



Election Challenges in Georgia

Pre-Election and Post-Election Procedures
Governing the Validity of Candidates and
Elections

An overview of the procedural challenges to candidacy and
elections for lawyers, candidates and campaign managers

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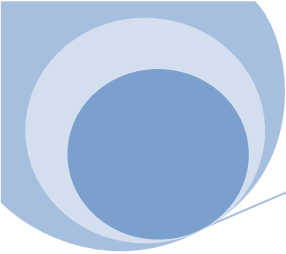
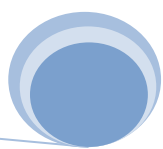
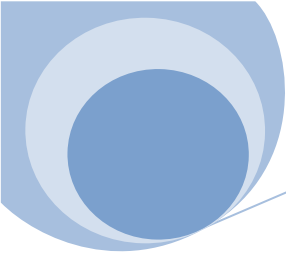


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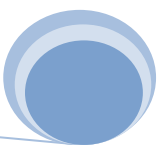
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The purpose of this article is to provide an overview of the procedural and statutory basis for making a pre-election challenge to the qualifications of a candidate and a post-election challenge based on voter ballot irregularities or irregularities involving the voters. This article does not attempt to analyze the more generalized arguments of violations of the Equal Protection Clause of the Fourteenth Amendment, following Bush v. Gore, 51 U.S. 98 (2000).

Georgia election law is built upon statutory and regulatory procedures and analysis. Case law of the Supreme Court of Georgia is generally limited to application of the same. The remainder of the authority regarding election standards in Georgia is found in the opinions (official and unofficial) of the Georgia Attorney General. Reliance on this secondary authority is helpful in comprehending the overall analysis, but should not be considered binding. Many of the opinions were authored prior to legislative enactments which supersede the subject matter. In addition, the opinions provided are narrowly drawn to specific circumstances, often involving local boards and municipal elections. Comparisons between the rules and regulations proscribed by one local board or municipalities and others should be drawn carefully and only after a thorough review of the relevant local rules and regulations.

I. Pre-Election Challenges to Qualifications of Candidate

The general rule in Georgia is stated in Jarangin v. Harris, 138 Ga. App. 318 (1976):

The right of a citizen to hold office is the general rule, ineligibility the exception; therefore, a citizen may not be deprived of this right without proof of some disqualification specifically declared by law.

Boards of Election may only abrogate that right and restrict a candidacy upon some clear statement of binding law that disqualifies them, i.e., “**proof of some disqualification specifically declared by law.**” Jarangin, 138 Ga. App. 318 (emphasis added). Candidates cannot be ruled ineligible due to public policy rationale, legal theories espoused in learned treatises or speculation about future events or concerns.

Candidates in Georgia, whether for state, county or municipal office, are required to meet the “constitutional and statutory qualifications for holding the office being sought”. O.C.G.A. § 21-2-5; § 21-2-6. For a complete listing of all constitutional and statutory qualifications for elected office, by office (Federal, State and County), please refer to the Georgia Secretary of State’s publication: *Qualifications and Disqualifications for Holding State or County Elective Office in Georgia* prepared by Betty J. Hudson, J.D., and Christine Kuykendall, J.D., legal research associates, and Ellen W. Smith, legal research assistant, Applied Research and Publications Division, Carl Vinson Institute of Government.

A. General Provisions Covering All Elected Officials

Georgia Constitution, Article II, Section 2, Paragraph 3 provides:

No person who is not a registered voter or; who has been convicted of a felony involving moral turpitude, unless that person's civil rights have been restored and at least ten years have elapsed from the date of the completion of the sentence without a subsequent conviction of another felony involving moral turpitude; who is a defaulter for any federal, state, county, municipal, or school system taxes required of such officeholder or candidate if such person has been finally adjudicated by a court of competent jurisdiction to owe those taxes, but such ineligibility may be removed at any time by full payment thereof, or by making payments to the tax authority pursuant to a payment plan, or under such other conditions as the General Assembly may provide by general law; or who is the holder of public funds illegally shall be eligible to hold any office or appointment of honor or trust in this state. Additional conditions of eligibility to hold office for persons elected on a write-in vote and for persons holding offices or appointments of honor or trust other than elected offices created by this Constitution may be provided by law.

See also, O.C.G.A. § 21-2-8.

