

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, 87503.
[1.10.22.1 NMAC - Rp, 1.10.22.1 NMAC, 4-28-06]

1.10.22.2 SCOPE: This rule applies to any special statewide election, general election, primary election, countywide election or elections to fill vacancies in the office of United States representative and regular or special school district elections as modified by the School Election Law (Sections 1-22-1 to 1-22-19 NMSA 1978).
[1.10.22.2 NMAC - Rp, 1.10.22.2 NMAC, 4-28-06]

1.10.22.3 STATUTORY AUTHORITY: Election Code, Section 1-2-1 NMSA 1978; Chapter 356, Laws 2003, Public Law 107-252, The Help America Vote Act of 2002; Chapter 270, Laws 2005, Chapter 137, Laws 2011. The issuing authority shall issue rules to ensure securing the secrecy of the provisional paper ballot, especially during canvassing, reviewing or recounting and protecting against fraud in the voting process.
[1.10.22.3 NMAC - Rp, 1.10.22.3 NMAC, 4-28-06; A/E, 10-2-08, A, 3-15-12]

1.10.22.4 DURATION: Permanent.
[1.10.22.4 NMAC - Rp, 1.10.22.4 NMAC, 4-28-06]

1.10.22.5 EFFECTIVE DATE: April 28, 2006 unless a later date is cited at the end of a section.
[1.10.22.5 NMAC - Rp, 1.10.22.5 NMAC, 4-28-06]

1.10.22.6 OBJECTIVE: The Election Code (Section 1-1-1 NMSA through 1-24-4 NMSA 1978) was amended by Chapter 356, Laws 2003 and Chapter 137, Laws 2011. The purpose of the amendments is compliance with the provisions of PL 107-252, effective October 29, 2002, which allows a voter whose name does not appear on the roster at the polling place, county voter file, or a new voter whose name does not appear on the roster and has not provided the required identification to cast a provisional paper ballot. Chapter 270, Laws 2005 and Chapter 137, Laws 2011 amended the Election Code to require uniform criteria used to determine if provision ballots shall be counted, and to ensure the secrecy of the provisional ballot during verification, canvassing, recounting or election contest.
[1.10.22.6 NMAC - Rp, 1.10.22.6 NMAC, 4-28-06; A/E, 10-2-08, A, 3-15-12]

1.10.22.7 DEFINITIONS:

- A. “Abbreviated address”** means a voter using initials to designate a city within New Mexico and includes, but is not limited to, “LC” for Las Cruces, “SF” for Santa Fe, or “ABQ” for Albuquerque.
- B. “Abbreviated name”** means shortened given or surname including, but not limited to, ‘Pat’ for Patrick, Patricio, or Patricia, ‘Wm’ or ‘Bill’ for William, or ‘Rick’ for Ricardo or Richard.
- C. “Absentee ballot”** means a method of voting by ballot, accomplished by a voter who is absent from the voter’s polling place on election day.
- D. “Absentee precinct board”** means the voters of a county who are appointed by the county clerk to open, tabulate, tally and report absentee ballot results.
- E. “Absentee provisional ballot”** means the paper ballot issued to an absent provisional voter.
- F. “Alternate voting location”** means a site outside the office of the county clerk, established by the county clerk, where a voter may cast an absentee ballot and includes mobile alternate voting locations.
- G. “Ballot”** means a system for arranging and designating for the voter the names of candidates, constitutional amendments, and other questions to be voted on and for the marking, casting or otherwise recording of such votes, and the term includes absentee ballots, provisional paper ballots and all other paper ballots.
- H. “Contest”** means court litigation that seeks to overturn the outcome of an election pursuant to Section 1-14-1 NMSA 1978.
- I. “County canvassing board”** means the board of county commissioners in each county.
- J. “County voter file”** means the computerized version of the county register, comprising a portion of the statewide voter file.
- K. “Election”** means any special statewide election, general election, primary election, countywide

election or special election to fill vacancies in the office of United States representative and regular or special school district elections.

