recuse herself.

Ms. Marendt: Does Mr. Dan Ladendorf have any input or advice?

Mr. Ladendorf: I know the normal reason why a clerk would have to recuse herself in a matter. I think we would have to go to the conflict of interest statute that may or may not

apply, and I'm not sure if I have it in front of me. As a public official, I think, it applies to state officials, not real sure on how it plays in with other officers.

Mr. Eichholtz: Sometimes you deal in breaches of impropriety when we talk about conflicts, Mr. Ladendorf.

Mr. Ladendorf: I understand that. I am just saying, from a legal standpoint...

Mr. Eichholtz: We want everyone to feel as if they have a fair shake, and you should give strong consideration to this.

Ms. Marendt: Madame Clerk, what is your response?

Ms. Sadler: What happens if there is a tied vote on the decision?

Mr. Ladendorf: I can't tell you that, except someone goes to court.

Ms. Marendt: I don't know where we go from here.

Ms. Sadler: Could we discuss the other issues and then confirm and make a decision?

Mr. Eichholtz: We have been advised to all the issues and with the perspective ballot in this election and it may come up on Election Day when we have to deal with those in respect to the absentee ballot.

Mr. Ladendorf: Actually, I can address this. The Clerk runs the elections and she herself is on the ballot every four years and votes on all the matters related to the conduct of that election and has never secluded herself or seen as a conflict. It is just sort of the nature of the beast here and there's going to be potentially a situation to come up where the clerk is going to have to deal with an issue being, even her own election, and this is a step down from that.

Ms. Sadler: In fact, I believe, there was some legislation that was presented this spring at the state legislature which would have required the clerk to not serve on any campaign committee other than his or her own and that was defeated at the legislature.

Mr. Eichholtz,: In terms of considering this, we have an issue here of fairness, an issue here of confusion, and an issue that we want to ensure the public all the people are being treated fairly and the decision is being made without any other influence, and, I think, there is an appearance here based upon the fact that your husband is running the campaign for one of the people running for mayor. And that raises serious questions to people on the appearance of impropriety, and, I think, that people will have questions about any decisions made by this board.

Mr. Ladendorf: This theoretically could come up in any discussion where the Republican Clerk could be seen as always voting for the Republican position on a matter because she

is a member of the Republican party, or a Democrat member of the board is always voting for Democrats.

Mr. Eichholtz: All I know is that the clerk could start getting into questions about who knew about this ballot before I did on Friday. Did your husband know about this? Was he involved in the design? Was Mr. Keeler, involved before I was? I want to know who was involved in the design of this ballot, the deciding people. I am demanding before I vote on any issue. I want witnesses sworn, and I want to know who was involved in the design of this ballot under oath. I am demanding under the Election Code provisions, we have the right to subpoena witnesses, and I am demanding a hearing on the adoption of this ballot and who was involved, and I want the names of witnesses here, and I want them to testify under oath.

Ms. Marendt: Okay, before we go further, I just want to say we are all in the political process, which is why some of us are here so at any given time we are going to have someone we know, care about or love on the ballot, let alone working for someone else.

Mr. Eichholtz: For example, if I am running, my wife cannot work on the Election Board.

Ms. Marendt: Yes, but that doesn't mean she can't work for someone's campaign.

Mr. Ladendorf: That is a statutory prohibition about any Election Board member voting on issues that may be closely related to their politics because that is why you are here.

Mr. Eichholtz: You just said you didn't know with the respect to the public ethics rule. Now have you read this since you spoke?

Mr. Ladendorf: No, but what I am saying is this, I don't know about the conflict statute, which I believe is a state law applying to state officials. There is no Marion County law that would apply. I would point out for everyone's edification, that the ballot design that is before you is somewhat implied in your comments, that this was dreamed up in some way for this election. When, in fact, it is the ballot, I am speaking from experience, I am not speaking from a political standpoint because I don't care what the ballot looks like. But I can tell you this is the same ballot layout that has been used in Marion County since we started using Optical Scan ballots in 1999.

