

ADVISORY 2008-03

February 26, 2008

To: All County Board of Elections

Re: Polling Place Conduct; Media Access to Polling Locations; and Exit Polling Within 100 Feet of a Polling Place

This advisory is intended to provide information to boards of elections as to whom may enter a polling place during an election, and what conduct is acceptable activity in and around a polling place. It also notes two significant, but limited, exceptions to the general rules as developed by case law in federal courts in Ohio. Those exceptions are for media access to polling places and exit pollsters operating outside polling places.

GENERAL RULES

On Election Day, it is the responsibility of county election officials and, more specifically, precinct poll workers, working in cooperation with local police officers when necessary (see R.C. 3599.31) to enforce Ohio's election laws at each polling place. Any person violating a provision of Title 35 of the Revised Code may be subject to prosecution by the county prosecutor, a local municipal prosecuting authority, or the Ohio Attorney General, as applicable.

U.S. Flags Marking the Distance from a Polling Place Entrance – R.C. 3501.30(A)(4)

R.C. 3501.30(A)(4) provides that two or more small U.S. flags must be placed 100 feet from the entrance to every polling place on the thoroughfares or walkways leading to the polling place, or as near to one hundred feet from the entrance to every polling place as is physically possible.

R.C. 3501.30(A)(4) also provides that no persons, other than election officials, observers, police officers, and electors waiting to mark, marking, or casting their ballots, may "loiter, congregate, or engage in any kind of election campaigning" within the area marked off by the U.S. flags.

Activities Prohibited Within Area Marked by the U.S. Flags – R.C. 3501.35

R.C. 3501.35(A)(1) extends the prohibition in R.C. 3501.30(A)(4), discussed above, to include any area outside the U.S. flags that is within ten feet of an elector waiting in line to mark his or her ballot if the line of electors waiting extends beyond the area marked by the U.S. flags.

R.C. 3501.35 also provides that no person shall:

- In any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector's ballot;
- Give, tender, or exhibit any ballot or ticket to any person other than the elector's own ballot to the judge of election within the area between the polling place and the small

flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line;

- Exhibit any ticket or ballot which the elector intends to cast;
- Solicit or in any manner attempt to influence any elector in casting the elector's vote.

Finally, R.C. 3501.35(B) provides that “no person who is not an election official,¹ employee,² observer, or police officer shall be allowed to enter the polling place during the election, except for the purpose of voting or assisting another person to vote as provided in section 3505.24 of the Revised Code,” or to view the posted precinct registration lists, as provided in R.C. 3503.23.

Thus, the secretary of state or any employee of the secretary of state, a member or employee of the board of elections for that county, a duly appointed observer, and/or police officer may be allowed to enter the polling place for official elections business unless his or her conduct has violated or violates one of the statutory provisions outlined in R.C. 3501.35 (above).

Penalties – R.C. 3599.39 & R.C. 3599.40

Whoever once violates the statutory provisions listed in R.C. 3501.35 (above) is guilty of a misdemeanor of the first degree. (R.C. 3599.40)

If a person has once been convicted of violating any provision of Title 35, including the statutes discussed above, and is again convicted of a violation of any provision of Title 35, whether for the same offense or not, that person is guilty of a felony of the fourth degree and shall also be disenfranchised. (R.C. 3599.39)

Unlawful Conduct During an Election – R.C. 3599.24

R.C. 3599.24 also provides guidance as to what is unacceptable conduct during an election. Division (A) provides that no person “shall do any of the following:

- (1) By force, fraud, or other improper means, obtain or attempt to obtain possession of the ballots, ballot boxes, or pollbooks;
- (2) Recklessly destroy any property used in the conduct of elections;
- (3) Attempt to intimidate an election officer, or prevent an election official from performing the official's duties;

Footnotes 1 and 2: The terms “election official” and “employee” as used in R.C. 3501.35(B) have the same meanings as set forth in R.C. 3501.01(U):

- (U) “Election officer” or “election official” means any of the following:
- (1) Secretary of state;
 - (2) Employees of the secretary of state serving the division of elections in the capacity of attorney, administrative officer, administrative assistant, elections administrator, office manager, or clerical supervisor;
 - (3) Director of a board of elections;
 - (4) Deputy director of a board of elections;
 - (5) Member of a board of elections;
 - (6) Employees of a board of elections;
 - (7) Precinct polling place judges;
 - (8) Employees appointed by the boards of elections on a temporary or part-time basis.

