

MEMORANDUM

TO: County Clerks, County Board Chairs, County Board Supervisors, County Executives, County Administrators, and County Corporation Counsels

FROM: Mark D. O'Connell

DATE: March 4, 2022

SUBJECT: Absentee Ballot Drop Boxes – What Do the Court Decisions Mean?

The Wisconsin Counties Association, the Association's general counsel, county clerks, corporation counsel, and others have received many questions surrounding the utilization of ballot drop boxes for the upcoming Spring of 2022 general election. Below, please find an analysis of the various court decisions impacting the use of ballot drop boxes, as well as a review of the statutes governing their use, as prepared by the Association's general counsel. In addition to the Association's general counsel, the county clerks from Racine, Fond du Lac, La Crosse and Price County assisted with the review and analysis and the Association thanks them for their assistance on this important issue. For additional questions, please contact Andy Phillips, Attolles Law, s.c., at aphillips@attolles.com or Matt Thome, Attolles Law, s.c., at mthome@attolles.com.

County officials and election staff are encouraged to review this guidance carefully with corporation counsel to ensure appropriate interpretation and application of the legal principles discussed.

BACKGROUND

On June 28, 2021, a lawsuit was filed in Waukesha County, challenging the legality of two memoranda the Wisconsin Election Commission had issued on March 31, 2020 and August 19, 2020 providing guidance to municipal clerks regarding the use of absentee drop boxes. The lawsuit alleged the WEC Memos incorrectly interpreted Wisconsin law related to absentee drop boxes. On January 20, 2022 the Waukesha County Circuit Court issued an order holding that the WEC Memos were invalid because they should have been, but were not, promulgated as administrative rules and that the WEC's interpretation of state law in the memos conflicted with state law. The circuit court ruled that state law—specifically, Wis. Stat. §§ 6.87(4)(b)1 and 6.855—requires the following with respect to absentee voting:

(1) an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf, (2) the only lawful methods for casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk, (3) the use of drop boxes, as described in the Memos, is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855.

Order Granting Summary Judgment for Plaintiffs, *Teigen v. Wisconsin Election Comm'n*, Waukesha Cty. Case No. 2021CV958 (January 20, 2022). The court enjoined the WEC from issuing any further interpretations that conflict with the court's interpretation of Wis. Stat. §§ 6.87 and 6.855 and further directed that the WEC withdraw the WEC Memos and "issue a statement to clerks notifying them that WEC's interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid[.]"

An appeal and stay motions before the Court of Appeals and Wisconsin Supreme Court followed. The Court of Appeals stayed the circuit court's order (*i.e.*, declared the order would not be implemented) through February 15, 2022, and the Supreme Court denied a motion to vacate that stay. This meant the circuit court's order relating to the processing of absentee ballots had no impact on the Spring of 2022 primary elections. The Supreme Court denied, however, a request to extend the stay through the April 5, 2022 election—meaning the circuit court's decision is currently in effect with respect to the April 5, 2022 election.¹ It appears as though the Supreme Court will not issue a final decision on the merits of the case until well after the April election.

This memo seeks to address potential issues that may arise as municipal clerks seek to conduct the April 5, 2022 election. In particular, this memo seeks to provide guidance on the use of absentee ballot drop boxes pending resolution of the appeal from the Waukesha County Circuit Court's decision. In particular, the decision leaves a number of unanswered questions regarding the administration of absentee drop box voting.² This memorandum attempts to review and summarize the current statutes and judicial guidance in an effort to address those questions and other questions that may arise in conducting the election.

To be clear, this memorandum does not take a position one way or the other as to the correctness of the Waukesha County Circuit Court's decision, nor is this memorandum intended

¹ On February 16, 2022, WEC issued a statement withdrawing its prior Memos, to the extent that the trial court declared certain portions invalid.

² "For example, does a drop box located outside a clerk's office count as a 'staffed' drop box? If so, what happens if the ballot is delivered after hours when the office is closed and no staff is present? Do law abiding citizens unwittingly break the law if they ask a spouse to drop a ballot in the mailbox for them? If a disabled voter gives the ballot to a relative to deliver to the clerk's office, is that an illegal vote?" See February 1, 2022 Order, *Richard Teigen v. WEC*, Case No. 2022AP91, at page 6 (Ann Walsh Bradley, J., dissenting).

to provide an analysis of the likelihood that the Supreme Court will affirm or reverse the circuit court's decision. Rather, this memorandum is simply an attempt to provide guidance on complying with the circuit court's order so that municipal clerks can, as practical as possible under the circumstances, ensure that the legality of their conduct of the April 5, 2022 election is not questioned.