Mr. Eichholtz: Well that may be for absentee ballots, Dan, but it's the first time used in a general election, and my issue is one of confusion.

Mr. Ladendorf: I understand that, but I want to make clear though that the ballot has the same exact layout as every optical scan ballot, and I'll grant you that it was used for absentee voting.

Ms. Marendt: Well, those are certainly no less important.

Mr. Eichholtz: As I recall, voting absentee last fall, there were a number of questions raised about that ballot being confusing. The year of the judges' races there were a number of people that indicated confusion. In fact, I had to return my ballot because I mismarked it the first time because of the way it was drafted, and I am a member of the Election Board. So it was on the year we had the judges' ballot, and it was the same way. It was a confusing ballot, and I forget what year that was.

Mr. Ladendorf: It would have been 2000.

Mr. Woo: We had one in 2000 and in 2002.

Mr. Eichholtz: I know that last year when I voted absentee, and I had marked my ballot and realized that I had been confused, based on the ballot, had to turn it in and get a new ballot.

Mr. Vane: Madame Clerk asked us to procure these just before the meeting, and if you look at it, you will see.

Mr. Eichholtz: This is the one I was confused on and had to return. So, if you are using this as an example, I am testifying that it is confusing.

Ms. Marendt: I would like to call on Wendy Orange from ES&S to add comment. Would you like her to be sworn in?

Mr. Eichholtz: Yes.

Mr. Ladendorf swore in Mrs. Wendy Orange.

Ms. Marendt: Can you give us an account of how the ballot was developed and the layout?

Ms. Orange: I can to the best of my knowledge. As you know, I am a newly hired employee of Election Systems & Software; so the history is there, and there is quite some history I can't speak to. But I can tell you that on August 29th, we did receive the ballot content information, meaning, what candidates and offices to be placed on the ballot from Mr. Vane of the Election Board. I forwarded that information to our coding department, which is located in Chicago, Illinois via email. They began working on the ballot layout, which is a standard layout that we use for all of our optical scan counties in Indiana. So, the title you see and instructions on the ballot, except the additional split ticket voting that was added at a later date by Mr. Vane, and of the format three columns on the ballot is a standard format used by ES&S and was also used when the system was certified by the state.

Ms. Marendt: So in every other jurisdiction in the state, their ballot would essentially mirror what the Marion County ballot currently looks like?"

Ms. Orange: That is correct, other jurisdictions that are using either the M100, M150, M550 or M650 central count tabulators. For those jurisdictions using the Optec 3P Eagle, those ballots differ in the fact they do not have ovals; they have arrows and there may be some layout differences.

Ms. Marendt: Okay, but there is no jurisdiction that has them separated by column?

Ms. Orange: That's correct.

Ms. Marendt: Separated by party?

Ms. Orange: Not in optical scan voting.

Ms. Marendt: Okay.

Mr. Eichholtz: I have a question for Wendy. When you received the information on the 29th, what information were you given?

Ms. Orange: I was given a list of candidates, the offices and party they represented and their ballot number.

Mr. Eichholtz: Were you given any instructions on terms of layout?

Ms. Orange: I was not.

Mr. Eichholtz: You then indicated that you sent this information to coding with respect to the ballot layout and design. Is that correct?

Ms. Orange: That is correct.

Mr. Eichholtz: And who would have that been in coding?

Ms. Orange: The person who did this particular layout name is Mike Brenner.

Mr. Eichholtz: You say and indicated you have utilized this ballot throughout the state?

Ms. Orange: Yes.

Mr. Eichholtz: Have you ever submitted it for a legal opinion whether or not it complies with the election laws?

Ms. Orange: I cannot answer that in certainty, but it has been indicated that Brad King has reviewed the ballot and given his approval.

Mr. Eichholtz: Your answer was you cannot answer that in certainty?

Ms. Orange: I cannot answer that in certainty.

Mr. Eichholtz: You can't answer that with any knowledge or information?