O.C.G.A. § 45-2-1 provides additional restrictions upon eligibility:

The following persons are ineligible to hold any civil office; and the existence of any of the following facts shall be a sufficient reason for vacating any office held by such person; but the acts of such person, while holding a commission, shall be valid as the acts of an officer de facto, namely:

- (1) Persons who are not citizens of this state and persons under the age of 21 years; provided, however, that upon passage of appropriate local ordinances, citizens of this state who are otherwise qualified and who have attained 18 years of age shall be eligible to hold any county or municipal office, except such offices of a judicial nature. The residency requirement for a candidate for any county office, except offices of a judicial nature, shall be 12 months residency within the county. The residency requirement for a candidate for any municipal office, except offices of a judicial nature, shall be 12 months residency within the municipality; provided, however, that municipalities may by charter provide for lesser residency requirements for candidates for municipal office, except offices of a judicial nature;
- (2) All holders or receivers of public money of this state or any county thereof who have refused or failed when called upon after reasonable opportunity to account for and pay over the same to the proper officer;
- (3) Any person finally convicted and sentenced for any felony involving moral turpitude under the laws of this or any other state when the offense is also a felony in this state, unless restored to all his rights of citizenship by a pardon from the State Board of Pardons and Paroles;

(4) Persons holding any office of profit or trust under the government of the United States other than that of postmaster and officers and enlisted men of the reserve components of the armed forces of the United States, or of either of the several states, or of any foreign state; provided, however, that without prejudice to his right to hold public office, any person may accept appointment to, and may receive his expenses and compensation arising from, membership upon any commission, board, panel, or other fact-finding or policy-making agency appointed by the President of the United States or other federal authority, where such appointment is of a temporary nature and the duties are not such as to interfere materially with the person's duties as a public officer. Acceptance of such an appointment and receipt of the emoluments therefrom shall not bar the right of any person to hold office in this state or to accede to a state office;

(5) Persons of unsound mind and persons who, from advanced age or bodily infirmity, are unfit to discharge the duties of the office to which they are chosen or appointed;

(6) Those persons who have not been inhabitants of the state, county, district, or circuit for the period required by the Constitution and laws of this state;

(7) A person who has not been a bona fide citizen of the county in which that person shall be elected or appointed at least 12 months prior to that person's election or appointment and who is not a qualified voter entitled to vote; provided, however, that no prior state or county residency requirement shall be applicable to any appointed local superintendent of schools; or

(8) All persons who are constitutionally disqualified for any cause. All officers are eligible for reelection and reappointment and to hold other offices, unless expressly declared to the contrary by the Constitution or laws of Georgia.

1. Conviction of A Felony Involving Moral Turpitude

“While the legal definition of “moral turpitude” is at best amorphous, “moral turpitude” has been defined as “ . . . an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.’ (Cit.). It would appear, then, that a crime involving moral turpitude would be a crime malum in se, rather than mere malum prohibitum.” [Ramsey v. State, 145 Ga. App. 60, 61 \(4\), 243 S.E.2d 555 \(1978\)](#), judgment rev'd on other grounds, [241 Ga. 426, 246 S.E.2d 190 \(1978\)](#), *citing*, [Huff v. Anderson, 212 Ga. 32, 34, 90 S.E.2d 329, 331 \(1955\)](#).

It has been held that the following offenses are crimes involving moral turpitude:

- Fraud or false pretenses in obtaining something of value
- Larceny or a misdemeanor theft by taking
- Larceny after trust
- Murder
- Soliciting for prostitutes
- Voluntary manslaughter
- Sale of narcotics or other illegal drugs
- Pattern of failure to file federal tax returns in years in which taxes are due
- Criminal issuance of a bad check
- Making a false report of a crime

The following have been held to be offenses which are not crimes involving moral turpitude:

- Public drunkenness
- Driving under the influence
- Carrying a concealed weapon
- Unlawful sale of liquor
- Fighting
- Simple Battery
- Simple Assault
- Misdemeanor criminal trespass
- Child abandonment
- Misdemeanor offense of escape
- Misdemeanor offense of obstructing a law enforcement officer
- The federal misdemeanor offense of Conspiracy in Restraint of Interstate Trade and Commerce
- Possession of less than one ounce of marijuana

Georgia Professional Standards Commission, © 2009., *citing* Daniel's Handbook of Criminal Evidence.