ANALYSIS

I. Can a municipal clerk still use a drop box to collect ballots under the circuit court's order?

Yes, under certain conditions.

Wisconsin law requires that an absentee ballot be “mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stat. § 6.87(4)(b)1. The term “municipal clerk” is defined as “the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives.” Wis. Stat. § 5.02(10). Although nothing in the Wisconsin statutes specifically mentions absentee ballot drop boxes, the plaintiffs in the pending litigation are not challenging the use of absentee ballot drop boxes under all circumstances. And, as noted above, in its decision the Waukesha County Circuit Court concluded that drop boxes are permitted when staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855. Even the plaintiffs in that case acknowledge that they “do not challenge a drop box that is *staffed* and located *at* the municipal clerk's office (or a properly designated alternate site).”³ According to the plaintiffs, “[p]utting a ballot into a secure box, if the clerk or an authorized representative is present, is ‘in person’ delivery.”⁴

The Department of Homeland Security Cybersecurity Infrastructure Security Agency's “Ballot Drop Box” guidance “on how to administer and secure election infrastructure in light of the COVID-19 epidemic” provides an example of the type of drop box that we believe would be acceptable under the circuit court's decision.⁵ For example, clerks can still provide a staffed, indoor temporary ballot drop box that is located in the clerk's office and only accessible when staff are physically present to monitor the drop box. Under the circuit court's order, however, it would not be appropriate to have a drop box that is not staffed when it is accessible to voters. Thus, for example, a 24-hour ballot drop box located outside the clerk's office would not be appropriate under the circuit court's order. This is so even if the drop box is subject to 24-hour video surveillance—the presence of video surveillance likely would not mean the drop box is staffed as the circuit court used that term.⁶

³ See Br. in support of Pls.' Motion for Summary Judgment, *Teigen, et al. v. WEC, et al.*, Waukesha Cty. Case No. 21-CV-958, at page 11, n.2.

⁴ *Id.*

⁵ A link to the document, cited in WEC's August 19, 2020 Memo can be found [here](#).

⁶ Again, the Department of Homeland Security Cybersecurity Infrastructure Security Agency's “Ballot Drop Box” guidance on which WEC had relied is illustrative. That guidance refers to permanently installed 24-hour ballot drop boxes as “unstaffed” even when they are subject to video surveillance.

Similarly, we are aware of some municipalities that have drop slots through the exterior wall of the municipal building where the clerk's office is located, where items can be dropped into the slot and into a locked container on the other side of the wall. It is our understanding that such drop slots may have been used to collect absentee ballots in the past. It is our view that such a system likely would not comply with the circuit court's decision, because the drop slots are not staffed. And, as discussed below, there is also a question as to whether delivery to the building where the clerk's office is located constitutes delivery to the clerk's office. Any municipalities with such a system should consider taking steps to inform voters that absentee ballots should not be delivered through such a drop slot, such as by placing a sign on the drop slot informing the public that the drop slot is not to be used for the delivery of absentee ballots.

Finally, as noted above, under the circuit court's order an absentee ballot drop box can be staffed by the clerk and located at a designated alternative site under Wis. Stat. § 6.855. Under this statute, a municipality "may elect to designate a site other than the office of the municipal clerk . . . from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. Wis. Stat. § 6.855(1) (emphasis added). It must be noted, however, that at least two justices of the Wisconsin Supreme Court have interpreted the emphasized language as indicating that Wis. Stat. § 6.855(1) only applies with respect to locations "where voters may request and vote absentee ballots." *Trump v. Biden*, 2020 WI 91, ¶ 56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (emphasis added and internal quotations omitted). In other words, there is some indication that a designated alternative site under Wis. Stat. § 6.855(1) is a site that also allows for in-person absentee voting by voters who request and physically vote absentee ballots at that location.