Ms. Orange: That is correct sir.

Mr. Eichholtz: So anything you have would be hearsay.

Ms. Orange: That is correct.

Mr. Eichholtz: Have you ever seen a written opinion from any lawyer indicating that this ballot applies to any election law, have you?

Ms. Orange: I have not.

Mr. Eichholtz: So if, in fact, you didn't, then you would be using it wrong in all the counties correct?

Ms. Orange: If it does not comply.

Mr. Eichholtz: Will there be any problem with having, since we have three parties, a third party and put these parties in this column?

Ms. Orange: That is where it gets a little tricky. The M100 tabulator and the ballot can be laid out in such a fashion the parties are in column form; however, because of the write-in requirements, this particular ballot will require four columns. The fourth column would then have to be placed on the back of the ballot, and due to the size, the races, and the length of the ballot, the ballot would be two sided and two pages.

Mr. Eichholtz: Like the one we used in 2002?

Ms. Orange: No, because that one is not in columnar form.

Mr. Eichholtz: It's not two pages?

Ms. Orange: No, that is two sided. The ballot would be two sided and two pages at the minimum.

Ms. Marendt: What would the cost be for that?

Ms. Orange: I can't answer that with certainty either, but the cost for your ballots this year was \$98,900 based on a 17 or 19 inch ballot complete, one sided only and black print only.

Mr. Eichholtz: When was the first proof of the ballot complete?

Ms. Orange: I don't know for certain. It was last week sometime. I can get that date for you, but I don't have it off the top of my head.

Mr. Eichholtz: So the information was given to you on August 29th, and it's your indication that the proof was sent sometime last week?

Ms. Orange: I don't know for sure.

Ms. Sadler: Who would the proof have been sent to?

Ms. Orange: It was emailed to myself and Mr. Vane.

Ms. Marendt: Do you want to have Mr. Vane sworn in?

Mr. Eichholtz: Not yet. After the proof was emailed, did you have any discussion of the ballot layout with anyone?

Ms. Orange: Yes, discussions were made with Mr. Brenner and Mr. Vane, and myself.

Mr. Eichholtz: What did those discussions consist of?

Ms. Orange: Those discussions consisted of corrections of candidate names, split ticket voting instructions and also the change of the party symbol device.

Mr. Eichholtz: The original ballot, when you were given and you have a device that came with the information you received it on the 29th of August?

Ms. Orange: We did not.

Mr. Eichholtz: When did these conversations in respect with the ballot corrections and split ticket instructions occur?

Ms. Orange: It occurred during business hours between the day that the first group arrived and yesterday.

Mr. Eichholtz: But you don't know when the first group arrived?

Mrs. Orange: I do not recall that date.

Mr. Eichholtz: Did you have conversations about the ballot with any other persons than Mr. Brenner and Mr. Vane?

Mrs. Orange: Yes, I did. Other personnel in Chicago in our coding department, Mr. Troy Drews, Ms. Janet Buchanan, Mr. Craig Keeney, my direct supervisor, Will Wesley, who is with us also today and David Woo.

Mr. Eichholtz: What did you and Mr. Woo discuss?

Ms. Orange: Just the same things I discussed with Mr. Vane, in respect to changing of instructions and changing of the party symbols and any corrections in timing.

Mr. Eichholtz: What were you told on changing of the party symbol?

Ms. Orange: I was informed that the Republican party had submitted a new symbol and that would have to be changed. Then I was given a copy of the new symbol, and I sent that to Chicago.

Mr. Eichholtz: They didn't give that to you on August 29th when you received the information about the ballot layout?

Ms. Orange: No.

Mr. Eichholtz: How was that issue brought up?

Ms. Orange: Actually, it was the local printer that ES&S partners with, Mr. Jim Bredensteiner.

Mr. Eichholtz: Okay, it wasn't through Mr. Vane?

Ms. Orange: It was not.

Mr. Eichholtz: How did that occur?