L. “Electronic vote tabulating (EVT) marksense voting system” or “optical scan vote tabulating system” means a voting system which records and counts votes and produces a tabulation of the vote count using a paper ballot imprinted on either or both faces with text and voting response locations. The marksense or optical scan vote tabulating voting system records votes by means of marks made in the voting response locations.

M. “In-lieu of absentee ballot” means a paper ballot provided to a voter at his polling place when the absentee ballot was not received by the voter before election day.

N. “In lieu of absentee ballot tally sheet” means a document or computer based document used by the county clerk for the counting of votes cast by a qualified in-lieu of absentee ballot voter,

O. “Naked ballot” means a provisional ballot or in-lieu of absentee ballot that has not been placed in the inner secrecy envelope by the voter.

P. “Observer” means a voter of a county who has been appointed by a candidate, political party chair or election related organization pursuant to the provisions of the Election Code.

Q. “Precinct” means a part of a county with definite boundaries established for electoral administrative functions.

R. “Precinct board” means the appointed election officials at a polling place, consolidated polling place, absentee precinct or alternate location.

S. “Provisional absentee voter” means a voter who votes on a provisional absentee ballot because the voter is a new registrant to the state, registered to vote the first time by mail and has not submitted the required voter identification.

T. “Provisional paper ballot” means a paper ballot that is marked by a provisional voter.

U. “Provisional paper ballot tally sheet” means a document or computer based document approved by the secretary of state, used by the county clerk for the counting of votes cast by a qualified provisional voter.

V. “Provisional paper 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.

W. “Provisional voter” means a voter casting a provisional ballot pursuant to the provisions of the Election Code, or a voter whose name does not appear on the signature roster or on the county voter file.

X. “Required voter identification” means the forms of identification as specified in Section 1-1-24 NMSA 1978.

Y. “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.

Z. “Tally sheet” means a document prepared by the county clerk and used for the counting of provisional paper ballots, hand tallied absentee ballots, in-lieu of absentee ballots and emergency paper ballots.

AA. “Verification process” means the process used by a county clerk to determine the qualifications of a voter who voted a provisional paper ballot or in-lieu of absentee ballot.

BB. “Voter” means any person who is qualified to vote under the provisions of the constitution of New Mexico and the constitution of the United States and who is registered under the provision of the Election Code of the state of New Mexico.

[1.10.22.7 NMAC - Rp, 1.10.22.7 NMAC, 4-28-06; A/E, 10-2-08, A, 3-15-12]

1.10.22.8 PRECINCT BOARD PROCEDURES:

A. A voter whose name does not appear on the signature roster or county voter file at a consolidated polling place or who is required to present identification at the polling place or alternate voting location and is unable to do so shall be entitled to cast a vote on a provisional paper ballot. The precinct board shall instruct the voter that the required voter identification must be taken to the office of the county clerk no later than 5:00 p.m. two (2) days after the election for the ballot to be qualified. The precinct judge shall give the voter written instructions on how the voter may determine whether the vote was counted and, if the vote was not counted, the reason it was not counted. The precinct board shall ensure that each provisional voter or in-lieu of absentee voter is provided with a toll free telephone number that may be called fourteen (14) days after the election for a determination on whether the provisional ballot was counted.

B. Each polling place shall post the telephone numbers of the county clerk and the secretary of state and a map of the precincts represented in that polling place and an alphabetical list of the voters in each precinct in that polling place. The precinct board shall also ensure that the provisional voter, or in-lieu of absentee voter shall fill out all required information on the provisional paper ballot affidavit or in-lieu of absentee ballot affidavit and

place the ballot in the inner secrecy envelope and outer envelope prescribed by the secretary of state. The precinct board shall ensure that the name of a provisional voter or in-lieu of absentee ballot voter is entered in the signature roster on the line immediately following the last entered voter's name, pursuant to the Election Code.

C. The precinct board shall ensure that each provisional paper ballot voter completes the certificate of voter registration attached to the provisional paper ballot outer envelope and that the certificate of registration remains attached to the provisional ballot outer envelope and is returned to the county clerk in the provisional ballot transmission envelope.