II. Can a drop box be placed outside of a clerk's office?

Under the Waukesha County Circuit Court's order, the answer is "no" unless the drop box is located at a properly designated alternate site under Wis. Stat. § 6.855. With the exception of alternate sites under Wis. Stat. § 6.855, the circuit court's order interprets Wisconsin law to require that an absentee ballot drop box be both staffed by the clerk and located at the office of the clerk. An absentee ballot drop box outside of a clerk's office, in a position where it is not under the personal supervision of the clerk or his or her authorized representatives, would not comply with the Waukesha County Circuit Court's order and would thus raise questions regarding the legality of absentee ballots collected via such a drop box.

On this point, we note that events such as the "Democracy in the Park" events that were held by the City of Madison during the 2020 presidential election, at which sworn city election inspectors collected completed absentee ballots, are almost certainly not allowed under the circuit court's order (to the extent such events are held at locations other than the clerk's office that do not also meet the requirements under Wis. Stat. § 6.855(1)). Although a legal challenge to the "Democracy in the Park" events failed, it did so on procedural grounds unrelated to the compliance of the events with Wisconsin law. *See Trump v. Biden*, 2020 WI 91 at ¶ 32 (holding that laches bars challenge to absentee ballots collected at "Democracy in the Park" events). We would further note, however, that Justice Hagedorn—who is generally regarded as the "swing" justice on the Wisconsin Supreme Court--wrote a concurring opinion (joined by Justice Ann

Walsh Bradley) in which he concluded that the “Democracy in the Park” events did comply with Wisconsin law (even though he also concluded the events did not involve alternate sites under Wis. Stat. § 6.855(1)). Thus, although we hesitate to make predictions, we do believe there is a significant possibility that the Wisconsin Supreme Court could conclude that absentee ballots can be collected at locations other than the clerk’s office. Unless and until such a decision is reached, however, we would advise municipal clerks to refrain from conducting similar events at locations other than the clerk’s office, in order to ensure compliance with the circuit court’s order.

Another area of ambiguity is whether a clerk’s office can establish a staffed temporary drop box or ballot drop-off in the municipal building where the clerk’s office is located (but not in the specific room of the clerk’s office) or on the street or in the parking lot at the location of the clerk’s office. For example, one method for drop boxes discussed by the Department of Homeland Security is the use of an outdoor, temporary drive-through drop-off, where a team of the clerk’s staff could accept absentee ballots from voters as they pull through and deposit them directly into a ballot box. One question is whether a municipality could use such a staffed, drive-through system on the street or in the parking lot at the address where the clerk’s office is located. Would delivery to a drop-box staffed by the clerk (or an authorized representative) in the parking lot outside the municipal building where the clerk’s office is located comply with the circuit court’s order?

Although we think an argument could be made that such a system would constitute delivery to the clerk’s office—and, as discussed above, we even think there is a significant possibility that the Wisconsin Supreme Court could conclude that absentee ballots can be collected by staff at locations other than the clerk’s office—any municipality using such a system would be taking on significant legal risk. There are Wisconsin statutes that appear to draw a distinction between the clerk’s office and the building in which it is located.⁷ And, of course, government buildings often house the offices for a number of distinct municipal officers and departments. Accordingly, a strong argument exists that to be a drop box at the office of the clerk, the drop box must be located within the room where the clerk’s office is located in a municipal building. Thus, we think any municipality that collects absentee ballots from voters in the parking lot or on the street in front of the municipal building—or even in the building in a location that is not within the room where the clerk’s office is located—risks a claim that the municipality is not complying with state law.

III. Can a clerk accept ballots delivered after hours when the office is closed and no staff are present?

⁷ See, e.g., Wis. Stat. § 7.41(1) (“Any member of the public may be present at any polling place, *in the office of any municipal clerk whose office is located in a public building* on any day that absentee ballots may be cast in that office, or at an alternate site under s. 6.855 on any day that absentee ballots may be cast at that site for the purpose of observation of an election and the absentee ballot voting process, except a candidate whose name appears on the ballot at the polling place or on an absentee ballot to be cast at the clerk’s office or alternate site at that election.”) (emphasis added); Wis. Stat. § 12.03(2)(b)2. (prohibiting electioneering “within 100 feet of an entrance to *a building containing the municipal clerk’s office* or an alternate site under s. 6.855”) (emphasis added).

