

ELECTION LAWS:
ABSENTEE VOTING:

Chapter 112 on absentee balloting is mandatory in its application and limits absentee balloting to precise procedures spelled out in the statutes. An Elector wishing to vote must apply either in person or by mail for his ballot. An elector wishing to cast an absentee ballot must either return his ballot by mail or deliver it in person to the issuing officer.

OPINION NO. 500

November 3, 1966

Honorable Fred A. Murdock, Chairman
Board of Election Commissioners
1331 Locust Street
Kansas City, Missouri 64106



Dear Mr. Murdock:

This opinion responds to your inquiries which you have posed by your letter involving the validity of your procedures for handling absentee ballots. The questions are set out below:

"1. May absentee ballots be issued to a qualified voter upon receipt of a signed written application therefor delivered by messenger to the Board, rather than by mail or a presentment by the applicant himself, in the light of the provisions of Section 112.020 RSMo., 1959?

"2. May the Board accept voted absentee ballots upon the delivery thereof to the Board by a messenger, rather than by mail or delivery by the voter in his own proper person, in light of the provisions of Section 112.050 RSMo., 1959?"

Parenthetically, it is noted the Missouri Constitution, 1945, provides in Article VIII, Section 7, only for absentee voting of those who are absent, whether within or without the state.

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The pertinent statutes on absentee voting, read, in part, as follows:

Section 112.010 RSMo., 1959 is as follows:

"Any person being a duly qualified elector of the state of Missouri, * * * who expects to be absent from the county * * * or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

Section 112.020 RSMo., 1959 is as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of the election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, * * * may make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, * * * In the event the elector recovers from his illness or physical disability sufficiently to permit him to present himself at the proper polling place for the purpose of casting his ballot, or in the event the elector, having expected to be absent, is in the county of his residence on election day, the absentee ballot cast by the elector shall be void, and the elector shall notify the county clerk of the removal of the disability before six o'clock p.m. on the day following the day of election."

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Section 112.030 RSMo., 1959 Supp. is as follows:

"Application for such ballot may be made on a blank signed by the applicant, to be furnished by the county clerk or the board of election commissioners * * * or may be made in writing by first class mail addressed to such officer or board signed by the said applicant,* * * and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send in a separate envelope addressed to each absentee voter and by certified mail with return receipt or deliver in person an official ballot or ballots if more than one is to be used and voted at said election to any applicant applying in person at the office of the county clerk or the board of election commissioners."

Section 112.050 RSMo., 1959 states as follows:

"The envelope shall be sent by mail by the voter, postage prepaid, to the officer issuing the ballot, and for the ballot to be effective and eligible to be counted the envelope containing it shall bear a postmark not later than the date of the election and shall be delivered to the issuing official not later than six o'clock p.m. of the day next succeeding the day of such election, or the ballot may be delivered in person to the issuing official, who shall give his written receipt therefor, not later than six o'clock p.m. of the date of the election."

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Section 112.120 RSMo., 1959, states as follows:

"Sections 112.010 to 112.120 shall be deemed to provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote, on election day. It is in addition to the method now provided by statutes in cases where the voter is present at the polling place in the county where he resides on the day of such election and to such extent is amendatory of and supplemental to existing statutes."

In answering your questions, we assume that the messenger that you refer to is the messenger or agent of the absentee voter.

In construing statutes, it is a cardinal principal that you first seek the legislative intent of the whole act and if possible, to effect that intent. (State ex rel v. Rooney, 406 S.W. 2d 1; May Department Stores Co. v. Weinstein, 395 S.W. 2d 525). Words should be given their plain and ordinary meaning (Bittker v. State Board of Registration for Healing Arts, 404 S.W. 2d 402, Johan v. Mayor, 391 S.W. 2d 864). Statutes normally directing the mode of procedure by public officers are to be held directory unless declared to be mandatory by the law itself. (Scales v. Butler, 323 S.W. 2d 25, 29. However, in Elliott v. Hogan, 315 S.W. 2d 840, 846, the St. Louis Court of Appeals has held these sections above quoted to be mandatory. We quote extensively from that decision as follows:

