

# CHAPTER 9

## POST-ELECTION ACTIVITIES

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### **9.1 Canvassing Board**

In all county, state, and federal elections except primary elections, the judge of probate, sheriff, and circuit clerk serve as members of the canvassing board of their county. In primary elections, the county executive committee of each political party participating in the primary elections serves as the canvassing board. §§ 17-1-2(6) and 17-12-15. The body responsible for counting provisional ballots is the canvassing board for the election. §§ 17-1-2(6) and 17-10-2(f)

For a general election, the sheriff may be represented by a deputy on the canvassing board. If the office of the judge of probate or the clerk of the circuit court is vacant, or if either or both are candidates in the election being canvassed, the appointing board must fill the vacant positions at the time poll workers are appointed. If the appointing board does not fill a vacancy or if any member of the canvassing board fails to attend the canvassing meeting, the sheriff must appoint a qualified elector of the county to fill the vacant position. § 17-12-15.

If all members of the canvassing board belong to the same political party, the sheriff must summon three reputable, qualified electors of the county who are members of the opposite political party to observe the proceedings. § 17-12-15.

## **9.2 General Elections**

### **9.2.1 Provisional Ballots**

The canvassing of provisional ballots by the canvassing board commences, at noon on the Tuesday seven days after the election, by tabulating the provisional ballots which have been certified by the board of registrars. The results must be posted in the courthouse and one copy shall be sealed with the provisional ballots, provisional voter affirmation challenges, and certification of the board of registrars and delivered with other records of the election. § 17-10-2(f).

### **9.2.2 Canvassing Returns**

After a general election, the sheriff, circuit clerk, and judge of probate assemble at the courthouse at noon on the second Friday after the election and, in the presence of any other persons who may choose to attend, canvass the returns from the various precincts within the county and make a final statement of the election results. The final results are checked and rechecked. § 17-12-15.

### **9.2.3 Declaring Results**

Immediately after determining the outcome of elections for county offices, the canvassing board must make a written declaration of the results, setting out the name of each successful candidate and the office to which he or she was selected. This declaration must be signed by at least two members of the canvassing board. The original declaration is filed for record in the probate office, a copy is posted at the courthouse door and a copy is immediately transmitted to the Secretary of State by fax or electronic transmission. § 17-12-16. The canvassing board must then make certificates showing the number of votes cast in the county by precincts for each candidate and file them with the judge of probate.

In the case of elections for state legislators and all civil officers commissioned by the Governor, except state executive officers, and for

constitutional amendment elections, the judge of probate forwards the election certificates to the Secretary of State by precincts. §§ 17-12-9 and 17-14-51.

All returns required by law to be sent to the Secretary of State must, within 22 days after the election, be opened, counted, and certified in the presence of the Governor, the Secretary of State, and the Attorney General, or any two of them, or by the Secretary of State in the presence of any one of the other officers in the case of constitutional amendments. The Governor proclaims the results of the election, and the proclamation is published in a newspaper at the state capitol. §§ 17-12-17, 17-12-18, and 17-14-50 through 17-14-53.

#### **9.2.4 Election Certificates**

Election certificates relating to elections for Governor, Lieutenant Governor, Attorney General, Auditor, Secretary of State, Treasurer, and Commissioner of Agriculture and Industries, are forwarded by the judge of probate to the Governor, who delivers them unopened to the Speaker of the House at least 10 days before the time set for a joint session of the legislature. § 17-12-19. These returns are then canvassed and the results are proclaimed by the Speaker of the House during the first week of the Legislature's organizational session in January. Ala. Const. § 115. The returns are then filed in the office of the Secretary of State. § 17-12-22.

### **9.3 Primary Elections**

The county executive committees of the parties participating in the primary election meet at the courthouse not later than noon on Tuesday following the primary election to receive the returns, tabulate them by precincts, and publicly declare the results. The chair of the county executive committee, not later than the close of business on the seventh day following the primary, shall certify and return to the chair of the state executive committee the voting results.

