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Election Law: Preventing Petition Fraud.

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Under New York Election Law § 6-164, upon obtaining the required number of signatures, enrolled members of a political party may file petitions seeking the opportunity to write in the name of a candidate on a ballot line in a primary election. Santiago Burger LLP helped a client to invalidate one such "Opportunity to Ballot Petition" fraught with fraud just days before the deadline in a Primary Election. Combating election fraud takes vigilance and fast action. This primer discusses the legal arguments and issues involved in our client's fight to defend ballot integrity.

I. A Notary Witnessing an Opportunity to Ballot Petition Must Administer an Oath and Elicit Confirmation that a Petitioning Signatory's Statement is True or the Signature is Invalid.

A. Burden and Standard of Proof.

Objectants to Opportunity to Ballot Petitions have the burden of proving the invalidity of an election petition. *See Blostein v Bauer*, 218 AD2d 912 (3rd Dep't 1995); Election Law § 6-154(1). The standard of proof is preponderance of the

evidence except in cases of fraud. *New Amber Auto Service, Inc. v. New York City Environ. Ctrl. Bd.,* 163 Misc.2d 113 (Sup Ct., NY Cty. 1994) (collecting cases). In cases where the Objectant alleges that the entire opportunity to ballot petition was permeated by fraud, the standard of proof is clear and convincing evidence. *See Powell v Tendy*, 131 AD3d 645, 646 (2d Dep't 2015).

Our client primarily objected to and challenged *individual petition signatures* as invalid based upon individual deficiencies rather than attacking the *entire* opportunity-to-ballot petition as a whole as *permeated* by fraud. *See Bonner v Negron*, 87 AD3d 737, 738–39 (2d Dep't 2011).

In *Bonner*, the Court found that the Petitioner-Objector met her burden of invalidating six *individual* signatures for the witnessing notary public's failure to properly carry out the responsibilities of his office.

> Here, the petitioner presented testimony establishing that [the notary] witnessed six of the signatures on his designating petition … without administering an oath in any form to the signatories or otherwise obtaining from them a statement affirming the truth of the matter to which they subscribed their names. However, the petitioner failed to present any evidence which would rebut the strong presumption of regularity established with respect to the remaining 443 signatures which [the notary] witnessed.

Id. (emphasis added). The *Bonner* court was nevertheless necessarily declined to invalidate the entire designating petition because a sufficient number of presumptively valid signatures remained and objectant failed to show that the balance of the petition was also permeated by fraud.

> Furthermore, aside from the testimony pertaining to the six aforementioned signatures, the [objectant] did not present any evidence which would rebut [the notary's] testimony that he obtained a statement from each of the signatories as to the truth of the matter to which they subscribed their names. Accordingly, … the petitioner failed to establish that all of the signatures to which Negron attested in his capacity as notary public were obtained in violation of Election Law § 6–132(3).

Id. (emphasis added).

II. The Petition was Invalid with Fewer than Six Qualifying Signatures.

According to the County Board of Elections, to qualify an opportunity to ballot petition for the Party primary election at issue, at least six (6) members of the Party must sign a petition nominating a committee to receive notices consisting of at least three other Party members and requesting the opportunity to write in the name of an undesignated candidate for nomination to such office.

A. <u>An Improperly Notarized Signature is Invalid.</u>

Opportunity to Ballot Petition signatures must be witnessed either by another member of the Party or by a qualified notary public or commissioner of deeds. Under Election Law sections 6-132(3) and 6-166, a notary public who witnesses a signature on an opportunity to ballot petition must attest that:

> On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing..... (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing statement made and subscribed by him or her, was true.

ELECTION LAW § 6-132(3) (emphasis added); ELECTION LAW § 6-166 ("statement of a witness or authentication by a notary public … shall be in the form prescribed for a designating petition").

Failure to so administer the oath and have the witness indicate the truthfulness of such witness's foregoing statement renders the signature invalid. *Helfand v Meisser*, 22 NY2d 762 (1968).

> [S]ignatures on the … petition, without which the petition did not contain a sufficient number of signatures, were invalid because authenticated by notaries public who had not taken the oaths of the signers or obtained any statements from them as to truth of statements to which they subscribed, though form of authentication … was annexed to the … petition at the time that each of the signatures was obtained.

Id.

Although the notary public's attestation on the petition at issue that the signing voter was "by me duly sworn" and that such voter "said that the foregoing statement made and subscribed by him or her, was true," ELECTION LAW §§ 6-132(3) & 6-166, is entitled to a "strong presumption of regularity," *Bonner v Negron*, 87 AD3d 737, 738 (2d Dep't 2011); *Frazier v Leon*, 186 AD2d 99, 100 (2d Dep't 1992), and not all formalities of the oath need be observed, *Bonner*; *Frazier*, *supra*, the notary presumption can be rebutted by credible testimony that the voter was not placed under oath or made to attest to the truth of his or her statement. *See Leahy v O'Rourke*, 307 AD2d 1008, 1009 (2d Dep't 2003) ("unrefuted testimony … that notary public … did not administer an oath or affirmation to the witnesses in

any manner required by law" invalidates such signatures).

In *Venditto v Brooks*, 142 AD3d 935, 935–36 (2d Dep't 2016), the court overruled the objections to petition signatures based upon a notary's failure to administer an oath where the

> notary public testified that he *introduced himself to each signatory*, and *told each one that he was a notary public* and *that his or her signature had to be notarized*. In addition, *he explained to them what they were signing*, and that *by signing, they were affirming the truth of the statement printed on the designating petition*. The notary public further testified that *the signatories affirmed the truth of the statement on the designating petition, and acknowledged what they were doing*.

Id. (emphasis added); *see also Merrill v Adler*, 253 AD2d 505, 506 (2d Dep't 1998) (notary public must obtain "statements from [signing voters] as to the truth of the statements to which they subscribed their names").

The *Venditto* Court found the notary credible over the testimony of signatories to the extent they conflicted. *Venditto*, *supra*. Accordingly, the *Venditto* Court properly found that the oath was administered in a form "calculated to awaken the conscience and impress the mind of the person taking it in accordance with his [or her] religious or ethical beliefs…." *Id*.; CPLR § 2309(b) ("An oath or affirmation shall be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.").

While substance reigns over form when it comes to the oath, in *Andolfi v Rohl*,

83 AD2d 890, 890 (2d Dep't 1981), the Court appears to have found that a notary who merely referenced an oath fell short:

> Notwithstanding the fact that the [notary] … testified that she did formally administer an oath to each of the four signatories, it appears that all she did was (1) inform each that she had to "swear" him and (2) have each state that he was who he purported to be.

Id.

Where the credible evidence shows that a witness was not sworn or under oath or did not attest to the truth of their alleged statements, that signature is invalid. In the absence of at least six valid signatures, the Court granted the petition to invalidate the subject Opportunity to Ballot Petition.

Furthermore, Respondent committee members failed to appear and therefore chose not to "contest the ensuing issues of fact…. [c]onsequently, there [is] no jurisdiction to review any question" that was not raised by Respondents. *Molloy v Lawley*, 25 NY2d 814 (1969). Respondent Board of Elections, while appearing, raised no opposition to the proceeding and took no position on the issues discussed above.

The Court the relief sought by our client and declared the Opportunity to Ballot Petition insufficient, defective, invalid, null and void and ordered the Board of Elections to not permit the write in or nomination of undesignated candidate(s) on the Party election in the Primary Election.