Ms. Orange: Jim asked me if I had heard anything about it, and I stated, 'No, I had not.' And I then asked Mr. Vane what that issue was regarding.

Mr. Eichholtz: When did this occur?

Ms. Orange: I cannot recall the date.

Mr. Eichholtz: What did Mr. Vane indicate to you when asked about the new device?

Ms. Orange: At the time he indicated that he was not aware of the change.

Mr. Eichholtz: Mr. Vane indicated he was not aware of the change.

Ms. Orange: That is correct.

Mr. Eichholtz: And this occurred when?

Ms. Orange: I cannot recall the date, but this all occurred over approximately a two week period.

Mr. Eichholtz: And when did you get final approval of the proof of the ballot?

Ms. Orange: Wednesday afternoon about 3 p.m.

Mr. Eichholtz: And who gave you that final approval?

Ms. Orange: Mr. Vane did.

Mr. Eichholtz: Is the ballot being printed at this time?

Ms. Orange: It is not.

Mr. Eichholtz: So you are indicating since there is a write-in candidate for Mayor, we would have to have a fourth column?

Ms. Orange: That is partially correct. Indiana law requires a write-in blank for every office on the ballot and in every vote for position on the ballot; therefore, we would have to have a write-in blank for every office on the ballot, regardless whether a qualified write-in had filed or not.

Mr. Eichholtz: So why do we have to have two pages and two sides?

Ms. Orange: Because the optical scan ballot is limited to three columns per side; therefore, the write-in column would have to be on the reverse of the first page and bring down the fourth column. Then because of the length of races...

Mr. Eichholtz: More races than what I have here?

Ms. Orange: Yes, towns, a couple of the City-County district race candidates have fairly lengthy names and moves it to two oval positions. So, on several ballots, that particular name takes up a majority of space. The City of Southport race on the current configuration of the ballot takes up the entire third column.

Mr. Eichholtz: So, it is my understanding that you and Mr. Vane have the final say on the ballot layout we use?

Ms. Orange: I communicate with the customer, and, in this case, the customer is the Marion County Election Board represented by Mr. Vane.

Mr. Eichholtz: Okay, so, to your knowledge, has there been a vote taken by the Marion County Election Board approving the ballot?

Mrs. Orange: Not to my knowledge.

Ms. Marendt: There's not one necessary.

Ms. Marendt asked Mr. Ladendorf to swear Mr. Vane under oath.

Ms. Marendt: Is there anything you would like to add to the testimony given by Wendy Orange on dates of when things were sent and when things were finalized?

Mr. Vane: Well, first, before I say anything about dates, let me state for the record and repeat what I have said to other people. I have discussed this issue, with regard to the ballot symbol, that the failure to include the ballot symbol on the initial proof of ballots is solely and totally my fault and rests with no member of the Election Board, nobody in my office and no contractor. I received it. Through my inexperience I was under the impression that it had to be done every time and realized that it wasn't. So, no matter what else happens I accept the blame for this error. Now, as far as the chronology goes, let me just say, on the 29th, I didn't print these emails, I just wrote dates down that might be needed. And these are just emails; I communicate with Joel Miller of the Democrat party and Carolyn Grant of the Republican party. On the 29th, I informed them that the ballots were ready to be proofed. Prior to the 29th of August, I had sent them both an email containing the names and ballot numbers for candidates of the R's and the D's so they could check them based on an Access Database, so they could take a look and see the names had changed, and that was not on the ballot. I had done that previously. On the 29th, I informed them of the ballot proof. On the second, I tried to get in contact, let me just say this, no one in the Republican or Democrat party was in any way negligent about anything, they were simply in cases I couldn't get a hold of them due to them being busy, which is perfectly understandable. Also, this is just a record of emails and not phone conversations because they have been numerous. On the 2nd, I sent Joel Miller an email that I needed to see him, and he said that he had been really busy, and I said no problem we'd get together. On the 11th, I sent him an email requesting a phone call, which he did, and, I believe, and I hate to say this to be perjurious. I believe on the 12th of September, I walked over to the Democrat Headquarters personally and showed them the proof of the ballot because time was kind of the essence. The three of us discussed it for about five or ten minutes. I told them there could be some changes in the language of the split ticket voting instructions. As I said at the time, this did not include the new ballot symbol, and again that is my error.