Not later than noon on the Wednesday, 8 days following the primary, the state executive committee will meet and declare the results. The state executive committee will also provide the Secretary of State with the primary election returns on the same Wednesday. § 17-13-17.

When there is a runoff or second primary held due to no candidate receiving a majority of votes, the canvassing procedure following this election is the same as after the initial primary. § 17-13-18(b).

## **9.4 Municipal Elections**

Commencing at noon on the first Tuesday after the municipal election, the statements of results that have been delivered by the election officials to the municipal clerk are canvassed by the municipal governing body. If a candidate has received a majority of the votes cast, the council or commission declares that candidate elected and issues them a certificate of election. If no provisional ballots were cast or if the certification results of provisional ballots cast have been received prior to that time, the municipal governing body may canvas the results prior to the first Tuesday after the election at any special or regular meeting. § 11-46-55(a). A similar procedure is followed with respect to propositions voted on at municipal elections.

When no candidate receives a majority vote, the governing body orders a runoff election, to be held on the fourth Tuesday following the regular election, between the two candidates who received the greatest number of votes in the first election. The second election is held and its results are returned and canvassed in the same manner as was done in the first election, and the candidate receiving the highest number of votes is declared elected. A tie is decided by a majority vote of the entire municipal governing body. § 11-46-55(d).

The municipal clerk files each certificate of election with the judge of probate of the county in which the municipality is located, and the judge of probate records these certificates in the same way he or she records declarations of results for county offices. § 11-46-55(d).

## **9.5 Ballots and Other Records and Supplies**

The used ballots and other election supplies and records delivered to the sheriff by the precinct returning officers are kept by the sheriff for a period of six months after an election when no federal races are on the ballot and twenty-two months after an election with a federal race on the ballot. They then take the packages containing these materials out of the ballot boxes

and destroy the election materials. If an election contest is instituted, he or she must preserve the ballots and other election materials until the contest is finally determined, in the event that they are needed in the settlement of the contest. § 17-12-7.

In municipal elections, these responsibilities belong to the municipal clerk. § 11-46-46.

## **9.6 Election Costs**

The expenses incurred in conducting state and county elections are paid initially by the counties. Primaries, as well as general and special elections, are held at public expense. At a minimum, the state partially reimburses counties for the costs.

In the case of elections in which candidates for both federal or state and county offices are nominated or elected, the state reimburses the counties for one-half the cost of the election. § 17-16-3. If there are only candidates for federal or state offices voted upon, the state reimburses the counties for the entire expense of conducting the election. § 17-16-4.

When constitutional amendments affecting one or more counties and amendments affecting the state as a whole are included in the same election, the state reimburses the counties for one-half of the expenses of the election. § 17-16-5. When amendments affecting only the state as a whole are voted upon at any election, the state reimburses the counties for all costs of the election. § 17-16-6.

Certain election expenses are defined in § 17-16-2. However, the Election Expense Reimbursement Committee identifies other election expenses. The committee established a list of reimbursable expenses before the March 2012 primary. This list continues in effect unless amended by the committee at least 90 days before the primary in a future election cycle. § 17-16-2.1

Municipal elections are held at the expense of the municipality conducting the election with exceptions for Class 1 municipalities and cities and towns organized under a commission form of government. § 11-46-20.

## **9.7 Challenge to Candidate's Qualifications**

The law makes no provision for challenge other than through a post-election

contest. However, a person may wish to challenge the qualifications of a candidate before an election. Generally, political party rules permit challenges to a candidate before primaries. Persons wishing to challenge a primary candidate should contact the county executive committee (for county offices) or the state executive committee (for district or state offices) for general information. Challenges based on such grounds as a lack of residency, eligibility to vote, or political or legal qualifications are normally heard by a party subcommittee with the right of appeal to the full committee. County appeals may be taken to the state executive committees.

The requirements of printing the ballots and other election supplies impose certain natural deadlines on challenges. Challenges involving candidates for state office should be initiated before the Secretary of State certifies candidates to the judges of probate. Challenges based on party rules should be completed before the party certifies its candidates to the Secretary of State (state offices) or the judge of probate (county offices).

