

## § 29. Scope of Examination; Objections

Witnesses may be examined regarding any matter, not privileged, relevant to the subject matter involved in the case, whether it relates to a claim or defense. The examination may extend to such subjects as the existence, description, nature, custody, and the condition and location of books, papers, documents, or other tangible things, as well as the identity and location of persons having knowledge of relevant facts. The right of cross examination is to be afforded the opposing party.<sup>(6)</sup>

Objections to the proceedings, including objections to the qualifications of the officer taking the deposition or to the manner of taking it, or to the evidence presented, or the conduct of any party, are to be noted by the officer. Evidence objected to is taken subject to such objection.<sup>(7)</sup>

A subpoena to compel the production of books, papers, or other tangible things designated therein is permitted under the Federal Contested Elections Act. However, the Committee on House Administration, on motion, may quash or modify the subpoena if it is unreasonable or oppressive, or condition

6. 2 USC § 386(b).

7. 2 USC § 386(g).

denial of it on the advancement of reasonable production costs.<sup>(8)</sup>

### *Failure to Produce Testimony*

**§ 29.1 A request was made by contestant to the Clerk of the House seeking the production of testimony taken before a commissioner who failed to forward it to the Clerk.**

In *Casey v Turpin* (§47.3, *infra*), a 1934 Pennsylvania contest, the committee recommended dismissal of the contest for lack of evidence of the matters charged in the notice, and for the failure of the contestant to appear in person and show cause why his contest should not be dismissed. The contestant had argued that he could not present evidence because an official failed to forward testimony, and that he had asked the clerk to seek such testimony.

### *Ballots as "Papers" Required To Be Produced*

**§ 29.2 The statute authorizing an officer to require the production of "papers" has been construed to confer authority to require the production of ballots.**

8. 2 USC 388(e).

In the 1932 Illinois election contest of *Kunz v Granata* (§46.2, *infra*),<sup>(9)</sup> ballots were determined to be “papers” within the meaning of 2 USC §219 such that their production could be demanded by a party.<sup>(10)</sup>

In this instance the contestant sought and obtained the appointment of a notary public to obtain testimony in his behalf. This notary public served a subpoena duces tecum on the election officials, who then procured the ballots and other materials from a court which had impounded them (for recounting a municipal election).

Upon a recount conducted by the election officials under the supervision of the contestant’s notary public, and in the presence of a notary public appointed by the contestee, it was determined that the contestant had received a majority of 1,288 votes in the election.

**§ 29.3 The more recent view, as asserted by the majority of an elections committee in 1949 and supported by the House, is that ballots them-**

9. Also reported in 6 Cannon’s Precedents §186.

10. 2 USC §219, now 2 USC §388. But see the 1949 Michigan contested election case of *Stevens v Blackney* (§55.3 *infra*).

**selves are not considered “papers” within the meaning of the contested elections statute permitting certain officers to require the production of papers pertaining to an election.**

In the 1949 Michigan contested election case of *Stevens v Blackney* (§55.3, *infra*), the Subcommittee on Elections sustained the action of an election official who refused to comply with a subpoena duces tecum issued by a notary public ordering him to bring the ballots in a contested election. Although the minority contended that the notary public was an “official” within the purview of 2 USC §206, who could demand production of the ballots as “papers” within the meaning of 2 USC §219, and cited the contested election case of *Kunz v Granata* (§46, *infra*), in support thereof, the majority disagreed with this interpretation of §219 and ruled that the official did not have to produce the ballots. The decision was based upon certain practical considerations, such as the difficulty of submitting certified copies of such “official papers” to the Clerk, payment to officials for making such copies and inclusion of voting machines as “official papers.” Further, the majority cited the problem of decid-

ing which count would be accepted by the House, that of the contestant's notary public or that of the bipartisan officials who first conducted the count. It was suggested that the alternative of having the House conduct a third count would not be effective because the inviolability of the ballots would then have been destroyed. Ultimately, the House sustained the committee by agreeing to a resolution seating the contestee.<sup>(11)</sup>

### § 30. Subpenas

The attendance of witnesses may be compelled by subpoena in the manner provided by the Federal Contested Elections Act.<sup>(12)</sup> Subpenas for compelling attend-

11. Under the 1969 Contested Elections Act, the question whether the ballots are "papers" that must be produced is not resolved. While only judges, or their clerks whether federal, state or county, may now issue subpoenas under 2 USC § 388(a), they may command the person to whom it is directed to bring "books, papers, documents, or other tangible things" designated in the subpoena under § 388(e). Ballots are not specifically mentioned. However, the subsection further provides that the committee before the time specified in the subpoena may "quash or modify the subpoena if it is unreasonable or oppressive. . . ." (See also § 39.3, *infra*.)
12. 2 USC § 386(e).

ance at a deposition must be issued by a judge or clerk of a federal district court or court of record of the state or county where the place of examination is located.<sup>(13)</sup>

The time, method, and proof of service is prescribed under the act, as is the form of the subpoena.<sup>(14)</sup>

A witness may be required to attend an examination only in certain counties or within 40 miles of the place of service.<sup>(15)</sup>

---

### *Clerk's Refusal to Respond to Subpena*

**§ 30.1 The settled rule that the Clerk will not give up House documents without authorization from the House has been followed by the Clerk in refusing to respond to a subpoena served by contestant in an election contest for purposes of obtaining documents filed by contestee in a contested election case.**

In the 1934 Illinois election case of *Weber v Simpson* (§47.16, *infra*), the contestant's notary public served a subpoena duces tecum upon the Clerk requesting

13. 2 USC § 388(a).

14. 2 USC § 388 (b), (d).

15. 2 USC § 388(c).