"In his brief contestee admits that the procedures followed in the case of the casting of 16 of the absentee ballots did not meet all of the 'technical provisions', as he describes them, of the relevant statutes, but contends that such statutes are merely directory, and not mandatory, and that being merely directory, non-compliance with the statutes was not a proper basis upon which to reject such ballots. The terms 'mandatory' and 'directory' are convenient only for the purpose of distinguishing one class of

irregularities from another, for, strictly speaking, all laws are mandatory in the sense that they are enacted to be observed and obeyed. However, adopting, for convenience, the nomenclature heretofore commonly used, it is true that in many decisions involving our election laws a distinction has been drawn between the result which followed from the violation of a statute held to be mandatory and the consequence of a breach of a statute said to be merely directory in nature. State ex rel Woodmansee v. Ridge, 343 Mo. 702, 123 S.W. 2d 20; State ex rel Hay v. Flynn; 235 Mo. App. 1003, 147 S. W. 2d 210; State ex rel Ellis v. Brown, 326 Mo. 627, 33 S. W. 2d 104; State ex rel Haller v. Arnold, 277 Mo. 474, 210 S. W. 374.

"But whether a statute is mandatory or merely directory is not always clear. It has been said that if the statute in question prescribes the result to follow from its violation, the courts will consider the provision a mandatory requirement, and enforce it. Nance v. Kearbey, 251 Mo. 374, 158 S. W. 629; Gass v. Evans, 244 Mo. 329, 149 S. W. 628; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L.R.A. 754. In the latter case it was said, 20 S. W. loc. cit. 105:

'If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement.'

"And it has been held that where the irregularity has been such as not to have interfered with a full and fair expression of the voters' choice, particularly where it is a mistake of an election official, the irregularity

should not result in the disenfranchisement of the voters. *Bowers v. Smith*, supra; *Nance v. Kearbey*, supra.

"[2] Thus no hard and fast test can be applied by which the question may be resolved. As we said in *State ex rel Hay v. Flynn*, supra, 147 S. W. 2d loc. cit. 211:

'There is no absolute test by which the question here presented may be resolved, but in passing upon the matter, the prime object is to ascertain the legislative intent from a consideration of the statute as a whole, bearing in mind its object and the consequences that would result from construing it one way or the other.'

And see *State ex rel Ellis v. Brown*, supra, and *Hehl v. Guion*, 155 Mo. 76, 55 S. W. 1024.

"With this guide in mind, we turn to a consideration of §§ 112.010 et seq RSMo 1949, V.A.M.S. concerning absentee voting. A review of those statutes reveals a comprehensive and restrictive code for the casting of absentee ballots. Other than military personnel, § 112.010 limits the right of absentee voting to only those who expect to be absent on election day from the county in which they are qualified to vote, and to those who through illness or disability expect to be prevented from personally going to the polls to vote. Section 112.020 provides that if a voter applies for an absentee ballot on the ground of illness or physical disability he shall attach to his application a certificate of illness or disability attested to by a licensed physician or duly accredited

practitioner of Christian Science; that such application, on either of the statutory grounds, must be made in person or by mail to the election official within 30 days before the election and up to 6 o'clock p.m. on the day before the election. Such application, by § 112.030, must be made on blanks to be furnished by the election official, and the latter is required to compile, keep current, and post in a conspicuous place accessible to the public, a list giving the names, addresses, and voting places of those voters to whom he issues absentee ballots, which he is required to deliver to the applicant either in person or by mail.