Ms. Marendt: At that time, were there any questions about the physical layout or any concerns about today?

Mr. Vane: I hate to say that I don't recall, but I don't recall that they expressed any questions about how their races were listed or any of that, the column order and all that. Then I told them we were working on an issue of explaining how to split ticket your vote, how to split your ticket, split your vote, if you split your ticket, and there would be some additional language coming, based on that. We all agreed that this is what we should do, and it was basically that the code didn't say we had to do it, but we believed, Doris Anne and I, and the parties believed it was a voter education issue, something we had to do.

Ms. Marendt: We might want to take this opportunity just for those who might not know when we are referring to the split ticket. If you were to get your ballot and mark a straight party choice. And then where you can vote for more than one candidate, vote for the other party's candidate and don't fill in the other ones, that would be from the same party as your straight party, which is why this is very confusing. Those votes will not be counted, and so we felt like that was a voters education thing that we needed to put on the ballot so folks would know if they did vote straight party and then choose to not invalidate their other votes that the perhaps thought they were casting by marking a straight party vote. So that is what the discussion and instructions were about?

Mr. Vane: Correct. Then on the 16th, I emailed the sample ballot with the new logo to both parties, I believe. Please, Joel, correct me if I am wrong, this is the first time he couldn't read it, and it wouldn't come through, and he couldn't read it. So, I faxed it to him and he said it wasn't very clear, but he could make out what it was basically saying. Then on the 17th, at 11:49 a.m., I sent the original straight ticket scratch, not in ballot form solely in email written form, to the parties. That was then revised later in the day. On September 17th, at 15:49, I sent the revised straight ticket language. I believe I called both parties, talked to them, and got their verbal that it sounded okay, and I believe I talked to Mr. Eichholtz on the phone. I then sent the latest ballot proof the day before yesterday, the final one. I had to send an email personally to ES&S, Mike Brenner, to say this is it; this has been approved. Then I sent that ballot proof that he had sent to me, the copied one that I passed down that you have. I forwarded it to the members of the Election Board, the parties, Mr. Ladendorf, and people who work with the Election Board administrative staff.

Ms. Marendt: Did you receive any phone calls, emails, faxes after September 12th saying from anyone, either the Chairman or representatives of the Democrat party, that they had a problem with the layout and wanted to discuss it?

Mr. Vane: I am going to say no, and then I am going to ask something. I believe the first indication from the Democrats that they had an issue with the ballot is when I received an email from Judge Eichholtz yesterday about ten 'til four. And the reason I hesitate is, I believe I called Joel Miller after I received the email and not prior. I got the email first, and then I immediately started calling people because I knew this meeting had to be set. And for purposes of administration, I knew the meeting had to happen right away. So that is why you and I talked yesterday. I talked to Mr. Eichholtz last night. Dan Ladendorf and I talked last night, and I think that is the chronology as I remember it correctly.

Mr. Eichholtz: Did you only talk to Democrats? Did you talk to Mr. Keeler or anyone from his party?

Mr. Vane: I said that I did.

Mr. Eichholtz: It's important to know who you talk to because if they are not making issues, some might infer the reason they are not making an issue because they were involved in the process.

Mr. Vane: Anything I sent official, that was any sort of update of information or update of the ballot or the indication of a change or a decision was made, was sent to both parties. In this situation, we'll say Carolyn Grant from the Republican party says I have a question about this. Carolyn Grant was the one who informed me that the new ballot symbol was not on. I could not get in communication with ES&S. Any communication that goes out, goes to both parties, unless I am answering a specific question.

Mr. Eichholtz: So, besides yourself, who was involved, you and Wendy? Did you give it to the clerk to review?

Mr. Vane: Yes.

