

# Lowenstein Sandler

ATTORNEYS AT LAW

Jeffrey J. Wild  
Member of the Firm  
Tel 973 597 2554  
Fax 973 597 2555  
jwild@lowenstein.com

October 21, 2008

**BY TELECOPY [609.392.8625]**

Arthur R. Sypek, Jr., Esq.  
Mercer County Counsel  
Mercer County Board of Elections  
McDade Administration Building  
640 South Broad Street, P.O. Box 8068  
Trenton, NJ 08650-0068

-and-

**BY E-MAIL [asypek@riker.com] & Telecopy [609.392.8625]**

Arthur R. Sypek, Jr., Esq.  
Riker Danzig Scherer Hyland & Perretti LLP  
50 West State Street  
Trenton, NJ 08608-1220

Re: **November 4th Election : Compliance With New Jersey Election Laws**

Dear Mr. Sypek:

This firm represents five registered voters who reside in Mercer County: Grayson Barber, a Fellow at Princeton's Center for Information Technology Policy; Peter Meyers, a Princeton professor; and Trenton Arthur, Sophie Jin and Michael Monoukas, three Princeton students (collectively, the "Voters"). We understand that you represent the Mercer County Board of Elections (the "BOE"). My firm is contacting you in one final effort to avoid litigation against the BOE relating to the November 4th election.

The Voters have applied for challenger badges as proponents and opponents of Public Questions #1 and #2 on the ballot for the general election on November 4, 2008. The BOE has failed to respond to these applicants, other than to convey "concerns" and a disinclination to issue challenger badges. Enclosed are copies of two letters dated October 9, 2008 and October 14, 2008 that more fully describe the resistance that Ms. Barber and the other Voters have thus far confronted in their efforts to resolve this matter with the BOE directly.

What the Voters want should hardly be controversial: the right to observe the counting of votes as part of a public election. This right is particularly important given that Mercer County intends

to use the Sequoia Advantage voting machines for this election. Reasonable people, perhaps, may disagree as to whether these Sequoia voting machines have security weaknesses that imperil the integrity of our elections. Reasonable people should agree, however, that the Voters have the right to see how their votes are counted, so the true facts can come to light.

The BOE has never responded to -- let alone denied -- the facts set forth in Ms. Barber's letter of October 9, 2008, which memorialized the Board's "concerns" as conveyed by Mrs. Erika McCoy. The BOE conduct, however, unless it ceases immediately, constitutes a violation of -- to start with -- multiple New Jersey statutes.

The statutory violations pertain to Title 19 and the Open Public Meetings Act. Ms. Barber and her colleagues seek authorization to be present and observe poll workers on Election Night as they close the polls and announce the results. The challenger badge applications were in compliance with N.J.S.A 19:7-2 and 19:7-3, and all the applicants are registered to vote in Mercer County. Thus, pursuant to the mandatory language of N.J.S.A 19:7-4, the BOE "shall" issue permits for the Voters to act as challengers.

In addition, under N.J.S.A 19:16-2 (again, a mandatory statute), "the counting [of ballots] shall be open and public." Under the Open Public Meetings Act, a district board of elections is a "public body" conducting "public business" in a "meeting," as defined by N.J.S.A 10:4-7, which must by definition be open to the public.

Yet in contravention of these statutes, Ms. McCoy conveyed the BOE's remarkable "concern" that the election is "too important" to let the Voters observe the counting of their votes. Even worse, Ms. McCoy and the BOE have expressed "concern" that another applicant for a challenger's badge, Professor Andrew Appel of Princeton, is an expert on Sequoia voting machines -- and thus could know what he is observing. Indeed, it would be a violation of the First Amendment for the BOE to exclude Professor Appel because of his publicly expressed concerns about the Sequoia voting machines.

Again, all the Voters want is to watch the poll workers, in order to see how they handle the electronic voting machines and report the results. Election Night is fast approaching and so please advise, by no later than 5:00 pm on Friday, October 24, 2008, whether the BOE will: (a) issue challenger badges to the Voters and Professor Appel; or (b) confirm that the Voters and Professor Appel will be permitted to watch poll workers on Election Night. If so, we can resolve this matter amicably and further the common goal of our clients and the State of New Jersey: open elections. If not, this firm will take all appropriate legal action without further notice, including (but not limited to) taking all appropriate legal action and recovering legal fees to the fullest extent permitted by law.

October 21, 2008

Please call me at 973-597-2554 upon your receipt of this letter.

Very truly,



Jeffrey J. Wild

JJW:cas

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Enclosure

cc: Grayson Barber, Esq. (by e-mail)  
Professor Peter Meyers (by e-mail)  
Trenton Arthur (by e-mail)  
Sophie Jin (by e-mail)  
Michael Monoukas (by e-mail)  
Professor Andrew Appel (by e-mail)

GRAYSON BARBER LLC  
68 LOCUST LANE  
PRINCETON, NJ 08540

Via fax (609) 278-2713  
Attn: Ms. Erika McCoy

October 9, 2008

Mercer County Board of Elections  
McDade Administration Building  
640 South Broad Street, P.O. Box 8068  
Trenton, New Jersey 08650-0068

Re: Appointment of Challengers  
For Public Questions

Dear Board of Elections:

I am writing to memorialize my telephone conversation yesterday with Erika McCoy, who conveyed your concerns about my application for challengers' badges.

