

**VOLUME NO. 35****Opinion No. 87**

**BALLOTS**—Method of marking, write-in candidate, how voted for, mark within square required, mark other than “X” permitted; **ELECTIONS**—Ballots, form of, how must be marked; **SCHOOLS AND SCHOOL DISTRICTS**—Elections, ballots, form of, how must be marked. Sections 23-1210, 23-3606, 75-5915, and 75-6402, R.C.M. 1947.

- HELD:**
1. The ballot of a qualified elector who writes in a name on the ballot but neglects to mark an “X” before that name must not be counted toward the election of the person whose name is written in.
  2. An elector may write in the blank spaces of a ballot the name of any person for whom he wishes to vote, but he only votes for that person by actually marking the square before that person’s name pursuant to section 23-3606, R.C.M. 1947.
  3. A mark other than an “X” within the square before a candidate’s name, or an election issue, may be used to express an elector’s choice on an election ballot if his intention is clear to the election officers.

June 5, 1974

Mr. Denzil R. Young  
Fallon County Attorney  
County Courthouse  
Baker, Montana 59313

Dear Mr. Young:

You have requested my opinion on the following questions concerning a school election matter:

1. If a qualified elector writes in a name on a ballot but neglects to mark an "X" before the name, is his ballot to be counted toward the election of such person to that office?
2. Does any mark other than an "X" within the square before the candidate's name constitute a valid ballot?

Generally, the school election provisions of Title 75, Revised Codes of Montana, 1947, take precedence over the election laws set forth in Title 23, R.C.M. 1947. Section 75-6402, R.C.M. 1947, states:

Unless specifically identified in any section of the election laws prescribed in Title 23, R.C.M. 1947, school elections shall be governed by the provisions of this Title. Should there be a conflict between the requirements of Title 23 and the provisions of this Title regulating school elections, the provisions of this Title shall govern.

Section 75-5915, R.C.M. 1947, sets forth the requirements for the conduct of school elections and the ballot form. It provides in pertinent part:

In preparing the ballots, only those portions of the prescribed ballot that are applicable to the election to be conducted need to be used. The ballot also shall be prepared with blank lines and vacant squares in front of the lines in a sufficient number to allow write-in voting for each trustee position that is subject to election.

Title 75, *supra*, however, does not contain anything about the method of voting and marking of the ballot. One must, therefore, turn to the general election provisions as set forth in Title 23, R.C.M. 1947, to resolve this issue. Section 23-3606 provides the method of voting and states in pertinent part:

- (1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.
- (2) **He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote.**
- (4) The elector may write in the blank spaces, or paste over any other name, the name of any person for whom he wishes to vote, **and vote for that person by marking an "X" before the name.** (Emphasis supplied)

Section 23-3606, *supra*, replaced former section 23-1210, R.C.M. 1947, which also provided that an elector "may write in the blank space or paste over any other name the name of any person for whom he wishes to vote, and vote for such person by marking an 'X' before such name."

In tracing the legislative history of the law that eventually became section 23-1210, R.C.M. 1947, the Montana Supreme Court stated in **Carwile v. Jones**, 38 Mont. 590, 101 P. 153 (1909), at pages 595 and 596:

. . . The Political Code of 1895, in section 1361, made provision for voting a straight party ticket, and also provided that an elector might vote a mixed ticket by placing "a cross *opposite the name* of every candidate," etc., for whom he intended to vote. This section was amended in 1901 (Laws 1901, p. 117) by abolishing the circle at the head of the party column, and by providing that the elector "shall prepare his ballot by marking an 'X' *before the name* of the person or persons for whom he intends to vote." The section as thus amended was further amended in 1907 (Laws 1907, p.210) by providing that the elector "shall prepare his ballot by marking an 'X' *in the square before the name* of the person or persons for whom he intends to vote." **We thus assume that the legislature had some purpose in view in thus restricting the elector as to the manner in which he should express his intention.** Similar statutes prevail in many of the states, and the courts are quite uniform in holding that, to constitute a substantial compliance with the law, at least the point of intersection of the two lines forming the cross must be *within the square before the candidate's name*. [Cases cited] (Emphasis supplied)

It must be acknowledged that on April 6, 1933, in 15 **Opinions of the Attorney General**, no. 140, then-attorney general Nagle held in part that in a school election, if an elector had written a name in on the ballot, but had neglected to put a cross before the name, his ballot should nevertheless be counted toward the selection of such a candidate for the office. There is, however, pertinent case law in Montana contrary to then-attorney general Nagle's opinion. In **Carwile**, *supra*, the Montana Supreme Court refused to count a ballot for a candidate for the office of clerk of the district court which was marked by crossing out all the names in the other party columns but which failed to show an "X" before the candidate's name.