"Section 112.040 provides that the election official shall initial the ballot before delivering it to the voter, and shall enclose it in an unsealed envelope bearing his name, official title, and post office address, as well as having printed thereon a form of affidavit set forth in the statute. Sections 112.050 to 112.100, inclusive, contain meticulous provisions as to the oath to be administered to the absentee voter by an officer authorized to administer oaths; the marking of the ballot in his presence; the sealing of the same in the official envelope; the return of the envelope to the election official by a designated time; the preparation by him of a list of absentee voters whose ballots are returned to him; the appointment of judges to open and canvass the absentee ballots; the challenging of votes; and the secrecy, sealing and safekeeping of such ballots."

"[3,4] Applying the principles referred to in determining the legislative intent, we are of the opinion that the absentee voting statutes with respect to such requirements are mandatory. By § 112.120, the General Assembly declared that such statutes were to provide a method of voting by voters absent from their county, or prevented by illness or physical disability from going to the polls to vote, on election day; that it is in addition to the method of voting at the polling places; and that it 'to such extent is amendatory of and supplemental to existing statutes.' As said in *Straughan v. Meyers*, 268 Mo. 580, 187 S. W. 1159, the absentee voting laws were enacted 'to provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised.' 187 S. W. loc. cit. 1163.

"But while the Legislature has extended this special privilege to those who would otherwise be unable to vote on election day, it is readily apparent that it has provided safeguards to prevent an abuse of the privilege. The right to vote an absentee ballot is strictly limited to two statutory grounds; absences from the county on election day, and illness or physical disability."

* * * * *

"Contestee points out that the only express statements as to the result to follow from a non-compliance with the act occurs in §112.050, in which it is provided that in order to be eligible to be counted the absentee ballot must

either be delivered to the election official by 6 o'clock p.m. of the day of the election, or be postmarked the day of the election and reach the election official the day next succeeding the election; and contends that the Legislature having thus made compliance therewith mandatory indicated that all other provisions are directory only. We think otherwise. Taking into account the purposes of the act, the nature of the safeguards provided, and the consequences which would result from non-compliance therewith, in our opinion the statutes are mandatory. It is equally as important and as obligatory that absentee ballots be issued only to those clearly entitled under the statute to receive them, and that such ballots should not be issued after the time designated in the statute, as it is that they be received by the election official before the stated time. And the result of non-compliance should be the same for all such violations."

We note that the above case was tried in 1958 and that the statute then provided that medical statements be attached. Otherwise, the statute was substantially the same. We must conclude that the statutory requirements (*supra*) are mandatory and must be strictly complied with by the elector. See also *Straughan v. Meyers*, Mo. 187 S. W. 1159, 1163.

Inasmuch as these statutes are in *pari materia*, and are to be read and construed together, with effect given to all provisions, if possible, we take the position the phrase, "in person" should be interpreted the same and harmonized throughout the entire act (*Mitchum v. Perry*, 390 S. W. 2d 600; *Bittiker v. State Board of Registration for the Healing Arts*, 404 S.W. 2d 402.)

Your question number one must therefore be answered in the negative inasmuch as under Section 112.020, the elector shall

either apply in person or by mail. See our Opinion No. 356 dated December 7, 1964, addressed to Honorable Frank Ellis (attached).

Your question number two must also be answered in the negative inasmuch as Section 112.050 requires the envelope containing the ballot "shall be sent by mail by the voter" or "the ballot may be delivered in person to the issuing official".

As used in Chapter 112, we conclude the words "may * * * or" to mean "either * * * or * * *". So read, any ambiguity is resolved and the several sections can be read in harmony with each of its several, component parts.

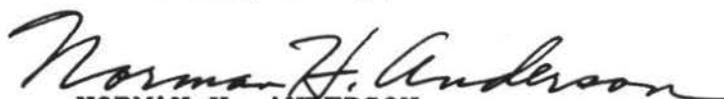
CONCLUSION

It is the opinion of this office that:

1. The requirements of Chapter 112, RSMo as amended, on absentee balloting are mandatory.
2. The elector wishing to vote an absentee ballot under Chapter 112 must apply either by mail or in person for his ballot.
3. The elector wishing to cast his absentee ballot under Chapter 112 must either return his ballot by mail or deliver it in person to the issuing officer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General