The state party chair must certify candidates for state offices to the Secretary of State no later than 5:00 p.m. 82 days before the primary election. The county party chair must certify candidates for county offices to the judge of probate no later than 5:00 p.m. 82 days before the primary election. § 17-13-5(b).

Amendments to candidate certifications must be submitted to the Secretary of State, by the state party, or to the judge of probate, by the county party, no later than 76 days prior to a primary or general election. § 17-6-21(b).

## **9.8 Contested Elections**

The law recognizes that the public, as well as the candidates, has a legitimate interest in fair elections. It provides safeguards during an election, grounds for a contest, and it permits individuals to contest the results after the votes are counted. § 17-16-40.

An automatic recount occurs, if not waived by the defeated candidate within 24 hours, when the margin of defeat in a general election is not more than one-half of one percent of the votes cast for the office. § 17-16-20.

Any person with standing to contest the election may petition the canvassing authority for a recount of any or all precinct returns. The time period for requesting a recount begins with the production of the certificate

of result and ends 48 hours after the official canvass of county returns. § 17-16-21.

Those contesting the results of a primary must be qualified electors, must belong to the party whose primary they are contesting and must have legally participated in that primary. § 17-13-71 and AG AO 82-00052.

## **9.9 Recount**

### **9.9.1 General Recount Provisions**

An automatic recount occurs when the margin of defeat in a general election is not more than one-half of one percent of the votes cast for the office, or the ballot measure. § 17-16-20. Additionally, § 11-46-55.1 provides a method of petitioning for a recount in municipal elections.

Other than the automatic recount provided for in § 17-16-20 and the recount in municipal elections under § 11-46-55.1, the law provides procedures for obtaining a recount in a primary or general election. § 17-16-21(a). Any person with standing to contest may petition the canvassing board for a recount of any or all precincts. A recount request must be made within 48 hours after the official canvas of county returns. Recount requests are to be made before the canvassing board. The recount must be conducted before a precinct election official. § 17-16-21.

The recount statute gives the right to apply for a recount to “any person with standing to contest an election.” § 17-16-21. Those contesting the results of a primary must be qualified electors, must belong to the party whose primary they are contesting and must have legally participated in that primary. § 17-13-71 and AG AO 82-00052. The statute grants this authority to “the body which under the general provisions of law, now have charge and control over ballot boxes.” In primary elections, this body is the county committee of the party. § 17-13-15. In general elections, the sheriff is the appropriate authority. §§ 17-12-14 and 17-12-7. When a primary election is contested, the contestant is required to deposit a bond or other security against the costs. § 17-13-84.

The three instances where a recanvassing is necessary and therefore permitted are as follows:

- (a) For obtaining the results of an election when the election

officials have failed to make a return, but only after receiving an order by the court to break the seals to obtain the results;

- (b) For hearing a contest; or,
- (c) For the purpose of a grand jury investigation.

Other than for an automatic recount, a person with standing to contest an election who petitions for a recount, must be prepared to pay the costs and should be required to give security to cover the same. If the recounting does not change the announced result, the requesting party should pay the costs. If the recounting changes the results of the election, the cost should be borne by the county unit involved. § 17-16-21(d).

In any event, the costs at stake should be relatively small. The ballot container would have to be opened and the canvassing board or its representative would have to re-run the ballots through the electronic voting machine and compare the new voting results with the old voting results. As in the case of the initial canvass, the parties involved and the press should be allowed to attend to ensure fairness. § 17-12-1.

After the recount, should it appear that the results of an election are incorrect, the sole remedy is to file an election contest. After the contest is heard, the authority charged with hearing the contest can declare a new winner or a new primary. §§ 17-16-59, 17-16-65, 17-13-86, and 17-13-87.

### **9.9.2 Automatic Recount in General Elections**

If the margin of defeat is not more than one-half of one percent of the votes, an automatic recount will be commenced within 72 hours after certification of the results of the election unless, within 24 hours after the certification, a written waiver for a recount is submitted by the defeated candidate. In the case of an election for any federal, state, circuit, or district office, or the state Senate, state House of Representatives, or any other office that is not a county office, the written waiver may be submitted to the Secretary of State. In the case of an election for any county office, the written waiver may be submitted to the judge of probate. § 17-16-20.