The Supreme Court has gone so far as to declare all felonies as being crimes involving moral turpitude, thus rendering the language in the election code doubly superfluous in the use of the words "moral" and "felony". "Moral turpitude seems to

mean infamy. . . Basically, it would seem that any crime designated as a felony and punishable by imprisonment would be a crime involving moral turpitude within the meaning of the law. Felonies are infamous.” [*Lewis v. State*, 243 Ga. 443, 445-446, 254 S.E.2d 830 \(1979\).](#)¹

2. Unpaid Taxes (If Such Person Has Been Finally Adjudicated by A Court of Competent Jurisdiction)

This provision of Georgia election law does not appear to have ever reached the appellate courts, nor has the Attorney General been asked to weigh in on the subject. The matter has been the subject of multiple news reports in the last several election cycles. *“Cobb commissioner owes back property taxes; Kesting says matter will be handled Monday”* Marietta Daily Journal, April 7, 2007; *“Liens put on four of Kesting's properties”* Marietta Daily Journal, August 1, 2008; *“Lawmaker's paycheck garnisheed for \$190,000 in back taxes”*The Atlanta Journal-Constitution, March 28, 2008; *“Loophole that allows legislators to hold office while not paying taxes is an insult to Georgians”*The Atlanta Journal-Constitution, May 2, 2008; *“19 Georgia lawmakers behind on taxes, state report says”*The Atlanta Journal-Constitution, February 26, 2009; *“Tax-owing lawmakers ID'd: Rule change failed: Senator's resolution to allow panel's probe of tax compliance did not pass.”* The Atlanta Journal-Constitution March 6, 2009; *“Marietta council candidate owes back taxes”*The Atlanta Journal Constitution, October 26, 2009.

¹ The debate over defining “moral turpitude” has likely ended. The impeachment statute which contained the language and under which the defining cases arose, O.C.G.A. 24-9-84.1 was amended effective July 1, 2005 to eliminate the phrase in favor of a more concrete standard.

3. Residency of Candidate

O.C.G.A. § 21-2-217 provides for a 15 item test for determining residency.

- (1) The residence of any person shall be held to be in that place in which such person's habitation is fixed, without any present intention of removing therefrom;
- (2) A person shall not be considered to have lost such person's residence who leaves such person's home and goes into another state or county or municipality in this state, for temporary purposes only, with the intention of returning, unless such person shall register to vote or perform other acts indicating a desire to change such person's citizenship and residence;
- (3) A person shall not be considered to have gained a residence in any county or municipality of this state into which such person has come for temporary purposes only without the intention of making such county or municipality such person's permanent place of abode;
- (4) If a person removes to another state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in this state;
 - (4.1) If a person removes to another county or municipality in this state with the intention of making it such person's residence, such person shall be considered to have lost such person's residence in the former county or municipality in this state;
- (5) If a person removes to another state with the intention of remaining there an indefinite time and making such state such person's place of residence, such person shall be considered to have lost such person's residence in this state, notwithstanding that such person may intend to return at some indefinite future period;
- (6) If a person removes to another county or municipality within this state with the intention of remaining there an indefinite time and making such other county or municipality such person's place of residence, such person shall be considered to have lost such person's residence in the former county or municipality, notwithstanding that such person may intend to return at some indefinite future period;
- (7) The residence for voting purposes of a person shall not be required to be the same as the residence for voting purposes of his or her spouse;
- (8) No person shall be deemed to have gained or lost a residence by reason of such person's presence or absence while enrolled as a student at any college, university, or other institution of learning in this state;
- (9) The mere intention to acquire a new residence, without the fact of removal, shall avail nothing; neither shall the fact of removal without the intention;
- (10) No member of the armed forces of the United States shall be deemed to have acquired a residence in this state by reason of being stationed on duty in this state;
- (11) If a person removes to the District of Columbia or other federal territory, another state, or foreign country to engage in government service, such person shall not be considered to have lost such person's residence in this state during the period of such service; and the place where the person resided at the time of such person's removal shall be considered and held to be such person's place of residence;

- (12) If a person is adjudged mentally ill and is committed to an institution for the mentally ill, such person shall not be considered to have gained a residence in the county in which the institution to which such person is committed is located;
- (13) If a person goes into another state and while there exercises the right of a citizen by voting, such person shall be considered to have lost such person's residence in this state;
- (14) The specific address in the county or municipality in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the person's residence address; and
- (15) For voter registration purposes, the board of registrars and, for candidacy residency purposes, the Secretary of State, election superintendent, or hearing officer may consider evidence of where the person receives significant mail such as personal bills and any other evidence that indicates where the person resides.

