

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 10 ELECTIONS AND ELECTED OFFICIALS
PART 22 PROVISIONAL VOTING

1.10.22.1 ISSUING AGENCY: Office of the Secretary of State, 325 Don Gaspar, Suite 300, Santa Fe, New Mexico, 87501.
[1.10.22.1 NMAC - Rp, 1.10.22.1 NMAC, 4/24/2018]

1.10.22.2 SCOPE: This rule applies to any election covered under the Election Code, Section 1-1-19 NMSA 1978 and the Special Election Act, NMSA 1978.
[1.10.22.2 NMAC - Rp, 1.10.22.2 NMAC, 4/24/2018]

1.10.22.3 STATUTORY AUTHORITY: Election Code, Section 1-2-1; Section 1-6-5; Section 1-6-16; Section 1-6-16.1; 1-12-25.2; Section 1-12-25.3; Section 1-12-25.4; 1-12-27.1 NMSA 1978 and Public Law 107-252, The Help America Vote Act of 2002.
[1.10.22.3 NMAC - Rp, 1.10.22.3 NMAC, 4/24/2018]

1.10.22.4 DURATION: Permanent.
[1.10.22.4 NMAC - Rp, 1.10.22.4 NMAC, 4/24/2018]

1.10.22.5 EFFECTIVE DATE: April 24, 2018 unless a later date is cited at the end of a section.
[1.10.22.5 NMAC - Rp, 1.10.22.5 NMAC, 4/24/2018]

1.10.22.6 OBJECTIVE: The Help America Vote Act, PL 107-252, effective October 29, 2002, requires the casting of a provisional ballot in the following circumstances; a voter whose name does not appear on the roster at the polling place, on the county voter file, or a new voter who has not provided the required identification to vote. The Election Code also provides for the use of a provisional ballot qualification process in the instance of an affirmed challenge or when a replacement ballot for an absent voter is required or in the event of an emergency, as defined in Section 1-6-16.2 NMSA 1978. This rule creates uniform criteria for the issuance and reporting of all provisional ballots and offers consistency in the qualification process and for the counting and canvassing of provisional ballots. The rule also provides for the secrecy of a provisional voter's ballot during each stage of the election process, extending through a recount or contest of the election and the ensuing requalification of the provisional ballots.
[1.10.22.6 NMAC - Rp, 1.10.22.6 NMAC, 4/24/2018]

1.10.22.7 DEFINITIONS:

A. “Adjudicate” means a decision made by a precinct board, in accordance with the Election Code, of a ballot signifying a voter's intent to mark their selection for a candidate contest or ballot question.

B. “Alternate voting location” means a location outside the office of the county clerk, established by the county clerk, where a voter may cast an early in person ballot on voting tabulator. This includes mobile alternate voting locations.

C. “Blank ballot” means a paper ballot on which the voter has not selected any of the alternatives allowed in any candidate contest or ballot question.

D. “Canvass” means the process of qualifying and verifying paper ballots and counting and tallying votes for each precinct beginning upon the closing of the polls and ending with the certification and announcement of the results by the county canvassing board pursuant to Subsection F of Section 1-2-31 NMSA 1978.

E. “Challenger” means a voter of a precinct located in that county, who has completed the required training pursuant to Section 1-2-22 NMSA 1978, and to which the voter is appointed in conformance with the Election Code, [~~Section 1-2-21 to 1-2-22 NMSA 1978~~] for the purpose of carrying out such duties as prescribed in the Election Code, [~~Section 1-2-23 to 1-2-26 NMSA 1978~~].

F. “Contest” means court litigation that seeks to overturn the outcome of an election pursuant to the Election Code, Section 1-14-1 NMSA 1978.

G. “County canvass observer” a voter of the county, who has completed the required training pursuant to Section 1-2-22 NMSA 1978, and to which they are appointed, in accordance with the Election Code, Section 1-2-31 NMSA 1978, and permitted to be present at any time from the time the county canvassing begins until the completion of the canvass, and strictly limited to observing and documenting the canvassing process.

H. “County canvassing board” means the board of county commissioners in each county, convened for the purposes of conducting the county canvass or the board of registration as designated by the board of county commission pursuant to Section 1-13-1 NMSA 1978.