Mr. Eichholtz: Did you give it to Mrs. Marendt to review?

Mr. Vane: No, every time you received an email...

Mr. Eichholtz: Correct me if I am wrong, with respect to the ballot, but the only two I received an email was the one Wednesday when you said we need to finalize the language, and then after that we had a discussion, and then there was one with the actual ballot attached.

Mr. Vane: Anytime you receive an email from me about anything having to do with the ballot that's disseminating information, I send it to you and Chairman Marendt. I sent them both at the same time, and, I believe, it's my duty as the Election Board Administrator to make sure when I am in that role of digging up information, that I give it out both at the same time.

Mr. Eichholtz: Did you discuss with someone what the proper layout of the ballot was? Did you ask Mr. Ladendorf? When you and Wendy were coming up with the ballot, did you and Wendy discuss with anyone or talk to Mr. Ladendorf about what the appropriate legal placement of the ballot was?

Mr. Vane: No.

Mr. Eichholtz: Did you talk to the clerk, Mr. Woo, Mr. Keeler, Mrs. Marendt?

Mr. Vane: No, when I got official proof of the ballot, I relied on the fact that ES&S researches these things, and when they sent the first proof, I took it as everything was okay. Now, to answer your question more comprehensively, what I discussed with Mr. Ladendorf and other people including members of the Marion County Republican and Democrat parties, was the language over the split ticket. That is the only specific thing we got into. As far as the ballot layout, no, we didn't discuss that other than sending out the ballot and saying here it is.

Mr. Eichholtz: It's my understanding, is the only testimony we have anybody passing the legality of the ballot is hearsay testimony that somebody talked to Mr. Brad King, and he has passed this on as okay in the past? Is that right?

Mr. Vane: I can't speak to the past, but I can say that Mr. King looked at the ballot this morning and did not state there was anything wrong with it. He gave me a verbal opinion.

Mr. Eichholtz: You and I have discussed that I have extremely different legal opinions on election law matters than Mr. King does.

Mr. Vane: That is correct, Judge, but let me say in my defense, when we have questions, election-related stuff, I email the Election Division, who answers the questions immaterial's to me. I am just looking for an answer. I email Mr. Ladendorf quite a bit. The other thing is the Election Division is free and Mr. Ladendorf is not. That counts with our budget getting cut forty thousand dollars that we need to be cautious of these things. And please understand my position Judge, but I am looking for opinions from people generally accepted as being experts, and I would think Mr. King would be considered an expert even if you disagree with his opinions.

Mr. Eichholtz: The fact of the matter is we have never had an official written legal opinion advising us to the appropriate legal placement.

Mr. Vane: I haven't been around long enough to answer that.

Ms. Marendt: That is neither here nor there.

Mr. Eichholtz: It is here nor there. There are statutory requirements that set forth how the ballot is to occur. You want to play games, fine. The fact of the matter is, this probably doesn't comply with the law and if you want to, just gloss over it and make light of it, that's fine.

Ms. Marendt: It does comply with the law.

Mr. Eichholtz: Show me the law.

Ms. Marendt: We are going to move on. Is there anyone who would like to address the issue of the ballot?

Ms. Sellers: The last thing I was going to add. I think the way the ballot looks now is deviating, and if we are going to deviate from the statute, we should at least do it in a way that furthers clearance to voters. There are ways around that. Put the write in candidates on the bottom of the ballot.

Ms. Marendt: How long have you been with City Legal?

Ms. Sellers: Since January.

Ms. Marendt: Do you know the reason why this has been the ballot for the last several years, and why these concerns have not been brought up?

Ms. Sellers: I cannot speak on the history of these ballots, but now we are talking about the first time every voter will vote on these ballots and will cause mass confusion. We should try to make it less confusing.

Ms. Marendt: This is the format that every other jurisdiction that you operate in the state of Indiana.

Ms. Orange: Correct.

Mr. Eichholtz: Let me make it clear, you have no written legal opinion that this complies with election laws.