The Board of Elections appears to have two major concerns. First, you consider the general election to be held on November 4, 2008, to be "too important" to permit extra people in the polling place, according to Ms. McCoy. Second, you fear my application might be fraudulent, since I am acting on behalf of people who are not really challenging the public questions on the ballot.

As to the first, of course we understand that poll workers will not want extra people getting in the way – that is why we are taking measures to get special authorization to be present. My request is entirely in compliance with NJSA 19:7-2 and -3, as we are all registered voters in Mercer County. The formal written request was apparently in order and, far from being fraudulent, I explained our project by telephone to Ms. McCoy

In spite of this, the Board expressed reluctance, via Ms. McCoy, based on the identities of the prospective challengers. In particular, she cited Professor Andrew Appel's status as an expert on Sequoia voting machines as a "concern," apparently sufficient to exclude him and the other applicants from obtaining authorization to be present when polls are closed on Election Night.

I respectfully urge the Board to reconsider. I applied for challengers' badges on behalf of five people: two Princeton University students (Sophie Jin, Trenton Arthur), two professors (Andrew Appel, Peter Meyers) and myself. We wish to be present on Election Night when our local district boards of election open up the voting machines

after the close of the polls and announce the results. This is to be done in the presence of persons who may be lawfully present at that time, per NJSA 19:52-5. We understand that a regular voter who does not have a challenger's badge might not be one of the people allowed to be present at that time, pursuant to NJSA 19:15-8.

Other New Jersey statutes provide that "the counting [of ballots] shall be open and public." NJSA 19:16-2. Under the Open Public Meetings Act, the district board of elections is a "public body" conducting "public business" in a "meeting," all as defined by NJSA 10:4-7, which must by definition be open to the public.

Our purpose is merely to watch the poll workers, to see how they handle electronic voting machines and report the results. To ensure that we can be lawfully present, we seek challengers' badges for proponents and opponents of Ballot Questions 1 and 2, as permitted by N.J.S.A. 19:7-2.

Other counties permit members of the public to watch the poll workers read the election results. Your reluctance conveys the unfortunate impression that Mercer County does not welcome public oversight. Worse, you appear to have an interest in preventing us from observing Mercer County's electronic voting machines. In our telephone conversation yesterday, Ms. McCoy conveyed your assurances that Sequoia has fixed the problems Professor Appel identified in past elections.

As an alternative to issuing challengers' badges, you invited us to visit your offices in Trenton on Election Night. But this would defeat the purpose of our request, because no electronic voting machines will be at your offices. You also suggested applying through our municipal chairs, but this would not influence your exercise of discretion. As noted, your current inclination is to exercise your discretion by issuing a denial.

I respectfully repeat my request for challengers' badges so that these Princeton University students and professors can observe Mercer County's deployment of electronic voting machines on November 4, 2008. Our request is non-partisan; it is in the spirit of open government. Not more than two of us will be in any one polling place. I do expect, however, to submit additional applications on behalf of more prospective challengers. We promise not to disrupt the proceedings, but merely to observe. I look forward to hearing from you.

Very truly yours,

Grayson Barber

GRAYSON BARBER LLC  
68 LOCUST LANE  
PRINCETON, NJ 08540

By Hand Delivery

October 14, 2008

Mercer County Board of Elections  
McDade Administration Building  
640 South Broad Street, P.O. Box 8068  
Trenton, New Jersey 08650-0068

Re: Request for Formal Ruling  
Appointment of Challengers for Public Questions #1 and #2

Dear Board of Elections:

I respectfully request a formal ruling on the applications I submitted last week for challenger badges. I enclose the original applications for your convenience.

I applied for challengers' badges on behalf of five people: two Princeton University students (Sophie Jin, Trenton Arthur), two professors (Andrew Appel, Peter Meyers) and myself. We wish to be present on Election Night when our local district boards of election close the polls and announce the results.

In addition, I submit herewith a sixth application for a challenger's badge, on behalf of Michael Monovoukas. Like the other applicants, he is registered to vote in Mercer County.

Please note the language of NJSA 19:7-4, which provides that "the county board *shall* thereupon issue, under the hands of its members, to the persons named in such appointment papers, or application, permits for them to act as challengers for their respective parties or candidates or for or against a public question at the election district or election districts specified, as the case may be." (Emphasis added.)

The students, professors and I wish to observe the poll workers on Election Night, when they close the polls and announce the results. Our intent is to engage in fewer of the activities than listed in NJSA 19:7-5: We will not challenge anyone's right to vote, nor do we expect to challenge the counting or rejecting of any ballot or any part of a ballot.

For this reason, we respectfully submit that challengers' badges are not required for our purposes. Our presence will not disrupt the poll workers, and our actions will be restricted to conduct that is allowed by law. New Jersey election law provides that votes

are to be counted *publicly*, NJSA 19:16-2, and announced in *public*. NJSA 19:16-10.  
(Emphasis added.)

Please issue a formal ruling to advise whether you will issue challengers' badges to the applicants. If you decline to issue badges, please advise whether these registered voters will be permitted to observe the poll workers on Election Night without badges.

Very truly yours,

Grayson Barber

Cc: Brian Hughes  
Lucille Walter  
Paula Sollami-Covello