The canvassing board shall obtain the polling officials necessary to conduct the automatic recount. The polling officials shall be compensated in the same manner and at the same rate as provided by law for vote tabulation in an election that does not result in a recount. Costs shall be kept to a minimum by using county personnel or volunteer workers whenever possible, under the supervision of a trained and certified poll official. The

expenses of an automatic recount shall be a state charge if the recount is held for any federal, state, circuit, or district office, or the state Senate, state House of Representatives, or any other office that is not a county office. Otherwise, the expenses shall be a county charge. § 17-16-20.

The automatic recount shall be conducted as simply as the type of equipment and local conditions permit, provided that certain procedural safeguards are observed. Additionally, representatives of opposing interests shall be given at least 24 hours' notice and shall be invited to participate in the recount. § 17-16-20(g).

After an automatic recount, the appropriate certifying authority shall amend the initial certification of the election to reflect the results of the recount. The time limit for contesting the election shall be suspended until the vote is recertified, reflecting the results of the automatic recount. § 17-16-20. If the results of the automatic recount name as a winner a person other than the person initially certified, the outcome shall constitute grounds for an election contest as prescribed by law.

### **9.9.3 Automatic Recounts for Primary**

The Code does not provide automatic recounts for primary elections.

### **9.9.4 Recount in Municipal Elections**

Any person with standing to contest a municipal election may petition the canvassing authority for a recount of any or all precinct returns within 48 hours after the official canvass of returns. The recount must be conducted under the supervision of a trained and certified poll official and shall be conducted as simply as the type of equipment and local conditions permit, provided that certain procedural safeguards are observed. Representatives of opposing interests must be given at least 24 hours' notice of the recount and shall be invited to participate. § 11-46-55.1.

The petitioner must give security to cover the estimated costs of the recount and must be prepared to pay the actual costs. If the recount produces a change in precinct totals which alters the result of the election, the outcome shall constitute grounds for an election contest. If the recount of the resulting contest alters the result of the election, the cost of the recount will be borne by the municipality. § 11-46-55.1.

## 9.10 Contesting an Election Generally

Election contests vary between primaries, where parties may have additional rules, and the general election. One should consult the Alabama Code and party rules. The following is only a general guide for contests.

Different offices may be contested by different procedures, and some have no contest procedures provided by law. An attorney should be consulted to determine the specific procedures for the contest in question. The rules for contesting general elections divide offices into four categories: statewide offices; state legislators (since each house is the final judge of its own members); judges of circuit or district courts (who try contests for county offices and must, therefore, have separate procedures for their own contests); and, offices elected from a single county or its subdivisions. However, several offices are not included in Alabama's law for contesting elections: Lieutenant Governor, U.S. Senator, and U.S. Representative. In addition, the office of public service commissioner is included with others when the grounds for contests are listed but are not included in any section on procedure. The omission of U.S. Senators and Representatives is probably due to the fact that each house of Congress is the final judge of its own members' qualifications.

## 9.11 Primary Election Contests

### 9.11.1 Standing to Contest

Candidates may contest an election but not because they were candidates. A contest is not simply a dispute between two people for the possession of an office; there is a public interest in the integrity of the electoral process. *Ex parte Hartwell*, 188 So. 891 (1939); *McGallagher v. Bosarge*, 136 So. 2d 181 (1961). State law provides that with appropriate grounds any elector can contest a general election. §§ 17-16-40 and 17-16-47. The law is more restrictive for primaries, the principal addition being the requirement that the elector actually voted in the primary. § 17-13-71.

### 9.11.2 Grounds

Elections may be contested only for reasons prescribed by law, and the person bringing a contest must state his reasons in advance. § 17-13-71.