D. The precinct board shall ensure that each provisional paper ballot, or in-lieu of absentee ballot cast at a polling place or alternate site is placed in an inner or secrecy envelope prior to placing the inner or secrecy envelope in the outer envelope containing the voter's oath or affirmation and certificate of voter registration.

E. The precinct board shall ensure that a provisional paper ballot voter or in-lieu of absentee ballot voter is not permitted to place the voted ballot into the electronic vote tabulating marksense voting system.

F. The precinct board shall ensure provisional paper ballot voters are not subject to challenge at the time of voting under the procedures provided in the Election Code.

G. The precinct board shall ensure that a provisional paper ballot or in-lieu of absentee ballot shall not be placed in the ballot box at the polling place, alternate voting location or county clerk's office. Provisional paper ballots shall be deposited in a special sealed provisional paper ballot transmission envelope or pouch designated by the county clerk for that purpose.

H. Identification documents submitted with provisional absentee ballots shall be attached to the voter's certificate of registration and a notation that the documents have been submitted shall be entered into the electronic file of registered voters.

[1.10.22.8 NMAC - Rp, 1.10.22.8 NMAC, 4-28-06; A, 3-15-12]

1.10.22.9 COUNTY CLERK PROCEDURES:

A. The provisional paper ballot outer envelope containing the voter's oath shall not be opened until the county clerk has completed the verification process and determined the reason the provisional voter's name was not on the signature roster, whether the voter has provided identification, if required, by the Election Code or if the provisional absentee voter's absentee ballot was received by the absentee precinct board. The county clerk shall place any naked ballot in an individual manila envelope to replace the inner secrecy envelope and mark the voter's correct voting precinct on that envelope.

B. The county clerk has the authority to determine the qualification of a provisional paper ballot, absentee provisional ballot or in-lieu of absentee ballot but shall not disqualify any provisional paper ballot, absentee provisional ballot or in-lieu of absentee ballot because the voter's address on the affidavit on the provisional paper ballot outer envelope does not match the voter's address on the voter's certificate of registration, provided the county clerk can identify the voter with other information provided on the affidavit or certificate of voter registration attached to the provisional paper ballot outer envelope.

C. The county clerk shall determine the qualification of a provisional ballot, absentee provisional ballot or in-lieu of absentee ballot but shall not disqualify any provisional ballot, absentee provisional ballot or in-lieu of absentee ballot because the voter has used an abbreviated name, abbreviated address, middle name, middle initial or suffix, provided the county clerk can identify the voter with other information provided on the affidavit on the provisional paper ballot outer envelope or certificate of voter registration attached to the provisional ballot outer envelope.

D. The county clerk shall determine the qualification of a provisional paper ballot but shall not disqualify any provisional paper ballot because the voter did not sign both the affidavit and the polling place roster if the voter provided a valid signature and the county clerk can identify the voter with information provided on the affidavit on the outer envelope or certificate of voter registration attached to the provisional paper ballot outer envelope.

E. A provisional paper ballot shall be qualified if both:

(1) the voter has provided all the information under Section 1-12-25.3 and Section 1-12-25.4 NMSA 1978 and the voter provides a valid signature and sufficient information for the county clerk to determine the voter is a qualified elector;

(2) the county clerk can determine the voter is a registered voter in the county; if a voter is registered in the county, but cast a provisional paper ballot at the wrong polling place, or if the voter was required to present identification.

F. A provisional paper ballot or in-lieu of absentee ballot shall be rejected if:

(1) the voter has not provided all the information under Sections 1-12-25.3 and 1-12-25.4 NMSA

1978 subject to the provision in Subsections B, C or D of this section;

- (2) the voter is not a registered voter in the county;
- (3) the voter is registered to vote in another county in the state;
- (4) the voter has voted an absentee ballot in the election and the ballot has been received by the absentee precinct board;
- (5) the voter's registration was properly cancelled; or
- (6) the voter is unable to meet the voter identification requirements.