Ms. Orange: I have no written legal opinion other than the certification of the equipment.

Ms. Marendt called on Mr. Treacy.

Mr. Treacy: I think the statute is clear that you have to put the party name, then the symbol and then the candidates underneath it. It doesn't matter if this is something that has continued for fifty years. Statute says we have to do it, and if we have been doing it wrong, it is now brought to your attention, and it is your obligation to do it right even if it has been used. That is not a defense of what has been done wrong. And I can guarantee you that if this doesn't change, the only thing that's going to happen is you're going to cause a lawsuit, in which the clerk will have less time to fix this and do it right. Then for you people to do the right thing today, and it will only make her job harder than when the judge tells you to do it two or three weeks later.

Ms. Marendt: I appreciate your words, Mr. Chairman. But as your appointee has so eloquently said, that legal minds differ and we have courts to reconcile...

Mr. Eichholtz: Well, we will get an injunction, and we will wait until the day before to print the ballot.

Ms. Sadler asked for legal opinion.

Mr. Eichholtz: I would like for Mr. Ladendorf to look over it over the weekend and have response.

Ms. Sadler: I would like his opinion.

Mr. Ladendorf: I disagree with Mr. Treacy in saying the law is clear. In fact, I will tell you the law is not clear, and that is why we have been sitting here for over an hour discussing this because reasonable minds can differ on what the law says. In fact, what

the law says is for ballot card voting systems, 3-11-13-11, is the section that relates to the arrangement of the information contained on the ballot. 3-11-13-11 applies to both the optical scan ballot as well as the ballot that would appear on DRE, the iVotronic. The ballot information, whether placed on the ballot card or on the marking device should be, as far as practicable in the order of arrangement applied for ballots under 3-11-2. What Mr. Treacy has referred to is that 3-11-2 specifically states the arrangement of the ballot and states that the one party in one column, the other party in the next column, and write-in to the right of the that and so on. The reason I don't think the ballot is clear is because when the legislature uses the words 'shall', it means you have no choice but to do that. If the legislature uses the words 'may' or 'should' then it's discretionary. In 3-11-13-11, which controls the arrangement of this optical scan ballot, the legislature decided to use the word 'should' not 'shall' 'as far as practicable', being the order of arrangement of ballot as applies under 3-11-2. My opinion is that the law is not clear and that there may be two people in this room that think its okay, and they may be right. There may be other people in the room who think it's not okay, and they may be right.

Mr. Eichholtz: If it's practicable, we should comply with 3-11-2?

Mr. Ladendorf: It says you should do it, and doesn't state you shall, and that is the difference. I am just saying, I didn't write the law, and statutory construction will tell you that you don't have to do it.

Mr. Eichholtz: Is there any reason why it's not practicable to do it that way?

Mr. Ladendorf: I don't want to get into that because I think Wendy's testimony is some of the problems you've encountered. All I am telling you is as far as the law is concerned, it is not clear, and if someone here thinks that is for the court to decide.

Mr. Eichholtz: So what we are coming down to is that the law is not clear; the law says it's practicable for us to do that. We now have one major political party indicating that they do not think the ballot is fair and find it confusing. And we are going to ignore those concerns and rely on something that isn't clear under the law where we have an opportunity to hold this election that will make all the partys' participants happy because they will have thought to have been treated fairly? And to further complicate that, we are going to add one of the wives of one of the Mayoral candidates' campaign chairman vote on whether or not we are going to be fair or do what has already been said here. That one major party indicated they do not think this is fair.

Ms. Marendt: Are you saying, with the write-in candidates, they would have to appear on the back?

Ms. Orange: Yes.

Ms. Marendt: It would seem to me the write in candidates would find that unfair to be the only candidates that are on the back, and a lot of voters wouldn't flip that ballot over.

Mr. Eichholtz: How many write in candidates do we have, Robert?