The grounds for contest are:

- (a) Malconduct, fraud or corruption on the part of any inspector, clerk, marker, returning officer, canvassing board or other person;
- (b) That the person whose nomination to office is contested was not eligible thereto at the time of such nomination;
- (c) Illegal votes;
- (d) The rejection of legal votes;
- (e) Offers to bribe, bribery, intimidation or other malconduct calculated to prevent a fair, free and full exercise of the elective franchise; or,
- (f) Miscalculation, mistake, or misconduct in counting votes.

The grounds available for contesting an election cover most common election problems. § 17-13-71. However, simple error or miscalculation is legal grounds for a contest only in primary elections for offices beyond the county level. § 17-13-71. Recounts have been held as part of discovery procedures in contests.

#### **9.11.3 Notice of Contest**

No testimony is to be received of any illegal votes or of the rejection of any legal votes in a contest unless the party complaining has given the adverse party notice in writing of the number of illegal votes, by whom given, for whom given and at what precinct or voting place which the person expects to prove at the trial. This notice must be served at least five days before taking testimony. § 17-13-79. The person whose nomination is being contested has five days after notice to file objections. § 17-13-80.

#### **9.11.4 Time and Manner of Contest**

Any contest of a county office must be commenced within 24 hours of the results that have been canvassed and their nomination declared by the county executive committee by filing a statement of contest with the chair of the county committee and a deposit of \$50 in cash to cover expenses of the contest. § 17-13-80.

The chair of the executive committee shall within five days after the contest is filed call the committee together in the county seat, and the committee shall meet not more than five calendar days after filing of the contest. § 17-13-81. Contest of elections other than for county office are filed with the state party executive committee. § 17-13-83. The time limit for calling a

meeting of the state executive committee is five to 10 days after the filing of the contest. § 17-13-85. Each party may prescribe additional rules governing contests. § 17-13-88.

### **9.11.5 Filing**

A person wishing to initiate a contest must make a statement verified by an official in writing setting forth:

- (a) The name of the party contesting and that he or she was a qualified voter when the election was held;
- (b) Office which the election was held to be filled;
- (c) Time of holding election;
- (d) Name of the person nominated; and,
- (e) Particular grounds on which the contest is filed. § 17-13-78.

A proper filing is the official beginning date of a contest, and other deadlines are determined from that time.

## **9.12 General Election Contests**

The procedure for contests of general elections is generally in the court system whereas a contest of primaries lies with the party's executive committees.

### **9.12.1 Standing to Contest**

Any person who at the time of the election was a qualified voter may file a contest.

### **9.12.2 Grounds**

Elections may be contested on any of the following grounds:

- (a) Malconduct, fraud, or corruption on the part of any inspector, clerk, marker, returning officer, canvassing board, or other person;
- (b) That the person whose election to the office is contested was not eligible thereto at the time of such election;
- (c) Illegal votes;

- (d) The rejection of legal votes;
- (e) Offers to bribe, bribery, intimidation, or other misconduct calculated to prevent a fair, free and full exercise of the elective franchise; or,
- (f) If the results of a recount conducted under § 17-16-20 name as a winner a person other than the person initially certified, the outcome shall constitute grounds for an election contest. § 17-16-40.

The statement of grounds gives the contestee (person against whom a contest is filed) an opportunity to prepare a defense. It serves to screen out nuisance contests and “fishing expeditions.” The purpose of a contest is to correct flaws in the election which resulted in the wrong person being declared the winner. Therefore, the statement of grounds must allege that except for the specified flaws there would have been a different winner. For example, it is not sufficient to allege that the declared winner received 100 illegal votes if his or her margin of victory is greater than 100 votes. Suspicions of error or wrongdoings which did not affect the outcome of the election must be handled in some way other than a contest. § 17-16-41.

In contests of legislative, judicial, or county offices where illegal votes are the grounds of the contest, it is a sufficient statement of said cause to allege that illegal votes were given to the person whose election is contested, which, if taken from him or her will reduce the number of legal votes given to him or her to or below the number of legal votes given to some other person for the same office. § 17-16-47.

### **9.12.3 Notice of Contest**

No testimony may be received of any illegal votes or rejection of legal votes unless the complaining party has given the adverse party notice in writing of the number of illegal votes and by whom given and for whom given, at what precinct or voting place and what the contesting party expects to prove at trial. The notice must be personally served 10 days before taking testimony. § 17-16-48.