G. A county canvass observer, pursuant to Section 1-1-25 and Section 1-2-31 NMSA 1978 may be present during the provisional paper ballot qualification and canvass. During the provisional ballot qualification and canvass, the observer shall wear a self-made badge designating the observer as an authorized observer of the organization represented. The observer shall not wear any other form of identification and party or candidate pins are prohibited. The observer shall not perform any duty of the county clerk or authorized deputy, handle any material, interfere with the orderly conduct of the provisional paper ballot qualification or canvass or use cell phones or electronic recording equipment while observing.

H. The provisional paper ballot qualification process shall be conducted as follows:

- (1) the county clerk or authorized deputy shall read aloud the name and address on the provisional paper ballot outer envelope;
- (2) the county clerk or authorized deputy shall 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 identification is attached or verified; and
- (3) the county clerk or authorized deputy shall publicly announce whether the provisional paper ballot is qualified or disqualified and the reasons for that determination.

I. The in-lieu of absentee ballot qualification process shall be conducted as follows:

- (1) The county clerk or authorized deputy shall determine, by use of the absentee precinct board roster, if an absentee ballot has been received by the absentee precinct board.
- (2) The county clerk or authorized deputy shall publicly announce whether the in-lieu of absentee ballot is qualified or disqualified and the reasons for that determination.

J. The county clerk or authorized deputy will announce aloud his or her decision regarding whether that provisional vote will or will not be qualified; the county clerk may assign a different county clerk staff member than those involved in the qualification process to receive and open the ballot outer envelope for the tallying process. The observer may preserve for future reference written memorandum of any action and may raise it at the canvass meeting. Observers shall not be in the line of sight or view or make notes of the voter's date of birth or social security number.

K. The determination of the provisional voter's status and whether the ballot shall be counted, along with the research done by the county clerk shall be noted on the provisional paper ballot outer envelope. The county clerk shall, after status determination, separate qualified ballots from unqualified ballots. Unqualified ballots shall not be opened and shall be deposited in an envelope or box marked "unqualified provisional paper ballots" which shall be retained for twenty-two (22) months, pursuant to 42 USC 1974. The outer provisional paper ballot envelope for qualified provisional paper ballots shall be opened and deposited in an envelope or box marked "qualified provisional paper ballot outer envelopes" which shall be retained for twenty-two (22) months, pursuant to 42 USC 1974. The county clerk or authorized deputy shall mark the number of the voter's correct precinct on the inner secrecy envelope and ballot for the purposes of a recount or contest, but no other information indicating the identity of the voter shall be furnished to the county canvassing board or any other person. After the tally of qualified provisional paper ballots, the county clerk or authorized deputy shall deposit the counted provisional paper ballots in an envelope or box marked "counted provisional paper ballots" which shall be retained for twenty-two (22) months, pursuant to 42 USC 1974.

L. The county canvassing board shall direct the county clerk to prepare a tally of qualified provisional paper ballots, in-lieu of absentee ballots and absentee provisional ballots and include them in the canvass presented to the county canvassing board to be tallied and included in the canvass of that county for the appropriate precinct. Provisional paper ballots, in-lieu of absentee ballots and absentee provisional ballots shall be tallied on separate tally sheets. The tally sheet may be a photocopy of a precinct tally sheet or a computer based tally sheet approved by the secretary of state, however it shall be clearly marked as designated for provisional paper ballots, in-lieu of absentee ballots or provisional absentee ballots. Upon the conclusion of the county canvass, the county clerk shall transmit the provisional paper ballot tally to the office of the secretary of state. The county clerk shall also prepare a report, on behalf of the county canvassing board, on the disposition of all provisional paper ballots cast within the county. The report shall contain the name, address and correct precinct number of each provisional voter

or provisional absentee ballot voter and the qualification or disqualification of in-lieu of absentee ballots. The report shall be transmitted to the secretary of state within 10 days of the election. Pursuant to the Help America Vote Act, information about an individual provisional paper ballot shall be restricted to the individual who cast the ballot. The report shall include an explanation of why a provisional voter's name was not included on the signature roster and the reason why any provisional voter's ballot, in-lieu of absentee voter's ballot or provisional absentee voter's ballot was not counted. The report shall be in alphabetical order.

