

**The statute and rules addressed in this opinion have changed.
Please consult current Florida law.**

February 12, 2004

The Honorable Kurt Browning
Supervisor of Elections
Pasco County
Post Office Box 300
Dade City, Florida 33526-0300

RE: DE 04-02
Manual Recount Requirements Relating to
Touchscreen Voting Systems; §102.166,
Florida Statutes

Dear Mr. Browning, et al:

This is in response to your request for an advisory opinion regarding the manual recount requirements under section 102.166, Florida Statutes, relating to touchscreen voting systems. You are the Supervisors of Elections for Pasco, Broward, Charlotte, Collier, Hillsborough, Highlands, Indian River, Lake, Lee, Martin, Miami-Dade, Nassau, Palm Beach, Pinellas, Sarasota and Sumter Counties and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask the following question:

In the context of a manual recount as prescribed by section 102.166, Florida Statutes, are counties who utilize touchscreen voting systems required to print ballot images of all undervotes in the recounted race?

Because it is impossible for a voter to overvote or make stray marks on an electronic ballot, the manual recount provisions of section 102.166, Florida Statutes, do not apply and therefore, counties utilizing touchscreen voting systems are not required or authorized to print or review the electronic ballot images of undervotes occurring in a recounted race.

The purpose of a review of overvotes and undervotes in a manual recount is for the canvassing board to make a determination as to whether marks made on the ballot by a voter that were not clearly readable by the tabulating machine might be able to provide a “clear indication on the ballot that the voter has made a definite choice.”¹ Given this purpose, in the context of a manual recount of undervoted electronic ballots, it is impossible for a voter to make any stray marks on the ballot that might provide guidance to the canvassing board in determining a clear indication on the ballot that the voter has made a definite choice. A review of the electronic ballot image will only indicate that the voter made no selection at all in that race. As a result, counties are not required to print or review the electronic ballot images of undervotes occurring in a manually recounted race, nor do you have the authority to do so.

In 2001, the Florida Legislature amended section 102.166(1), Florida Statutes, to require that if the second set of unofficial returns indicates that a candidate was defeated by one-quarter of a percent or less of the votes cast for such office, that “the board responsible for certifying the results of the vote on such a race...shall order a manual recount of the overvotes and undervotes cast in the entire geographic jurisdiction of such office.”

Our interpretation of the Florida Legislature’s intent regarding manual recounts is supported by a report issued to the Florida Senate in 2001,² which was the basis for the election reform legislation passed during the 2001 Legislature. The report indicates that the Legislature was fully aware that there would be no manual recount for direct recording equipment (DRE) voting systems. Because of the time involved in conducting recounts, coupled with the certification deadlines, the recommendation to the Legislature was to only manually recount overvotes and undervotes. The report recognized that DRE voting systems would be treated differently from optical scan voting systems by providing the following explanation: “Counties using DREs would have no overvotes or undervotes to manually count.”³ This is further clarified in the explanation of the voter intent standards. The report recommended that the Division of Elections should be charged with adopting rules containing recount substandards for voter intent. The report further states that with respect to DRE voting systems, the “recount substandards for DRE systems would be fairly straightforward. DRE systems are essentially electronic lever machines. The recount standard for DRE systems would be to re-calculate the individual totals from each machine or tabulator, to insure there is no mathematical error.”⁴ Ultimately, the final scheme adopted by the Legislature mirrored the report recommendations.

As I state above, the purpose of a review of overvotes and undervotes in a manual recount is for the canvassing board to make a determination as to whether marks made on the ballot by a voter that were not clearly readable by the tabulating machine might be able to provide a clear indication on the ballot that the voter has made a definite choice. If the canvassing board can make such a determination from a manual review of the ballot, then the vote is to be counted. If they cannot, then no vote is counted in that race by that voter. However, given this purpose, in

¹ Sections 102.166(5)(b) and (6)(c), F.S.

² Review of the Voting Irregularities of the 2000 Presidential Election, Report Number 2001-201, Prepared for the Florida Senate by the Committee on Ethics and Elections, March 2001.

³ *Id.*, p.38, footnote 100.

