

Opinion No. 66-51

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BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. Clay Buchanan, Director, Legislative Council, State Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. What election officials may accompany a voter desiring assistance into the voting booth or election machine booth in a Primary Election?
2. May any other person accompany such voter into such booth?
3. What are the duties and authority of an extra poll clerk appointed by the candidates in a Primary Election?

CONCLUSIONS

1. All of the poll clerks present of the voter's political party.
2. At the request of the voter, he may also be accompanied by the spouse of the voter desiring assistance or by one related to him within the second degree by blood.
3. The same as any other poll clerk, as are the penalties for violation of the election laws.

OPINION

{*62} ANALYSIS

The above questions all relate to the assistance to a voter at Primary Elections. It is necessarily assumed that the voter has complied with all of the requirements for assistance, i.e., that because of blindness, defective eyesight, physical disability, which prevent marking of the ballot or inability to read either English or Spanish sufficiently well to mark the ballot, he or she needs assistance; that he or she has so declared, and that the elector has been sworn and has executed the required affidavit.

Once the above conditions have been met, the voter is entitled to assistance in the marking of his paper ballot or casting of his vote on a machine. The questions to be answered concern the procedure to be used in the rendering of this assistance.

We are here dealing with a Primary Election. Sections 3-11-1 through 3-11-69, N.M.S.A. 1953 Comp., as amended, deal with such elections. Section 3-11-36 through 3-11-47, Section 3-11-47.1 and Sections 3-11-55 through 3-11-68, supra, have been repealed and one new Section 3-11-54.1 has been enacted. Other new sections have been enacted, and many sections, as originally enacted, have been extensively amended.

Section 3-11-20, supra, provides in substance that, except where the Primary Election Code is inconsistent or provides otherwise, the holding of the Primary Election, the method of voting, the counting and canvassing of votes and the returns shall be the same as in a General Election and such shall govern. All powers and duties conferred or imposed by law on boards, judges, clerks of election and other public officials in connection with a General Election are likewise so conferred or imposed upon them in a Primary Election unless otherwise provided or in conflict with some provision of the Primary Election laws. This section was enacted in 1963. It becomes necessary then to determine whether there are provisions in the Primary Election Code which conflict with or are inconsistent with the provisions of the General Election Code insofar as assistance to voters in marking their ballot is concerned. In this connection, we note Section 3-11-19, supra, of the Primary Election Code, which provides as follows:

". . . The poll clerk or, if more than one [1] poll clerk has been appointed, all the poll clerks of the political party of the voter shall accompany any voter, requiring assistance in the marking of his ballot, and who has signed an assistance affidavit, into the voting booth and in the presence of each other assist the voter in marking his ballot."

The answer to the first question is that the only **election officials** who enter the voting or voting machine booth with the voter to assist him or her in marking the ballot are the poll or election clerks of the particular party with which the voter is affiliated. This would include the additional poll clerk if any, designated by a group of candidates, as hereinafter discussed, and the voter may request that the principal assistance be rendered by the additional poll clerk, including casting the vote where the voter is physically unable to do so.

Your attention is called to the fact that the terms "poll clerk" and "election {*63} clerk" are synonymous, Section 3-3-20, N.M.S.A. 1953 Comp. (P.S.). The only clerks who may accompany such voter are the **poll clerks** of the **same party affiliation** as the voter. Therefore, **no counting clerk may accompany such voter unless he or she comes within the definition of some other person who may, under the second question, accompany such voter at the voter's request.**

Your next question is whether additional persons, not election officials, may accompany and assist such voter. There is no provision concerning this contained in the laws specifically governing Primary Elections. We must, therefore, under the provisions of Section 3-11-20, supra, turn to the laws governing General Elections.

Section 3-3-20, supra, was amended to read in its present form in 1963. It concerns itself with instructions to election officials to be printed in the poll books and provides, in

part, for the voter being assisted to be accompanied, in addition to the designated election officials, by some person of the voter's choice. Subsequent to this, Section 3-3-13, N.M.S.A. 1953 Comp. (P.S.) was amended to its present language in 1965. The 1965 amendment dealt with assistance to the voter in marking his ballot but did not specifically amend Section 3-3-20, supra. It changed the language so as to provide that the voter might, **at the option of the voter**, be accompanied into the booth by his spouse or a relative to the second degree of consanguinity who shall assist the voter in marking the ballot.

Although repeals by implication are not favored in the law, yet if they both deal with the same subject matter and are inconsistent, the later act is considered to repeal the earlier act so far as its provisions are repugnant to the earlier act. **Geck v. Sheperd**, 1 N.M. 346, **Steed v. Roundy**, 342 F.2d 159, **State v. Valdez**, 59 N.M. 112. The statutes here being considered are both part of the laws relating to General Elections. They both deal with the same subject matter and the 1965 amendment to Section 3-3-13, supra, is irreconcilable with and repugnant to the provisions of Sections 3-3-20 concerning the same subject matter and earlier enacted. Such being the case, the later enactment prevails and the only person entitled to accompany such voter into the booth, in addition to the poll clerk or poll clerks designated to accompany such voter, is the voter's spouse or some other person related to the voter within the second degree by consanguinity (blood).

Sections 29-1-2 and 29-1-3, N.M.S.A. 1953 Comp., contain the definition of such relationships. Under these sections, a natural son, daughter, grandson, granddaughter, father, mother, grandfather or grandmother is related by consanguinity within the first or second degree and can, **if requested**, accompany such voter and the proper election officials. Additionally, a natural brother or sister of such voter is related collaterally by consanguinity within the second degree and may, if requested, accompany such voter.

A voter requiring assistance in marking his ballot may, **if he** desires, be so assisted by such voter's spouse or by a relative of such voter who is in the direct ascendant or descendant line of such voter or by a brother or sister of such voter. However, only one such relative may accompany such voter and additionally the proper election officials shall accompany and assist such voter.

Your last question concerns the status of an extra poll clerk appointed pursuant to the provisions of Section 3-11-19, supra. In substance this section, relating to Primary Elections only, provides that any group or groups of six county candidates for each political party may require the County Commission to appoint an additional poll clerk selected by such group for each polling place. It is implicit that such additional poll clerk must have the same qualifications as any other poll clerk.

Once a qualified additional poll clerk has been so selected and appointed, his or her, responsibilities and duties are the same as those of the other poll clerks at such voting place. The same penalties for offenses would also apply, and it is pointed out that rather severe penalties for violation of the election laws are applicable. Such additional poll

{*64} clerks serve without compensation or are paid by the requesting candidates and are not paid by the County.

Such additional poll clerk would accompany a voter requiring assistance in marking his ballot into the booth and help, along with the other poll clerk or poll clerks and the qualified relative, if any, desired by such voter, in the marking of his ballot.

The actual casting of the ballot by pulling the voting machine lever or placing the paper ballot used in the ballot box must be done by such voter, if he is physically able, after such voter has assured himself that the ballot being so cast, whether by machine or by paper ballot, is in fact the vote desired by such voter. **It is the duty of all of the persons assisting such voter to be certain that the vote, on the ballot or machine, to be cast for each office, is the vote desired by such voter.**