

STRUMWASSER & WOOCHELL LLP
100 Wilshire Blvd, Suite 1900
Santa Monica, CA 90401

April 16, 2006

News Advisory

For further information:
Gregory G. Luke
(310) 576-1233; (818) 486-4233 cell
gluke@strumwooch.com

SUPERIOR COURT RULES THAT ALAMEDA COUNTY REGISTRAR VIOLATED ELECTION LAW IN RECOUNT OF 2004 ELECTION

A Superior Court judge has ruled that Alameda County and its Registrar violated both the Elections Code and three separate provisions of the California Constitution in denying voters their recount rights in a 2004 election.

In 2004, Berkeley voters requested a recount of an election for a citizens' initiative conducted on a Diebold electronic touchscreen voting system. Exercising their rights under section 15630 of the Elections Code, which provides that a voter may examine "all ballots ... and any other relevant material as part of any recount," the voters asked to see the copies of the votes redundantly stored in the voting units, the audit logs from those machines, the results of Logic & Accuracy system tests, and the chain-of-custody records for system components. Former Alameda County Registrar Bradley Clark refused to provide any of this "relevant material." The voters filed suit.

On April 12, 2007, Judge Winifred Smith held that the county officials had violated the voters' statutory and constitutional rights. She also denied the County's requests to seal election records from the public. The Court's decision is available on its website at <<http://www.alameda.courts.ca.gov/courts>> by following the Domain Web links to the "Case Summary" page and entering "RG04192053" when prompted for a Case Number.

On May 4, 2007, the Court will hear argument on the voters' Motion for Sanctions, in which they ask that the County and its Registrar be fined for having given away the machines containing copies of the votes while the litigation was pending and having falsely claimed that audit logs and redundant data were not available at the time of the recount.

A fact-sheet regarding the litigation is attached.

In December of 2004, Berkeley voters requested a recount of the election for citizens' initiative Measure R, which had been conducted on a direct recorded electronic ("DRE") touchscreen voting system made by Diebold Elections Systems, Inc. The California Elections Code provides that a voter may examine "all ballots . . . and any other relevant material as part of any recount." The Berkeley voters asked to examine as part of the recount the very vote verification tools that Diebold and the County of Alameda had touted as reasons to trust the DRE voting system. The voters asked to examine chain-of-custody records for the system to make sure that no unauthorized persons had an opportunity to alter the votes during the vote tabulating process. They asked to examine the back-up copies of the votes ("redundant data") that are stored on the touchscreen units for the precise purpose of providing a cross-check against the official vote tallies. They asked to examine the audit logs generated by the DRE system that show whether the system functioned properly. Finally, they asked to examine the results of "Logic & Accuracy" testing that had been performed on the machines before and after the election. The Registrar of Voters refused all of these requests, claiming that the law did not require him to show voters anything other than the voted ballots during a recount.

The voters filed suit to compel the County to follow the law and produce materials that are necessary tools to confirm the accuracy of votes, and to detect potential fraud or error, in elections conducted on all manner of electronic voting systems. In its decision, the Superior Court determined that the Registrar's

refusal to produce the materials requested by the voters violated the Elections Code as well as three separate provisions of the California Constitution that guarantee equal protection, due process, and the right to have one's vote counted. The Court also denied the County's requests to seal such election records from the public.

"Judge Smith's decision vindicates a fundamental right reserved long ago by the People of California to ferret out possible fraud or error in election results," noted counsel for the voters Gregory Luke. "The County's refusal to follow the law threatened *all* future elections in California – no matter what technology is used. The Registrar took a position in this case that, if allowed to stand, would have permitted elections to be conducted behind closed doors. This ruling is a strong rebuke to the culture of secrecy that has unfortunately taken hold of many local elections offices around the country."

California Secretary of State Debra Bowen filed a friend-of-the-court letter in the case to support the Berkeley voters.

In May, the Court will determine whether the County should be sanctioned for conduct related to this case. With the Superior Court poised to address whether the copies of the votes, audit logs, and chain-of custody records must be produced, Alameda County and its Registrar surrendered custody of the voting machines back to Diebold Elections Systems, Inc., without first preserving the copies of the votes and audit logs stored inside. The voters have asked the Superior Court to fine the County for this spoliation of election evidence.