

To: Drafting Committee on a Uniform Military Services and Overseas Civilian Absentee Voters Act
From: Steve Huefner, Reporter
Date: Sept. 15, 2009
Re: Agenda for September 25-26 Meeting of Drafting Committee

In anticipation of our meeting later this month in Minneapolis, I wanted to identify what appear to be the major issues now facing us. Some of these issues grow out of the first reading of our act at the annual meeting, while others predate Santa Fe or have arisen from elsewhere since then. In particular, since the annual meeting Jack Davies has invited us to address two concerns, and I also have received a more extended comment about our draft act from the law partner of ULC commissioner Tom Grimshaw of Colorado, which Claire Levy forwarded to me. We will want to talk about these matters in Minneapolis as well. Hopefully this "issues list" can focus our thinking and help us make the most of our time in Minneapolis.

This memorandum should be read in conjunction with three documents that accompany it. The first is a mark-up of the draft of our act read at Santa Fe, reflecting changes I have made in light of that first reading. The second is a "clean" version of this revised draft, with all the redlining removed, that I hope can be the primary vehicle for discussion in Minneapolis. The third is a pdf of all the notes that the drafting committee received from commissioners at the annual meeting. The mark-up of the annual meeting draft contains a number of cross-references not only to these notes, but also to the transcript of our session at the annual meeting, which I am assuming all committee members have already previously received.

One additional note: NOT reflected in the redlining of the mark-up is the reordering of sections of the act that I decided to undertake in light of input from our Style Committee liaison. Specifically, because our act is relatively short, in preparation for Santa Fe our Style liaison removed the separate article headings. In my judgment, the resulting article-free sections were not organized in the most logical fashion, so in this new draft I have attempted to put them into a better order. However, if I use the redline feature to show this reorganization, it will make it very difficult to find the substantive changes within individual sections. I therefore turned the redlining off when I reordered the sections.

The issues that I sense we will want to discuss in Minneapolis include several items currently in our "Definitions" section (Section 2), and then a variety of matters from other sections. I have listed them here in an order that we might consider discussing them in Minneapolis, rather than either in the order in which they appeared in the previous draft, or the order in which they appear in the new draft (although for convenience I have indicated below the sections in which they appear, both in the ordering of the old draft and the new draft).

Timing. Of course, one key issue that we should continue to refine in Minneapolis is the matter of timing, particularly concerning when blank ballots, both electronic and paper, need to be provided to voters. This issue cuts across several sections, and also may depend upon where we end up going with the use of electronic technologies. It may also be affected by what has happened in Congress by Sept. 25 (the Schumer amendment to UOCAVA is now in conference committee).

Electronic Transmission. A second major issue pertains to way in which the draft relies upon electronic transmissions, and electronic signatures. Jack Davies would like us to continue discussing what might be possible in the realm of electronic *voting*, and at Santa Fe one possibility that arose was to encourage electronic voting if voters were willing to give up the secrecy or anonymity of their vote (as now sometimes occurs when voters are allowed to fax their voted ballots). This merits committee discussion. In addition, in the committee's work to date, some electronic transmission options presumably have contemplated the use of electronic "signatures." We should consider how this relates to the notion that voter identity can be determined by comparing the handwritten signature on a voted ballot with the voter information on file at a local elections office, if a voter can register electronically without providing a handwritten signature.

Registration and Absentee Ballot Application - Old Section 7, New Section 5: Going into Santa Fe, we had considered two alternatives, one that required use of the federal forms as a condition of receiving the protections of the act, and one that permitted use of a variety of forms. I believe that we did not get any input in Santa Fe to assist in choosing between these.

Definitions - Old and New Section 2. Here several items will merit discussion. First, I think we will want to share ideas about whether to further define how we are using the two terms "spouse" and "dependent." We also have been invited to consider whether there is too much ambiguity in the phrase "by reason of such service," a phrase that we created to replace the language "by reason of such active duty" used in the federal law. Separately, in Santa Fe we received conflicting views about how to treat U.S. citizens serving in a foreign military, something the current draft does not address. And finally, some additional discussion will likely also be in order about how to define and treat the class of voters born abroad who have never lived in the U.S. As one aspect of this issue, Jack Davies has invited us to think more about "emancipating" them from their parents – and specifically from their parents' voting jurisdiction.

Emergency Power - Old Section 4, New Section 18: In Santa Fe several commissioners encouraged us to narrow this Emergency Power section. This presumably will merit a robust discussion in Minneapolis.

Voter Declaration - Old Section 18, New Section 13: Many of those who commented at the first read found our proposed affirmation confusing. The revised draft reflects one possible clarification, which is to leave out of the general affirmation the specific item that is relevant only to the casting of the ballot ("I have voted and sealed this ballot in private and have not ... been improperly influenced..."), and include it only on the affirmation required to accompany the ballot itself. But this cuts against our effort

to develop a uniform declaration. I think we will want to spend a little time discussing this possibility, as well as the affirmation language more generally.

Nonessential Requirements - Old Section 19, New Section 17: In Santa Fe some commissioners seemed to be distinguishing between the impact of misspellings, etc., on the validity of the ballot versus on the validity of a particular vote. I hope to clarify this. I also would like to see us discuss a little more the issue also mentioned in Santa Fe of whether to give ballots cast by overseas/military voters a different treatment in discerning voter intent.

Injunctions and Equitable Relief - Old Section 20, New Section 19: I think the committee should briefly consider comments in Santa Fe about how existing standing doctrines of particular states might relate to this provision providing a private right of action.

These are by no means the only matters that will merit discussion in Minneapolis, but they are the ones that seemed most important to invite us all to continue thinking about in advance. Meanwhile, we could all think about what other topics – whether proxy applications, or the definition of “United States,” or whether to permit standing requests for absentee ballots, to name a few -- from Santa Fe or elsewhere, might deserve some additional attention in Minneapolis. In addition, in his capacity as the new head of the Federal Voting Assistance Program, Bob Carey has been in touch to say that FVAP is now preparing its 2009 set of state letters, in which FVAP identifies for each state what it sees as the legislative reforms most helpful for military voters. Bob has expressed an interest in using some of the provisions from our draft act in these letters as recommended models for the states. When we meet in Minneapolis we might also discuss how to best coordinate our efforts with this FVAP initiative.

Attachments.