B. Constitutional And Full Time Offices

Pre-Election challenges to Constitutional and Full Time Offices (generally Statewide, County or members of the General Assembly) are governed by the “resign to run rule” set forth in the Georgia Constitution, Article II, Section 2, Paragraph 5:

Paragraph V. Vacancies created by elected officials qualifying for other office

The office of any state, county, or municipal elected official shall be declared vacant upon such elected official qualifying, in a general primary or general election, or special primary or special election, for another state, county, or municipal elective office or qualifying for the House of Representatives or the Senate of the United States if the term of the office for which such official is qualifying for begins more than 30 days prior to the expiration of such official's present term of office. The vacancy created in any such office shall be filled as provided by this Constitution or any general or local law. This provision shall not apply to any elected official seeking or holding more than one elective office when the holding of such offices simultaneously is specifically authorized by law.

The “resign to run” rule is Constitutionally mandated and, therefore, virtually iron-clad. It cannot be modified by an act of local legislation. Ga. Atty. Gen. Op. 00-3 (2000) (involving the vacancy created by Dekalb County Commissioner attempting to simultaneously hold office and run for Deklab County CEO). In addition, local governments cannot manipulate or alter the term of office of the candidate in order to avoid the “resign to run” rule. Id.; O.C.G.A. § 1-3-11.

C. State Employees Holding Part Time Office

Insofar as the individuals have the right to run for office (though not a “fundamental right”) the restrictions upon that right must meet the well-established state and federal Constitutional analysis. Restrictions on that right are constitutionally permissible where the government entity impairing the right shows that the strictness placed on the ability to run for office are reasonably necessary to achieve a compelling public objective. That is (1) that the “ends” of the challenged regulations are compelling and (2) that the “means” are reasonably necessary in order to justify impairing plaintiff’s First Amendment rights. MacKenzie v. Snow 675 F.Supp. 1333, 1339 (N.D.Ga.,1987).

1. Statutory Restrictions (Post 1985)

In 1985, Georgia codified the analysis at O.C.G.A. § 45-10-70:

No rules or regulations of any state agency, department, or authority shall prohibit nonelective officers or employees of this state from offering for or holding any elective or appointive office of a political subdivision of this state or any elective or appointive office of a political party or political organization of this state, provided that the office is not full time and does not conflict with the performance of the official duties of the person as a state employee.

The language of the statute has been interpreted as codifying the analysis for the common law doctrine of “incompatibility of offices.” Ga. Atty. Gen. Op. 02-07 (2002).

The common law doctrine of incompatibility of offices provides that incompatibility exists where one office is subordinate to the other, one office is subject to the supervision and control or the duties of the offices conflict. Ga. Atty. Gen. Op. U02-7 (2002). O.C.G.A. § 45-10-70 has been interpreted as precluding:

- A state paid district attorney from holding office as the Mayor of the City of Comer; Ga. Atty. Gen. Op. U02-7 (2002);

- A member of the Georgia Bureau of Investigation's Division of Forensic Sciences in its Crime Lab from simultaneously serving as a county deputy coroner; Ga. Atty. Gen. Op. 97-21 (1997); and,
- A University of Georgia professor from seeking state or federal office; Ga. Atty. Gen. Op. 98-5 (1998).
- But as allowing a member of the General Assembly to serve on a local County Planning Commission. Ga. Atty. Gen. Op. U97-11.

2. Common Law Restrictions (Pre-1985)

Prior to 1985, the analysis was maintained under the common law doctrine of “incompatibility of office” and determinations regarding the viability of the right to hold various offices while a state employee were considered under that lens. Under this analysis, the common law doctrine was interpreted as precluding:

- a State Court Judge from holding office as Chief Magistrate, Ga. Atty. Gen. Op. U83-36 (1983);
- a Clerk of Superior Court from being appointed as the Judge of a Mayor’s Court. Ga. Atty. Gen. Op. U84-26(1984)
- a Clerk of Superior Court from being appointed district court administrator. Ga. Atty. Gen. Op. 78-1 (1978).

but allowing:

- simultaneous service as a Magistrate and a City Councilman; Ga. Atty. Gen. Op. 83-55;
- simultaneous service as a Probate Judge and Chief Magistrate; Ga. Atty. Gen. Op. 84-26 (1984); and,
- simultaneous service as a member of the General Assembly and as an employee of a city or county school board, or a member of a school board. Ga. Atty. Gen. Op. U77-47; *reaffirming* Ga. Att’y Gen. Op. 1962, p. 52; 1954-56, p. 383; 1954-56, p. 296; 1948-49, p. 582.