I. “County voter file” means the computerized version of the county register, comprising a portion of the statewide voter file.

J. “Health care provider” means an individual licensed, certified or permitted by law to provide health care in the ordinary course of business or practice of a profession.

K. “Inner envelope” means the official envelope, prescribed by the secretary of state, given to the voter along with ~~[an absentee]~~ a mailed or provisional ballot into which the voter places the ballot after it is voted and which is used to preserve the secrecy of the voter’s ballot.

L. “Naked ballot” means a provisional or ~~[absentee]~~ mailed ballot that has not been placed in the inner envelope by the voter.

M. “Overvoted ballot” means a ballot on which the voter has selected more than the number of candidates to be elected for that contest, or has voted in both the affirmative and negative on a ballot question.

N. “Precinct” means ~~[a part of a county with definite boundaries established for electoral administrative functions]~~ a designated division of a county for election and redistricting.

O. “Provisional ballot envelope” means the official envelope, prescribed by the secretary of state, which has information that will identify the provisional voter, purpose the provisional ballot was issued and contains a sworn affidavit and a blank voter registration certificate, into which the provisional voter places the inner envelope.

P. “Provisional ballot transmission envelope” means a sealed envelope or pouch marked and designated by the county clerk to transmit provisional ballots from the polling place or alternate location to the office of the county clerk.

Q. “Qualification process” means the process used by a county clerk to determine the qualifications of a voter who voted on a provisional ballot.

R. “Replacement absentee ballot” means a ballot that is processed as a provisional ballot, that is provided to a voter whose name appears on the absentee ballot register or signature roster as having been issued an absentee ballot, and who has affirmed that the ballot was not received or voted on pursuant to the Election Code, Section 1-6-16 NMSA 1978. The ballot shall be placed in a provisional ballot envelope prescribed by the secretary of state and processed within the timeframe specified in the Election Code, Section 1-6-16 NMSA 1978.

S. “Signature roster” means ~~[the certified list of voters at a polling place, which is signed by a voter or county voter file at a consolidated polling place]~~ a physical or electronic copy of a voter list with space provided opposite each voter’s name for the voter’s signature or witnessed mark.

T. “Tally sheet” means a ~~[document]~~ form prescribed by the secretary of state used for the counting and tallying of votes cast on a ballot that has not been fed into a voting tabulator.

U. “Undervoted ballot” means a paper ballot that is not a blank ballot, and on which the voter has selected at least one candidate or answered at least one ballot question in accordance with the instructions for that ballot type, but on which the voter has selected fewer than the number of alternatives allowed in a candidate contest or on a ballot question.

[1.10.22.7 NMAC - Rp, 1.10.22.7 NMAC, 4/24/2018; A, 8/31/2023]

1.10.22.8 PROVISIONAL BALLOT ISSUANCE AND PRECINCT BOARD PROCEDURES:

A. A person offering to vote shall be allowed to vote on a provisional ballot in accordance with the Election Code.

B. When issuing a provisional ballot, the precinct board shall ensure the following:

- (1)** a provisional voter places the ballot in the inner envelope and provisional ballot envelope prescribed by the secretary of state and shall fill out all required information on the provisional ballot envelope;
- (2)** the name of a provisional voter is entered in the signature roster on the line immediately following the last entered voter’s name, or in its electronic equivalent when consolidated precincts are used, pursuant to the Election Code;
- (3)** a provisional voter completes the certificate of voter registration attached to the provisional ballot envelope, and that the certificate of registration remains attached to the provisional ballot envelope and returned to the county clerk;
- (4)** a provisional voter is not permitted to place the voted ballot into the voting tabulator;
- (5)** a provisional voter is not subject to a challenge at the time of voting under the procedures provided in the Election Code;

(6) the required physical form of identification provided by a provisional voter who returned to the alternate voting location, mobile alternate voting location or election day polling place, after already casting a provisional ballot, shall be placed with the provisional ballot envelope to be used by the county clerk during the provisional ballot qualification process, in accordance with the Election Code, Section 1-12-7.1 NMSA 1978; and,

(7) a provisional ballot shall not be placed in the ballot box designed for tabulated ballots, but rather, shall be deposited in a special sealed provisional ballot transmission envelope, pouch or ballot box designated by the county clerk for the sole use of securing provisional ballots.