In the filing, the contestant is required to state grounds, but not necessarily to name individual voters who will be examined. If the contest hinges on illegal votes received or legal votes rejected, the contestant will have to provide a list of individuals involved to the person challenged before taking statements from witnesses, but that step comes after filing. Before filing

the contestant does not have access to poll and registration lists from which to obtain names. §§ 17-9-12, 17-17-16, and 17-16-43.

#### **9.12.4 Time of Contest**

All contests must be commenced within 20 days after the results of the election are declared. At the time of filing, the contesting party must give security for cost. § 17-16-49.

#### **9.12.5 Filing of Contest**

Contest statement in writing must set forth:

- (a) The name of the party contesting and that he or she was a qualified voter when the election was held;
- (b) The office which the election was held to fill and the time of holding the same; and,
- (c) The particular grounds of the said contest.

This statement must be verified by the affidavit of such contesting party to the effect that the same is believed to be true. If the reception of illegal votes is alleged as a cause of contest, it is a sufficient statement of cause to allege that illegal votes were given to the person whose election is contested, which, if taken from that person, will reduce the number of legal votes given to the person to or below the number of legal votes given to some other person for the same office. § 17-16-47.

#### **9.12.6 Election Contests of Senators and Representatives in the Alabama Legislature**

Contests must be filed in the clerk's office in the county where the election is held. § 17-16-50. Testimony depositions and costs for contests is provided by state law. §§ 17-16-51, 17-16-52, and 17-16-53.

#### **9.12.7 Election Contests of Circuit Judges and District Judges**

Contests must be filed in the office of the judge of probate of the county of residence of the person being elected. § 17-16-54. Testimony must be taken by deposition as in civil cases. The contest must be heard by the probate court without a jury. § 17-16-55.

### **9.12.8 Election Contests of a Judge of Probate, Sheriff, Circuit Court Clerk, and Other County and Municipal Officers of Any City or Town**

Contest must be filed in the clerk's office in the county in which the election was held. § 17-16-56. Testimony may be by personal attendance of a witness or depositions. The contest is tried as other civil matters in open court without a jury. §§ 17-16-56 and 17-16-57.

### **9.12.9 Statewide Elections**

Any voter may contest any election for a specified state wide office within 10 days after the speaker of the House of Representatives opens the returns and proclaims the results. The contestant must file with the speaker a written statement of the grounds and give bond.

The written statement of the grounds of contest must set forth specifically the following:

- (a) The name of the person contesting and that the person was a qualified voter when the election was held;
- (b) The office which the election was held to fill, and the time of holding the same;
- (c) The particular grounds of contest;
- (d) The name of the counties in which any of the alleged grounds of the contest may have occurred and the names of the election precinct in each of such counties in which the grounds of contest may be alleged to have occurred; and,
- (e) The grounds on which the declared voter of each of the named election precincts in each county contested. § 17-16-64.

The two houses of the Legislature in joint convention and presided over by the speaker of the House will constitute the tribunal. § 17-16-65. A commission of legislators (three senators and five representatives) will take testimony. §§ 17-16-66 through 17-16-76.

### **9.12.10 Appeals**

Appeals from contests before the judge of probate lie to the Supreme Court within 14 days after judgment. Appeals of contests of judge of probate, sheriff, circuit clerks, and other county and municipal offices lie to the

Supreme Court within 14 days after judgment. § 17-16-61. A bond for security and cost must be filed and approved. § 17-16-62.

### **9.13 Post-Election Audit in 2022**

The Alabama Legislature has authorized the Secretary of State to conduct a post-election audit of the General Election to be held in 2022. The Secretary of State may select up to three counties to participate in the post-election audit. The audit is to be conducted in only one polling place in each county. The audit must include only one statewide office selected by the Secretary of State and only one county office in each of the three participating counties. The Secretary of State shall report all findings of the post-election audit to the Governor and the Legislature within 30 days of completion of the audit. § 17-16-90.