Under the law of Jarangin v. Harris, 138 Ga. App. 318 (1976), the analysis of these opinions of the Georgia Attorney General may be fundamentally flawed. Jarangin was a reaffirmation of the holding of two long standing cases in Georgia, Avery v. Bower, 170 Ga. 202, 152 S.E. 239 (1930), Patten v. Miller, 190 Ga. 123, 8 S.E.2d 757 (1940). These

cases hold that disqualification from office requires proof specifically declared by law. In order to maintain validity, the Opinions of the Attorney General would have to be reevaluated as applying the common-law doctrine only as a means of interpretation of O.C.G.A. § 45-10-70.

D. Non-State Employees Holding Office

Non-State employees are not subject to O.C.G.A. § 45-10-70 nor any similar statute of general application regarding holding office (other than the standard eligibility requirements discussed above). Individual Counties, Municipalities and other political structures may have ordinances or regulations similar to O.C.G.A. § 45-10-70 which create a mechanism for a challenge related to incompatibility of offices. A direct interpretation of Jarangin v. Harris, Avery v. Bower, and Patten v. Miller, would limit any such challenge to the specific language of such ordinance or regulation. However, this has not always been the case. The Georgia Attorney General has applied the common-law doctrine (perhaps in error) in instances where no express statutory disqualification exists. In other instances, the Georgia Attorney General has used the common-law doctrine properly as a tool for analyzing the intent and scope of a statutory disqualification.

In this regard, the Georgia Attorney General has opined as follows with regard to various non-state public offices:

- A member of a County Board of Elections could not serve as the Board's full time chief clerk; Ga. Atty. Gen. Op. U2004-2;
- A member of the Board of Education could not also be employed as a librarian; Ga. Atty. Gen. Op. 80-64;
- County Coroner could not serve as deputy sheriff, but could be a city policeman. Ga. Atty. Gen. Op. 69-356; *later revised*, Ga. Atty. Gen. Op. U97-18 and U81-6,

neither County Coroner nor deputy coroner could serve as deputy sheriff or city policeman;

- An assistant district attorney from holding office as a city recorder. Ga. Atty. Gen. Op. 77-25 (1977).

E. Procedural for Pre-Election Challenge

O.C.G.A. § 21-2-5 and O.C.G.A. § 21-2-6 provide the method for challenging the eligibility of any candidate for office. This challenge may be brought by the Secretary of State (for State and Federal offices) or by Superintendent of the Board of Elections (in municipal and county elections) at any time prior to the election or by an elector eligible to vote for such candidate, provided that such challenge is made within two weeks after the deadline for qualifying. O.C.G.A. § 21-2-5(b); O.C.G.A. § 21-2-6(b).

In the event of a challenge involving a State office, O.C.G.A. § 21-2-5 provides that the Secretary of State shall initiate a proceeding under Article 2 of the Georgia Administrative Procedure Act, O.C.G.A. 53-13-40, *et seq.* which provides for the Office of State Administrative Hearings. The findings of the Administrative Law Judge are referred to the Secretary of State who is empowered to make an independent decision concerning the eligibility of the candidate. O.C.G.A. § 21-2-5(c). O.C.G.A. § 21-2-5(b) provides that notice of the hearing shall be provided to the candidate.

In the event of a challenge involving a county or municipal office, O.C.G.A. § 21-2-6 provides that the elections superintendent shall conduct a hearing on the matter. O.C.G.A. § 21-2-6(b) provides that notice of the hearing shall be provided to the candidate. The determination of eligibility is made by the superintendent.

Interestingly, nothing within the statutory scheme expressly contemplates the right of the challenging party to notice or to either party to present evidence, to intervene or to

be heard before the administrative law judge or the Secretary of State in a State eligibility contest or the superintendent in the case of a county or municipal contest. Experience, however, dictates that the practice is otherwise.