⁴ *Id.*, p.40.

the context of a manual recount of undervoted electronic ballots, it is impossible for a voter to make any stray marks on the ballot that might provide guidance to the canvassing board in determining a clear indication on the ballot that the voter has made a definite choice. As you note in your inquiry, a review of the electronic ballot image will only indicate that the voter made no selection at all in that race.

Rule 1S-2.027, F.A.C., which became effective on June 6, 2002, provides the standards to be used in a manual recount for determining whether there is a clear indication on the ballot that the voter has made a definite choice, and specifically states that they are “standards to determine in a manual recount as provided specifically by Section 102.166, F.S., on an optical scan ballot, whether there is a clear indication on the ballot that the voter has made a definite choice.”⁵ [Emphasis added] It does not refer to or mention electronic ballots.

Additionally, the present version of Rule 1S-2.031, F.A.C., entitled, “Recount Procedures” which became effective on May 30, 2002 also does not refer to or mention electronic ballots. A review of the rule promulgation history for the current Recount Procedures rule shows that the rule’s silence regarding manual recounts of electronic ballots was, in fact, intentional.

Initially, the proposed content of the Rule 1S-2.031 published on October 5, 2001 in the *Florida Administrative Weekly* (Volume 27, Number 40, page 4619) included a provision relating to DREs which would have required, that “[a] manual recount shall be conducted by printing out or exporting the ballot image files and counting these files manually.” Following that publication, in public hearings held around the state, the need for the inclusion of such a requirement was raised.⁶ Due to the public input, that requirement was stricken from the proposed rule as being unnecessary. As a direct result, the current “Recount Procedure” rule, Rule 1S-2.031, F.A.C., only provides procedures regarding manual recounts of optical scan ballots. It is intentionally silent as to electronic voting systems, as it was not envisioned that any manual recount activities would occur with regard to undervotes cast on touchscreen (DRE) voting systems. In addition, because the rule provides no standards for the review of electronic ballot images cast on touchscreen (DRE) voting systems and because the Florida Election Code requires uniformity in the application and operation of the election laws and rules among the counties, you are not authorized to review printed electronic ballot images of undervotes as part of the manual recount.

As you know, the Recount Procedures rule is currently going through the rule promulgation process to incorporate substantial revisions to the recount process and in its next iteration is expected to state with specificity that when touchscreen ballots are used, that no manual recount of undervotes and overvotes shall be conducted since these machines do not allow a voter to cast

⁵ Rule 1S-2.027(1), F.A.C.

⁶ For example, at the October 29, 2001 public hearing held in Miami, Norm Ostrau, the Deputy County Attorney of Broward County stated that he did not see why there was a need for a recount process for a DRE system. Further, in a February 13, 2002 letter to the Division of Elections, Kurt Browning, Supervisor of Elections of Pasco County, specifically requested that the requirement to print out or export the ballot image files and count them manually be stricken. In justification of his request, Supervisor Browning stated that the recount statute, “specified that in a manual recount situation, only the overvotes and undervotes shall be recounted. With a DRE system, the overvotes are non-existent and the undervotes would be blank sheets of paper.”

an overvote and since review of undervotes cannot result in a determination of voter intent as required by section 102.166(5), Florida Statutes. This will further memorialize what has clearly been the intent of the rule since the time of its implementation.

Finally, as you also note in your inquiry, the current certified touchscreen voting systems as deployed in the counties were never required or expected to have the capability, within the current statutory timeframe allowed for the completion of a manual recount, to print out the number of the ballot images that would be required in the context of a statewide manual recount if a review of all undervoted ballots images were to be done. Again, it was clearly not contemplated that such an activity would occur in the context of a manual recount involving electronic ballots.

SUMMARY

In the context of a manual recount as prescribed by section 102.166, Florida Statutes, counties utilizing touchscreen voting systems are not required to print or review the electronic ballot images of undervotes occurring in the recounted race. In addition, because the rule provides no standards for the review of electronic ballot images and because the Florida Election Code requires uniformity in the application and operation of the election laws and rules among the counties, you have no authority to do so.

Sincerely,

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