C. After the period allowed for voting at the office of the county clerk, alternate voting location, mobile alternate voting location, or, upon close of the election day polling place, all provisional ballots shall be delivered and transferred to the county clerk. A receipt indicating the date and time, the total number of provisional ballots, the name of the alternate voting location, mobile alternate voting location or election day polling place, and the signature of the presiding judge shall be prepared. After verification of the total number of provisional ballots received, the county clerk shall sign the receipt indicating custody of the ballots.

[1.10.22.8 NMAC - Rp, 1.10.22.8 NMAC, 4/24/2018]

1.10.22.9 COUNTY CLERK PROCEDURES:

A. The county clerk is charged with, and authorized to, determine the qualification of provisional ballots issued for the election, and must notify provisional voters of the qualification determination and count and record qualified provisional ballots.

(1) The provisional ballots shall be kept separate by each voting method - absentee, early or election day, as well as, by the name of the alternative voting location, mobile alternate voting location or election day polling place. The provisional ballot envelopes shall not be opened until the county clerk has completed the qualification process.

(2) A provisional ballot shall be qualified if the voter has provided all the information under the Election Code, Section 1-12-25.3 NMSA 1978, and the provisions set out in the Election Code, Section 1-12-25.4 NMSA 1978 have been met.

B. The provisional ballot qualification process shall be conducted by the county clerk, as follows:

(1) read aloud the name and address on the provisional ballot envelope;

(2) determine, by use of the statewide voter file, the registration status, county of registration and correct precinct of the provisional voter, or if the required physical form of identification is attached; and,

(3) publicly announce whether the provisional ballot is qualified or disqualified and the reasons for that determination.

C. A county canvass observer, pursuant to the Election Code, Section 1-2-31 NMSA 1978 may be present during the provisional ballot qualification and canvass.

(1) During the provisional ballot qualification process and canvass, the observer shall wear a self-made badge designating the observer as an authorized observer of a candidate or organization.

(2) The observer shall not wear any other form of identification and all campaign and electioneering materials are prohibited.

(3) The observer shall not perform any duty of the county clerk, handle any material, or interfere with the orderly conduct of the provisional ballot qualification or canvass.

(4) The observer shall not be in the view of the provisional ballot envelope, so as to maintain the privacy of the voter's social security number or full date of birth, nor shall the use of cell phones or electronic recording equipment be allowed while observing.

(5) Observers are permitted to take written memoranda for later reference.

D. The determination of the provisional ballot disposition, along with the research done by the county clerk, shall be noted on the provisional ballot envelope by the county clerk to include the following:

(1) notation of qualified or disqualified status;

(2) the voter's correct voting precinct, if registered;

(3) the voter's correct party designation, if registered;

(4) if the voter is registered in a different party than that of the issued ballot, a notation of "Different Party" shall be made;

(5) if the voter is registered in a different county within the state, a notation of "Out of County" shall be made;

(6) if the voter is not registered in the state, a notation of "Not Registered" shall be made;

(7) if the voter's record shows that a ballot for the election has already been received, a notation of "Already Voted" shall be made;

(8) if the voter's record shows it has been cancelled in accordance with the Election Code, a notation of "Cancelled" along with the reason for cancellation shall be made; and,

(9) when consolidated precincts are not used, the relevant districts in which the voter is registered shall be listed so that only the votes for those candidate contests or ballot questions for which the voter is eligible to vote shall be counted.

E. The county clerk, after the qualification process, shall separate qualified provisional ballot envelopes from unqualified provisional ballot envelopes, while keeping them arranged by voting method - absentee, early or election day - and sorted by each alternative voting location, mobile alternate voting location or election day polling place. Unqualified provisional ballot envelopes shall not be opened and shall be deposited in an envelope or ballot box marked "unqualified provisional ballots" and retained pursuant to the Election Code, Section 1-12-69 NMSA 1978.

(1) The provisional ballot envelope for qualified provisional paper ballots shall be opened and attached to the inner envelope and ballot, until the time period for an election recount or contest has expired, pursuant to the Election Code, Section 1-14-1 to 1-14-25 NMSA 1978. The county clerk shall place naked ballots in an individual envelope to replace the inner envelope.