In either instance, the process of appeal is the same. Within 10 days of the decision, either the challenger or the candidate may file an appeal with the Superior Court of Fulton County (for State office challenges) or with the Superior Court of the county in which the candidate resides (for county and local challenges). O.C.G.A. § 21-2-5(e); O.C.G.A. § 21-2-6(e). The mere filing of the petition is not a stay of the decision of the superintendent however; the reviewing court is authorized to order a stay of such decision. (This does not equal a stay of the election). Id. The review is be conducted by the court without a jury and shall be confined to the record. Id. The standard is an appellate standard, that is, the court cannot substitute its judgment as to the weight of the evidence on questions of fact. The Superior Court may affirm the decision or remand the case for further proceedings, but may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions, or decisions of the superintendent are:

- (1) In violation of the Constitution or laws of this state;
- (2) In excess of the statutory authority of the Superintendent;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

O.C.G.A. § 21-2-5(e); O.C.G.A. § 21-2-6(e).

Appeals from the Superior Court are taken to the Court of Appeals or the Supreme Court, as provided by law.

II. Post-Election Challenges in Georgia

The ability of a candidate to make post-election challenges upon statutory grounds is far more limited than those available pre-election. As a general rule, a challenge may only be brought by a candidate and will only prevail if the irregularities alleged are sufficient to place the outcome in doubt.

A. Procedural Requirements

1. Recounts & Recanvass

In the event of irregularities in the voting results, the superintendent may order a recount of the ballots or a recanvass of the voting machines. O.C.G.A. § 21-2-495. A recount or recanvass is a matter of right held by the losing candidate if the margin of victory is less than 1 percent of the total votes cast. Id. If the margin of victory exceeds 1 %, either candidate may seek a recount or recanvass upon petition to the discretion of the superintendent.

2. Initiation of an Election Contest Petition

A post-election challenge may only be initiated by a “contestant.” O.C.G.A. § 21-2-520. A “contestant is defined only to include “any person who was a candidate at such primary or election for such nomination or office, or by any aggrieved elector who was entitled to vote for such person or for or against such question.” O.C.G.A. § 21-2-521. Thus, neither the Secretary of State nor the local superintendent of the board of elections can initiate a post-election contest. The local elections superintendents are

authorized to investigate election errors or fraud and report the same to the district attorney; however, a return of the election must be certified and delivered to the Secretary of State not later than 5:00 p.m. on the seventh day following the day on which the election was held. O.C.G.A. § 21-2-493.

A petition filed by a proper contestant is filed with the Clerk of the Superior Court within 5 days of the final certification of the returns. O.C.G.A. § 21-2-524 (a). The contest is to be filed in the Superior Court of the county of the residence of the defendant (generally, the opponent), unless the matter is a municipal election in which case the petition is filed in the Superior Court of the county where city hall is located. O.C.G.A. § 21-2-523.

Under O.C.G.A. § 21-2-524(a), the verified Petition must allege the following:

- (1) The contestant's qualification to institute the contest;
- (2) The contestant's desire to contest the result of such primary or election and the name of the nomination, office, or question involved in the contest;
- (3) The name of the defendant;
- (4) The name of each person who was a candidate at such primary or election for such nomination or office in the case of a contest involving same;
- (5) Each ground of contest;
- (6) The date of the official declaration of the result in dispute;
- (7) The relief sought; and
- (8) Such other facts as are necessary to provide a full, particular, and explicit statement of the cause of contest.

3. Notice and Assignment of Judge

Upon the filing of a Petition, the Clerk of the Superior Court must generate a special notice of process to be served upon all persons by the Sheriff of the County which requires them to appear and answer the Petition on a date fixed in the notice which is not more than ten (10) but not less than five (5) days from the service of such notice. O.C.G.A. § 21-2-524(f). No other means of service (such as private process service or acknowledgment of service) is specified. The Chairman of the State Election Board must be served with a copy of the Petition by certified or statutory overnight mail and the Petitioner must file a certificate of service showing the same. O.C.G.A. § 21-2-524(b).

Pursuant to O.C.G.A. § 21-2-523(c) the Clerk of the Superior Court must also notify the administrative judge for the administrative judicial district or the district court administrator. Having been so notified, said administrator must select a superior court judge from within the district, but not from the circuit, or a senior judge not a resident of the circuit of the proceeding. Within twenty (20) days of the return day fixed in the notice, the presiding judge is required to fix a place and time for a hearing. O.C.G.A. § 21-2-525.