M. Counting procedures for provisional paper ballots. The county clerk shall count the qualified provisional paper ballots using the hand tally method. One team of at least two persons shall be used to count each qualified provisional paper ballot. The team shall consist of one reader and one marker, not of the same political party if feasible. The reader shall read the ballot to the marker and the marker shall observe whether the reader has correctly read the ballot; the marker shall then mark the tally sheet of the precinct where the vote was cast, and the reader shall observe whether the marker correctly marked the tally sheet. If consolidated precincts were used county-wide, provisional paper ballots may be counted by an optical scan vote tabulating system, with a separate memory card used.

N. Votes to be counted. When counting provisional paper ballots, votes shall be counted for only those positions or measures for which the voter was eligible to vote in the precinct where the ballot was cast. If a ballot is marked indistinctly or not marked according to the instructions for that ballot type, the counting team shall count a vote as provided for in Subsection A and Paragraphs (1) through (4) of Subsection B of Section 1-9-4.2 NMSA 1978. In no case, shall the counting team mark or re-mark the ballot. 1.10.23.12 NMAC contains illustrative examples of how to discern voter intent.

O. The county clerk shall provide a free access system, such as a toll-free telephone number or internet web site that a voter who casts a provisional paper ballot may access to ascertain whether the voter's ballot was counted, and, if the vote was not counted, the reason it was not counted. Access to this system is restricted to the voter who cast the ballot.

P. The county clerk shall notify by mail each voter whose provisional paper ballot was not counted and the reason the ballot was not counted. The clerk shall send out this notification any time between the closing of the polls on election day through the tenth calendar day following the election. The voter shall have until the Friday prior to the meeting of the state canvassing board to appeal this decision to the county clerk.

Q. The appeal process pursuant to Subsection C of Section 1-12-25.2 NMSA 1978 shall be conducted as follows:

- (1) the county clerk shall select a hearing officer(s) from staff or a person who is not affiliated with any candidate on the ballot and knowledgeable of election law and the clerk shall provide a disability accessible room for the hearing officer to work;
- (2) 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;
- (3) the voter may appear with an advocate;
- (4) the appeal hearing shall be an open meeting, but the voter's personal information:
 - (a) date of birth; and
 - (b) 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;
- (5) the county clerk or authorized deputies 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;
- (6) 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 or send by certified mail a letter explaining the hearing officer's decision to the voter;
- (7) there is no statutory right of appeal;
- (8) all decisions shall cite a provision of the Election Code explaining the disposition and be announced or mailed by the Monday before the state canvassing board meeting;
- (9) if the voter prevails, the hearing officer shall direct the county clerk staff to handle the ballot as a qualified provisional paper ballot as found above; and
- (10) the county clerk shall notify the county canvassing board of the completion and results of the appeals process.

[1.10.22.9 NMAC - Rp, 1.10.22.9 NMAC, 4-28-06; A/E, 10-2-08; A/E, 11-3-08, A, 3-15-12]

1.10.22.10 SECRETARY OF STATE PROCEDURES:

- A.** Provisional voters wishing to determine the disposition of their ballot may call the office of the

secretary of state fourteen (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 paper ballots, or may 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 his ballot, shall verify the identity of the voter by name, address, date of birth and social security number.

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

[1.10.22.10 NMAC - Rp, 1.10.22.10 NMAC, 4-28-06, A, 3-15-12]

1.10.22.11 [RESERVED]

[1.10.22.11 NMAC - N, 4-28-06; A/E, 10-2-08]

1.10.22.12 [RESERVED]

[1.10.22.12 NMAC - N, 4-28-06; A/E, 10-2-08]

1.10.22.13 [RESERVED]

[1.10.22.13 NMAC - N, 4-28-06; A/E, 10-2-08]

HISTORY OF 1.10.22 NMAC:

History of Repealed Material:

1.10.22 NMAC Provisional Voting Security (filed 8-1-03) - Repealed effective 4-28-06