(2) After the counting of qualified provisional ballots, the county clerk shall deposit the provisional ballots with attached outer and inner envelopes in an envelope or ballot box marked "counted provisional ballots". The provisional ballots shall be retained pursuant to the Election Code, Section 1-12-69 NMSA 1978.

(3) At no time shall the county clerk or members of the canvassing board disclose the votes of a provisional voter.

[1.10.22.9 NMAC - Rp, 1.10.22.9 NMAC, 4/24/2018]

1.10.22.10 TABULATION AND CANVASSING OF QUALIFIED PROVISIONAL BALLOT PROCEDURES:

A. Qualified provisional ballots shall be counted for the reporting of votes by precinct and voting method for each candidate contest or ballot question, as specified in the Election Code, Section 1-12-70 NMSA 1978. Only the votes for those candidate contests or ballot questions for which the voter is eligible to vote shall be counted, as follows:

(1) A qualified [~~absentee by mail~~] mailed ballot, processed as a provisional ballot, in a provisional ballot envelope prescribed by the secretary of state because the first time voter did not provide the required form of physical identification prior to the ballot issuance, shall be hand tallied and recorded in the absentee provisional by hand tally counting group, or tabulated by a voting tabulator designated, programmed and certified for such specific use, and recorded in the absentee provisional by machine counting group.

(2) A qualified absentee replacement ballot, processed as a provisional ballot, in a provisional ballot envelope prescribed by the secretary of state because the absentee voter did not receive, or if received, did not vote the [~~absentee by mail~~] mailed ballot, shall be hand tallied and recorded in the absentee provisional by hand tally counting group, or tabulated by a voting tabulator designated, programmed and certified for such specific use, and recorded in the absentee provisional by machine counting group.

(3) A qualified provisional ballot issued during early voting in the office of the county clerk, alternate voting location or mobile alternate voting location shall be hand tallied and recorded in the early voting provisional by hand tally counting group, or tabulated by a voting tabulator designated, programmed and certified for such specific use, and recorded in the early voting provisional by machine counting group.

(4) A qualified provisional ballot issued on election day shall be hand tallied and recorded in the election day provisional by hand tally counting group, or tabulated by a voting tabulator designated, programmed and certified for such use, and recorded in the election day provisional by machine counting group.

(5) A qualified federal write-in absentee ballot shall be hand tallied and shall be counted and recorded in the federal overseas hand tally counting group.

(6) The hand tally of votes from qualified provisional ballots shall be conducted in accordance with 1.10.23 NMAC by a team of at least two persons. The team shall consist of one reader and one marker, not of the same political party, if possible. The reader shall read the ballot to the marker and the marker shall observe whether the reader has correctly read each vote from the ballot; the marker shall then mark the tally sheet of the precinct, voting method and voting location where the ballot was cast, and the reader shall observe whether the marker correctly marked the tally sheet. The hand tally team shall observe the following:

(a) Only the votes for the candidates or ballot questions from the precinct the voter is eligible to vote for shall be counted;

(b) Each ballot shall increase the ballots cast count by one;
(c) Only those contests receiving no more than the allotted selections for the number of candidates to be elected or ballot questions where there is one selection for either the affirmative or negative will be hand tallied on overvoted ballots;
(d) No votes for either candidate contests or ballot questions will be hand tallied for blank ballots;
(e) Only those candidate contests or ballot questions receiving a selection by the voter will be hand tallied on an undervoted ballot; and,
(f) Overvoted, blank or undervoted ballots cast by voters, after going through the above process shall be recorded as a "ballot cast" and proper voting credit shall be given on the respective voter registration record on file with the county clerk.

(7) When a voting tabulator is used for the counting and recording of qualified provisional ballots of voters who were issued a ballot for their correct voting precinct, a member of the county canvassing board shall feed the ballots into the voting tabulator.

(a) An overvoted or blank provisional ballot shall be accepted by the voting tabulator after it has been adjudicated by the county canvassing board. The ballot will be counted and recorded in the appropriate machine counting group, as detailed above.

(b) If a provisional ballot is misread after being fed into a voting tabulator, a county canvass board member shall feed it into the voting tabulator a second time. A provisional ballot that is rejected after two attempts shall be adjudicated by the county canvass board, hand tallied, counted and recorded in the appropriate hand tally counting group, as detailed above.