4. Hearing and Trial

At the hearing, the court is authorized to make, issue, and enforce all necessary orders, rules, processes, and decrees for a full and proper understanding and final determination and enforcement of the decision of every such case; to subpoena and to compel the attendance of any officer of the primary or election complained of and of any person capable of testifying concerning the same; to compel the production of evidence

which may be required at such hearing; to take testimony (including limiting the time to be consumed in taking testimony, dividing such time equitably among all litigants concerned); and to proceed without delay to the hearing and determination of such contest, postponing for the purpose, if necessary, all other business. O.C.G.A. § 21-2-525. In the event either party so elects, the issues may be tried to a jury. O.C.G.A. § 21-2-526. A jury cannot, however, be called upon to determine “intent of the voter” as to marked ballots. Blackburn v. Hall, 115 Ga.App. 235, 154 S.E.2d 392 (1967); Henderson v. County Bd. of Registration and Elections, 126 Ga.App. 280, 190 S.E.2d 633 (1972).

B. Standard for Validating or Invalidating Election

The grounds provided for contesting an election include:

- (1) Misconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result;
- (2) When the defendant is ineligible for the nomination or office in dispute;
- (3) When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;
- (4) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or
- (5) For any other cause which shows that another was the person legally nominated, elected, or eligible to compete in a run-off primary or election.

O.C.G.A. § 21-2-522.

Essential to each of the foregoing enumerated grounds (other than eligibility) is that the conduct alleged must inject into it insurmountable uncertainty incident to

rejection of votes of electors in sufficient number to overcome apparent and announced result of election if their votes counted against result reached. Crow v. Bryan, 215 Ga. 661, 113 S.E.2d 104 (1960) (A mayor's race was properly invalidated based on improper notice to 113 persons, who were properly qualified voters, where the margin of victory was 55 votes and less than 10 of the voters actually offered or attempted to vote).

The contestant is not required to allege or provide any information as to turnout, percentages or confront the question of whether or not voters "would" have voted for the contestant or voted at all. Stuckey v. Storms, 265 Ga. 491, 458 S.E.2d 344 (1965). Nor is the contestant required to demonstrate that the voters would have been in favor of the contestant. It is enough to establish that sufficient votes were rejected to place in doubt the result. Id. Bell v. Cronin, 248 Ga. 457, 283 S.E.2d 476 (1981) (Trial court properly invalidated an election where three individuals had improperly voted in an election having a margin of victory of three votes); Howell v. Fears, 275 Ga. 627, 571 S.E.2d 392 (2002) (Trial Court properly voided election where ballots in one precinct omitted House District Race and number of ballots in the precinct outnumbered the margin of victory). Thus, the dispositive factor is the illegality of the number of ballots returned and prepared, not the number of ballots which contained votes in the contested race. Mead v. Sheffield, 278 Ga. 268, 601 S.E.2d 99 (2004).

C. Determinations of Voting Irregularities

Voting irregularities have been found in instances wherein:

- Candidate was incorrectly identified by first name on a number of ballots greater than the margin of victory; Mead v. Sheffield, 278 Ga. 268, 601 S.E.2d 99 (2004);
- Ballots of an entire precinct omitted the race entirely (both candidates); Howell v. Fears, 275 Ga. 627, 571 S.E.2d 392 (2002);
- Improper rejection of absentee ballots by registered voters; McIntosh County Bd. of Elections v. Deverger, 282 Ga. 566, 651 S.E.2d 671 (2007);

Voting irregularities were not determined to be present (despite the number affected being larger than the margin of victory) in cases where:

- Sheriff, mailed approximately 1,200 letters to voters urging them to vote for candidates on stationery identifying the sheriff and were processed by sheriff's department personnel at a sheriff's department sub-station. The sheriff also used a tent to campaign within 150 of the Precinct One poll and the sheriff used that location to hand out campaign materials to voters. Middleton v. Smith, 273 Ga. 202, 539 S.E.2d 163 (2000);
- 10 voters cast their ballots illegally in the primary election and that the declared winner won by a margin of 10 votes, however, only four of the ten illegal voters actually cast their votes for either of the two candidates involved. (Miller v. Kilpatrick, 140 Ga.App. 193, 230 S.E.2d 328 (1976) (which highlights an important legal distinction between improper voters and improper ballots as noted in Mead v. Sheffield, 278 Ga. 268, 601 S.E.2d 99 (2004);
- Among other alleged errors, voting machines reported total number of votes cast as 1,066, when only 1,064 people voted and election officials could not explain the difference. Johnson v. Rheney, 245 Ga. 316, 264 S.E.2d 872 (1980);
- The election superintendent failed to include the "nickname" of a candidate and failed to generate a sample ballot. Maye v. Pundt, 267 Ga. 243, 477 S.E.2d 119 (1996);