Mr. Vane: One certified for mayor, roughly five, and that is an educated guess. Just to make a practical point, two things, it costs us one hundred thousand dollars to do a one-sided ballot in black, and if you are going to ask another side and page, that will add an additional one hundred thousand dollars for the cost of the election. If we use a two-sided ballot, our Ballot On Demand printer program will not work with the equipment we currently have and we would not have time to replace it.

Mr. Eichholtz: You're going to spend the money one way or the other because I am sitting here listening. We are going to subject ourselves to a lawsuit. It's going to delay what happens and you have the opportunity here to work with people and do something that is acceptable to everybody. Or we can go ahead and vote me down two to one if you like. We are going to end up getting sued, and we are going to spend more money. And based on what I read, I think there is as much, if not more, likelihood that we will end up doing the same thing. We have an opportunity to make something right and to have an election that we can all work together and work on something that everybody will be in agreement to, then it's right. But if we go forward with these concerns, we are inviting once again, litigation, and it will be the third election in a row we have had to deal with litigation because people put their heads down and move forward and won't compromise or work with the other side to develop a ballot or develop an election process that all participants agree is fair. That is what we are headed for, I have tried to avoid it in the past, but, again, if that is the way you want to go, then go ahead with this ballot. (directed to Wendy) Don't start printing it yet because I promise you someone will get an injunction against us, and we will be sitting here not knowing what ballot to use.

Mr. Vane: I don't know what all will happen with this, but is it possible to get an approval of the split ticket voting language?

Ms. Marendt: I don't believe it's necessary under statute, and my understanding is that we don't need to vote on this.

Mr. Eichholtz: Given my preference, given that I was given at a very late hour to review on, my preference would be that ES&S program the machines in such a fashion that if someone votes an over-vote, that it can deal with the fact that they have done this. I would like to understand why we can't do this?

Mr. Vane: First of all, what we are discussing here is an under-vote and not an over-vote. It would be kicked out automatically on an over-vote. We all agreed if someone wanted to vote straight ticket Republican but wanted to vote for City County Councilman JoAnne Sanders, fill in that oval. We agreed, based on phone conversations, that the public should be informed that only the vote for Council Sanders would a vote be counted in that race. I ask that the board adopted the language of split ticket language?

Ms. Marendt: No, it doesn't need to be. There is no statutory requirement to adopt it.

Mr. Treacy: I think what the language says is very difficult language. It does say what it is supposed to but is rather difficult. It is correct, I think, and if we work on some of these issues, I believe, we should work on that to make a little more clear.

Mr. Vane: I agree with that.

Ms. Marendt: Me too. It is a difficult thing to explain.

Mr. Vane: I respectfully request and ask if you can come up with something even better, I would be willing to hear it. And then we'll get something from the Republicans or lawyers and bring it in front of the board.

Mr. Eichholtz: Madame Chair, you have an opportunity here to avoid a lot of problems. The action you decide to take or not take will dictate whether or not we will have problems. We can work with people and try to get a solution and maybe resolve it over the weekend, or we can act like there is not a problem and this will be a long drawn out process and won't be resolved until sometime in October probably. Madame Chair, based upon the testimony we've heard today, I make a motion to not send the ballot to the printer and take an opportunity to consider the concerns and come up with a new ballot that addresses those concerns and, if possible, complies with, as the code dictates, the portions of the ballot that are susceptible. And I also ask the clerk to reclude herself from making a motion.

Ms. Marendt: Is there a second? Motion dies for lack of second.

Mr. Eichholtz: That is fine. I've been there before.

Ms. Marendt: Our legal counsel will check to see if we are required to take further action. At this point, I am a little shocked due to this has been used in other jurisdictions and for absentee voting, and this has become such a hot issue. And as long as I am Chairman of this board, every vote is going to count, and we will do what is right for every voter. Attorneys may differ, but there are numerous county election boards that call the Election Division for advice and are well respected and known. We read what there is and interpret it to the best of our own knowledge, and I will look to them for answers. I move to adjourn this meeting.

Ms. Sadler: Second.

Meeting was adjourned.