Under the Waukesha County Circuit Court's order, the answer is likely "no" insofar as the order requires that a drop box be staffed by the clerk (which, again, would include staffing by the clerk's authorized representatives). Accordingly, a drop box that is accessible after hours and allows for the delivery of absentee ballots when the clerk's staff are not personally present would likely be considered to be not staffed by the clerk. This conclusion is consistent with the Department of Homeland Security guidance on which the WEC had relied, which refers to a 24-hour ballot drop box under video surveillance as an "unstaffed" drop box.

IV. What happens if an absentee voter delivers a ballot when no staff are present?

As noted above, we are aware of some municipalities that have drop slots through the exterior wall of the municipal building where the clerk's office is located, where items (other than absentee ballots) can be dropped into the slot and into a locked container on the other side of the wall. The existence of such drop slots thus creates the risk that some voters may attempt to deliver absentee ballots by depositing them into such a drop slot.

Wisconsin law is clear that any such ballots may not be counted. Wis. Stat. § 6.84(2) provides:

Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.

Left unresolved in the statutes, however, is whether a clerk's office can contact a voter who may mistakenly deposit such a ballot in order to allow the voter the opportunity to correct the situation. For example, although Wisconsin law expressly allows a clerk's office to contact a voter when the clerk's office identifies errors with respect to the absentee certificate envelope, Wis. Stat. § 6.78(9), there is no statute authorizing a clerk to contact a voter when an absentee ballot is not delivered properly. Thus, there is at least some risk that a plaintiff could claim that a clerk's office exceeds its statutory authority if it contacts a voter in this situation. On the other hand, errors with respect to the absentee certificate envelope are the general type of error that a municipal clerk would be able to identify ahead of election day, and by authorizing clerks to contact voters regarding such errors it could be argued the Legislature has expressed an intent that voters be alerted to errors with respect to their absentee ballots when such errors can still be corrected. Ultimately, it is our view that state law neither expressly permits nor prohibits a municipal clerk from contacting a voter who might deliver an absentee ballot to the clerk's office under this type of circumstance. We would advise each clerk's office to consult with their regular attorney regarding how to address this situation.

V. Can a clerk accept an absentee ballot delivered by someone other than the elector voting absentee, such as the elector's spouse?

Under the Waukesha County Circuit Court's order, the answer is "no" (unless another provision of the law specifically authorizes an agent to act on the elector's behalf).⁸ Accordingly, in conducting the April 5, 2022 election, clerks should avoid making any statements where they tell voters a third party may drop off their absentee ballots. Clerks should similarly disregard the parts of the WEC Memos that suggest a family member or another third party may drop off an absentee ballot for a voter. Unless and until the Supreme Court rules otherwise, clerks who want to avoid any question regarding the legality of absentee ballots received in their municipality should abide by the circuit court's conclusion that "an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf."

CONCLUSION

The conduct of elections in Wisconsin has become a highly contentious issue. This makes the already difficult task of election administration even more difficult. Adding to the difficulties are the seemingly conflicting orders emanating from courts regarding the appropriate absentee ballot process. But while only the Supreme Court can provide final clarity on the interpretation and application of the relevant statutes, it is important that county and municipal clerks have a firm understanding of the current court orders in place, what those orders mean, and where the orders fall short of providing clarity.

As discussed above, Wisconsin law requires that an absentee ballot be "mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. And, a circuit court has interpreted that to prohibit the use of drop boxes unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855. Under these circumstances, the only option for a drop box that would appear to lack legal risk would be the use of a temporary drop box within the clerk's office, that is under the personal supervision of the clerk or an authorized representative.

If you have any questions surrounding this memorandum or the principles discussed above, please do not hesitate to contact your county clerk, county corporation counsel or the Wisconsin Counties Association. In the meantime, we will continue to update this guidance with additional information as questions regarding implementation of absentee ballot drop boxes arise.

⁸ The plaintiffs in the Waukesha County Circuit Court case have identified several situations in which they claim that the law specifically allows for a third-party to return an absentee voter's ballot. *See* Wis. Stat. § 6.875(retirement/care communities); Wis. Stat. § 6.86(1)(b)(sequestered jurors); and Wis. Stat. § 6.86(3)(hospitalized individuals). The court was likely referencing these statutes when it referred to situations where the law specifically authorizes an agent to act on the elector's behalf.