In the earlier case of **Dickerman v. Glesthorne**, 19 Mont. 249, 47 P. 999 (1897), the Montana Supreme Court, in discussing the Australian form of ballot which Montana had adopted, stated on pages 255 and 256:

The distinctive feature of the Australian ballot system is the use of the mark in connection with the names of the candidates and questions to be voted on; and, of course, **unless the mark is employed to indicate the choice of the voter in his ballot, the ballot he casts is a nullity**, however clearly that choice might otherwise be expressed. (See *Martin v. Miles*, 46 Neb. 772, 65 N.W. 889) (Emphasis supplied)

The Court in **Dickerman** went on to hold, in part, at page 259;

... it is clear to us that the provisions ... as to the manner of preparing a ballot are **mandatory** as to **indicate his choice** . . . (Emphasis supplied)

The **Carwile** and **Dickerman** cases, section 23-3606 and its predecessor, section 23-1210, all supra, clearly establish that an elector may write in the blank space on a ballot the name of any person for whom he wishes to vote, but that he only **votes** for that person by actually marking the square before the name of that person.

Your letter also raises the question of the type of mark an elector must make within the square before the candidate's name to constitute a valid ballot. Again, one must look to Title 23, R.C.M. 1947, and the case law established thereunder since Title 75, R.C.M. 1947, does not address itself to that question.

As seen above, section 23-3606, supra, requires the voter to mark an "X" in the square before the candidate's name. In discussing the marks made by an elector, the Montana Supreme Court stated at page 598 of the **Carwile** case, supra:

... His [the elector's] pencil marks are retraced, additional lines are made, the figures are crude, and the entire ballot shows that he was embarrassed by age, infirmity, insufficient light in the booth, or unfamiliarity with the use of a pencil. **We do not think the legislature ever meant to require that a perfect letter "X" inclosed in quotation marks, should be the only means by which an elector can express his choice.** Any mark which can be said to be a cross mark will answer. In the absence of anything to indicate a purpose on the part of the elector to identify his ballot by the use of a third line within the square, this defect ought not to vitiate the ballot. ... (Emphasis and bracketed material supplied)

It is a general rule that election laws must be liberally construed. The Montana Supreme Court in **Stackpole v. Hallahan**, 16 Mont. 40, 40 P. 80 (1895), announced on page 57: "... in the construction of election laws, the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors." In the **Dickerman** case, supra, on page 255, the Court went on to explain:

... The reason for this rule is that **the paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters** upon all questions submitted to them. . . . It is apparent that any form of voting prescribed by election statutes, while a natural and necessary incident, is still only an incident to the main object in the enactment of the same. In considering the details of any and all means by which an end is to be accomplished, the end itself must never be overlooked. **Hence, it is our duty in this controversy — if we can, under the law — to count all ballots honestly cast;** for, if the voter substantially complies with the

prescribed statutory method for preparing and casting his ballot, the main purpose of the election law is complied with. (Emphasis supplied)

Finally, in **Peterson v. Billings**, 109 Mont. 390, 96 P.2d 922 (1937), the court held that the statutory provision requiring a ballot to be marked by an "X" is directory and not mandatory, and in the absence of a further provision that unless so marked the ballot shall not be counted, a ballot upon which the elector marked all squares with a check mark instead of an "X" should be counted. Quoting from the Tennessee court which had interpreted similar statutory language in the case of **Menees v. Eging**, 141 Tenn. 399, 210 S.W. 648, 649 (1919), the Montana Supreme Court stated on page 396:

. . . Although *Carwile v. Jones*, supra, holds that there must be an "X" with two lines intersecting, we believe reason and justice support the Tennessee court and especially the following language from the opinion: The legislature designated the cross (X) as the proper way to designate the candidate for whom the voter was voting, but **it did not intend by this designation to deprive a voter of his vote if he had so marked his ballot that his intention was made clear and obvious to the officers of election. . . .** To deprive a voter of his vote when he makes his choice clear and obvious is such an act of apparent injustice that the intention to do so will not be ascribed to the legislature, unless the language employed by it in reference to the matter is plain and unambiguous. **It cannot be assumed that the legislature intended to deprive a voter of his choice merely upon the form of the mark employed to designate the candidate voted for.** This all assumed . . . that the voter employed a method of designating the candidate for whom he intended to vote, which was clear. (Emphasis supplied)

From the above-mentioned authorities it appears that the ultimate object of an election is to obtain an honest and fair expression from the voters. The legislature, in providing the method of voting, certainly did not intend to deprive any voter of his right to express his choice on a ballot merely because the mark he made to express his vote did not conform to the statutorily designated mark.

THEREFORE, IT IS MY OPINION:

1. The ballot of a qualified elector who writes in a name on the ballot but neglects to mark an "X" before that name must not be counted toward the election of the person whose name is written in.
2. An elector may write in the blank spaces of a ballot the name of any person for whom he wishes to vote, but he only votes for that person by actually marking the square before that person's name pursuant to section 23-3606, R.C.M. 1947.
3. A mark other than an "X" within the square before a candidate's name, or an election issue, may be used to express an elector's choice on an election ballot if his intention is clear to the election officers.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General