D. Remedies Authorized

The trial judge is authorized to enter a judgment which (a) certifies that the candidate receiving the most number of votes is nominated, elected or eligible; (b)

that the candidate receiving the most number of votes is ineligible and the election invalid and directing a date for a second election; or (c) that misconduct of poll officers or the election itself is so defective so as to place the outcome in doubt thereby invalidating the election and directing a date for a second election.

O.C.G.A. § 21-2-527. Even where a single precinct contains irregularities or errors, the trial court must order a new primary election for the entire race and not just affected precinct. Howell v. Fears, 275 Ga. 627, 571 S.E.2d 392 (2002). See also, Steven F. Huefner, *Remedying Election Wrongs*, Harv. Journal on Legis. 265 (Summer 2007) (noting New Mexico as the only jurisdiction with an express procedure to allow a County clerk to send new ballots only to voters identified as having a defective ballot); but see, Daniel v. Barrow, 256 Ga. 318, 348 S.E.2d 649 (1986) (authorizing new primary only between second and third place candidates).

Election contests may only be settled if all parties are presented the opportunity to object and the Court approves the settlement. O.C.G.A. § 21-2-527.1. Appeals of election contests are taken to the Supreme Court and must be filed within ten days.

O.C.G.A. § 21-2-528. The appeal does not act as a supersedeas. Id.

III. Conclusion

Election disputes in Georgia can prove to be fact intensive based upon the unique circumstances in each case. This approach runs contrary to the expressed policy of the Georgia Supreme Court that individuals must be “specifically disqualified” by express language of the Constitution or Statute. The qualifications of a candidate based upon

issues such as criminal record, tax debts, and residency would seem to be objective determinations. Yet, the analysis and statutory scheme provides for a much more subjective and fact-based inquiry. The determinations are made by superintendents or boards of elections and reviewed by the Superior Courts for legal error. Accordingly, the instances and opportunities for the creation of a more unified body of case law by the Georgia Court of Appeals and the Georgia Supreme Court are limited. As a result, persuasive and secondary authority such as the opinions of the Georgia Attorney General and public policy considerations creep into the proceedings. Representation in these proceedings should therefore be resolute in attempting to limit the amount of such argument in the event the opponent relies heavily upon the same. To the contrary, those making challenges without clear and objective grounds for disqualification are likely to find an opinion of the Georgia Attorney General or some learned recitation of a public policy rationale which can be analogized to their case.

In the instance of pre-election disputes, subtle nuances such as whether a citizen is a “state paid” employee or not can have monumental consequences in the legal analysis. When the “incompatibility of offices” test is triggered, the roles and responsibilities of individuals in their official capacities can be dramatically different across jurisdictions. Georgia election law is built upon statutory and regulatory procedures and analysis. Case law of the Supreme Court of Georgia is generally limited to application of the same. The remainder of the authority regarding election standards in Georgia is found in the opinions (official and unofficial) of the Georgia Attorney General. Reliance on this secondary authority is helpful in comprehending the overall

analysis, but should not be considered binding. Many of the opinions were authored prior to legislative enactments which supersede the subject matter. In addition, the opinions provided are narrowly drawn to specific circumstances, often involving local boards and municipal elections. Comparisons between the rules and regulations promulgated by one local board or municipality and others should be drawn carefully and only after a thorough review of the relevant local rules and regulations.

In the post-election context, the case law is greater and the analysis far more established. Litigants in these proceedings need to stay mindful of case authority involving disputed ballots vs. case law involving disputed voters. Those in the former situation who seek to void an election will find themselves with a far easier road to a new election. In these instances, the matter is simply a mathematical endeavor; irregular ballots must exceed margin of victory. In the second circumstance, though the number of irregular voters may exceed the margin of victory, this may not equal a new election. In certain such instances, it will have to be determined whether (or how many) of the irregular voters were actually affected. The most difficult challenges will remain as those election contests alleging irregularities not specific to certain voters or ballots but rather claims of illegal campaign activity, equal protection violations and voter intimidation.