

October 22, 1998

Gary O. Bartlett Executive Secretary-Director State Board of Elections VIA HAND DELIVERY

P.O. Box 2169 Raleigh, NC 27602

Re: Advisory Opinion; Use of Video Cameras and Cellular Telephones by Political Party Observers at Voting Places; N.C. Gen. Stat. § 163-45

Dear Mr. Bartlett:

You have asked our opinion whether observers designated by a political party pursuant to N.C. Gen. Stat. § 163-45 may use video cameras and cellular telephones while serving as observers. For reasons which follow, it is our opinion that videotaping of voters by observers is outside their permissible statutory activities and is inconsistent with the right of voters to vote by secret ballot. The discreet use of cellular phones, however, is permissible.

The General Assembly has permitted county political parties "to designate two observers to attend each voting place at each primary and election." N.C. Gen. Stat. § 163-45. The observers must serve for at least four hours, and "[n]ot more than two observers from the same political party shall be permitted in the voting enclosure at any time." *Id.* With respect to the permissible activity of observers, N.C. Gen. Stat. § 163-45 provides:

An observer shall do no electioneering at the voting place, and he shall in no manner impede the voting process or interfere or communicate with or observe any voter in casting his ballot, but, subject to these restrictions, the chief judge and judges of elections shall permit him to make such observation and take such notes as he may desire.

The clear intent of the statute is to permit observation by persons admitted to the voting enclosure so long as the observation does not impede or interfere with the right of any voter to cast his ballot and do so secretly. A separate statute, N.C. Gen. Stat. § 163-48, places on the chief judge and judges of election the responsibility to "especially keep open and unobstructed the place at which voters or persons seeking to register or vote have access to the place of registration and voting. They shall prevent and stop improper practices and attempts to obstruct, intimidate, or interfere with any person in registering or voting."

The voting enclosure is a demarcated area of the voting place no greater than 20 feet from each voting machine or ballot box. Access to the voting enclosure is strictly limited under N.C. Gen. Stat. § 163-153 to include only persons such as voters in the act of voting, elections officials, and duly appointed observers. The permission given to observers is limited by statute -- they may observe and take notes so long as they do not electioneer or otherwise impede or interfere with the voting process. The function of observers by definition is partisan, and they are not charged with the responsibility, as are elections officials, with conducting fair and impartial elections. See *Preisler v. Calcaterra*, 362 Mo. 662, 243 S.W. 2d 62 (1951); *In re Parrish*, 214 Pa. 63, 67, 63 A. 460, 461 (1906) ("The rights of watchers at a polling place are prescribed by the act. They have a right to be in the voting room outside the inclosed space while the votes are being cast, and are permitted to keep pollbooks and challenge lists, and to be present during the counting of votes. These, and no other rights, are conferred on watchers . . .").

The arrangement of the voting enclosure is prescribed by N.C. Gen. Stat. § 163-146, and requires a single entrance to the enclosure not more than three feet wide, and all voting booths and ballot boxes must be placed in plain view of the qualified voters in the voting place and the precinct judges. The booths are to be

arranged so that no voter can see a voter in another booth in the act of marking his ballot. Precinct officials shall not permit any person to be situated "in any position that will permit one to see or ascertain how a voter votes on a voting machine except when the voter obtains assistance as provided in this Chapter." Id. Videotaping of voters by persons located in the voting enclosure would interfere with the voter's right to participate in the election because many voters would be intimidated by being videotaped while in the act of voting. In addition, videotaping may interfere with the right to cast a secret ballot because it would be very difficult for precinct judges to monitor whether the voter's right to a secret ballot was being compromised by a video camera with a zoom lens fewer than twenty feet away.

Systematic taping by designated observers in the voting enclosure is significantly different from isolated instances of videotaping conducted by identified members of the news media. Members of the news media are not in the categories of persons admitted to the voting enclosure. In recognition of the public's interest in a free press, members of the news media have been allowed to photograph voters from the voting place but not the voting enclosure. In addition, the State Board of Elections has consistently recommended to the news media that they should avoid actions that might intimidate voters such as blocking doors or passageways with bulky equipment, using bright lights for more than a few seconds, or keeping a camera running or focused on an individual voter for more than a few seconds. The State Board has also requested that interviews with voters be conducted at least 50 feet from the entrance to the voting place, consistent with the prohibition against congregating or electioneering within the voting place set forth in N.C. Gen. Stat. § 163-147.

Thus, it is our opinion that videotaping of voters by observers would be outside their permissible activities under applicable statutes and inconsistent with the constitutional and statutory principles insuring unfettered elections for voters. We do not, however, see the same legal concerns with the use of cellular telephones. Conversations conducted over cellular telephones while in the voting enclosure could impede or interfere with the election process, but may not. Thus, we believe the use of cellular telephones in the voting enclosure is a matter best entrusted to the administrative discretion of elections officials to be exercised consistently with the principles discussed herein.

*signed by:*

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*Ann Reed*

Senior Deputy Attorney General

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