B. During the counting of qualified provisional ballots, the county clerk shall ensure that observers are not permitted to see the identity of any voter whose ballot is being tallied. If, in the instance of only one provisional ballot cast in an alternate voting location, mobile voting location or election day polling place, the observer may know the identity of the voter, but may not observe the tally of the ballot.

C. Upon the conclusion of the county canvass, the county clerk shall transmit the provisional ballot results to the office of the secretary of state in accordance with the Election Code, Subsection H of Section 1-12-25.4 NMSA 1978, and the county canvassing board shall direct the county clerk to prepare the required provisional ballot report.

D. If there is a discrepancy in the number of provisional ballots returned based on the number of provisional ballots issued, the county canvassing board shall follow the procedures set out in the Election Code, Section 1-13-1 to 1-13-22 NMSA 1978.

[1.10.22.10 NMAC - N, 4/24/2018; A, 8/31/2023]

1.10.22.11 PROVISIONAL VOTER NOTIFICATION AND HEARING PROCESS:

A. In accordance with ~~Subsection A of~~ Section ~~[1-12-12.2]~~ 1-12-25.2 NMSA 1978, the county clerk shall notify each provisional voter whose provisional ballot was rejected and inform the voter of ~~[their ability]~~ the right to appeal such rejection and provide information or documentation to cure the reason the ballot was rejected until the Friday prior to the meeting of the state canvassing board. ~~[, by requesting a hearing.]~~ The appeal process shall be conducted as follows:

(1) the voter shall submit a written request for a hearing to appeal the rejection, and at any time up to and including the appeal hearing, the voter may provide information or documentation to satisfy the reason the ballot was rejected

~~[(4)]~~ (2) the county clerk shall select a hearing officer(s) from staff or a person who is not affiliated with any candidate to be voted for at the election and knowledgeable of election law;

~~[(2)]~~ (3) the county clerk shall provide a disability accessible room for the appeal hearing to be held;

~~[(3)]~~ (4) the voter shall schedule an appointment time for an appeal by calling the county clerk's office and shall appear under oath and show by a preponderance of the evidence that the vote should be counted;

~~[(4)]~~ (5) the voter may appear with an advocate;

~~[(5)]~~ (6) the appeal hearing shall be a public meeting, but the voter's date of birth and social security number shall not be stated out loud and the public shall not be in the line of sight or view or make notes of the voter's personal information;

~~[(6)]~~ (7) the county clerk and the public may make a brief public comment and offer relevant exhibits but only the hearing officer shall be permitted to cross examine the witness;

~~[(7)]~~ (8) the hearing officer shall not be bound by the rules of civil procedure, but may use them

for guidance and shall make an immediate oral decision explaining the decision by citing a provision of the Election Code;

~~(8) — there is no statutory right of appeal; and~~

(9) if the voter prevails, the hearing officer shall direct the county clerk to handle the ballot as a qualified provisional ballot.

[1.10.22.11 NMAC - N, 4/24/2018; A, Rn, 8/31/2023]

1.10.22.12 SECRETARY OF STATE PROCEDURES:

A. Provisional voters wishing to determine the disposition of their provisional ballot may call the office of the secretary of state 14 days after the election. The secretary of state shall make the agency toll free number available to county clerks for the purpose of determining the status of provisional ballots, and shall establish a web-based computer program for the same purpose. The secretary of state, prior to providing information to a voter on the disposition of the voter's ballot, shall verify the identity of the voter.

B. The secretary of state shall not discuss the disposition of any provisional ballot with any person other than the provisional voter

[1.10.22.12 NMAC - Rp, 1.10.22.10 NMAC, 4/24/2018]

1.10.22.13 [RESERVED]

HISTORY OF 1.10.22 NMAC:

1.10.22 NMAC - Provisional Voting was Repealed and Replaced by 1.10.22 NMAC - Provisional Voting effective 4/24/2018.

History of Repealed Material:

1.10.22 NMAC - Provisional Voting Security (filed 8/1/2003) - Repealed effective 4/28/2006.

1.10.22 NMAC - Provisional Voting (filed 4/28/2006) - Repealed effective 4/24/2018.