- (4) Knowingly tear down, remove, or destroy any of the registration lists or sample ballots furnished by the board of elections at the polling place;
- (5) Loiter in or about a registration or polling place during registration or the casting and counting of ballots so as to hinder, delay, or interfere with the conduct of the registration or election; or
- (6) Remove from the voting place the pencils, cards of instruction, supplies, or other conveniences furnished to enable the voter to mark the voter's ballot."

R.C. 3599.24(B) provides that a violation of R.C. 3599.24(A)(1) or (2) is felony of the fifth degree and that a violation of (A)(3), (4), (5) or (6) is a misdemeanor of the first degree.

MEDIA ACCESS TO POLLING PLACES

The Secretary of State's office is commonly asked whether the media must be granted access to polling places during an election. While it appears that statutory authority exists to keep the media from entering polling places (R.C. 3501.30, discussed above), a federal court has effectively enjoined election officials and authorities from enforcing that statute against representatives of the media. The United States Court of Appeals for the Sixth Circuit, in *Beacon Journal Publishing Company, Inc. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004), stated that the media must be granted "reasonable access to any polling place for the purpose of news-gathering and reporting so long as [they] do not interfere with poll workers and voters as voters exercise their right to vote."

Poll workers must grant representatives of the media access to polling locations, but they must consider several factors in granting access so as to ensure voters are not disturbed or delayed. Such factors include, but are not limited to:

1. the credentials of the media representative, and whether the purported media representative is from an accredited media source as opposed to an internet writer;
2. the length of time the media is present;
3. the length of voter lines;
4. the layout of the polling location;
5. whether voter secrecy may be compromised;
6. the conduct of the representatives of the media who are present; and
7. the effect the presence of the media has on voters and poll workers.

If a representative of the media interrupts, disrupts, interferes with, or otherwise disturbs the administration of an election, intimidates voters in any way, or jeopardizes the secrecy of the ballot, he or she may be removed from the polling place. If assistance is necessary to remove a media representative, the presiding judge has the authority to seek the assistance of law enforcement officials, ordering them to remove the offending person(s).

The court's ruling in the *Beacon Journal* case did not address media access to polling places or rooms in offices of boards of elections where counting is occurring after the close of polls, or the statute that appears to prohibit media access to polling places or rooms in offices of boards of elections where counting is occurring after the close of polls. R.C. 3505.21 provides in pertinent part:

No persons other than the judges of elections, the observers, a police officer, other persons who are detailed to any precinct on request of the board of elections, or the secretary of state or the secretary of state's legal representative shall be admitted to the polling place, or any room in which a board of elections is counting ballots, after the closing of the polls until the counting, certifying, and signing of the final returns of each election have been completed.

Consequently, boards of elections still are prohibited from granting the media access to polling locations or rooms at board of elections offices where counting is occurring after the polls close.

EXIT POLLING WITHIN 100 FEET OF THE ENTRANCE TO A POLLING LOCATION

While some of the statutes discussed above seem to indicate that exit polling may be prohibited within the area marked by the U.S. flags, a federal court has effectively enjoined election officials and authorities from enforcing those statutes against exit pollsters within 100 feet of a polling place.

Specifically, in *American Broadcasting Co., Inc. v. Blackwell*, 479 F.Supp. 2d 719 (S.D. Ohio 2006), Judge Watson stated:

It would be unlawful, and a violation of the First Amendment to the U.S. Constitution, to interpret, apply, or enforce Ohio's election Loitering Statutes, Ohio Rev. Code §§ 3501.30, 3501.35 and 3599.24, to prohibit exit polls within 100 feet of polling places.

Thus, unless an exit pollster is interfering with or disrupting an election, harassing electors, or otherwise violating the law, exit pollsters may operate within the area marked by the U.S. flags at each polling location on an election day.

Judge Watson's order does not specify or permit exit polling **within** a polling place. Courts have long recognized the compelling need for election officials to provide and protect a neutral environment for voting and to protect voters from intimidation. Thus, the statutes referenced above may still be interpreted to prohibit exit polling **within** any polling place.

If you have any questions concerning this Advisory, please direct them to the Secretary of State Elections Counsel assigned to assist your board of elections.

Sincerely,

Jennifer Brunner