

Steven Ward

From: Marilyn Marks [REDACTED]
Sent: Thursday, June 11, 2015 7:47 PM
To: Harvie Branscomb; Colorado Voter Group
Cc: Steven Ward
Subject: Reply to Harvie Branscomb's comments Re: [Colorado Voter].4982 Fwd: Memo to Election Watcher Panel

By copying Steven Ward of the SOS office, I am requesting that my reply be distributed to the same panel members who received his original email. I have annotated Harvie's comments with mine, using red font italics below

Marilyn Marks

From: "harvie@electionquality.com" <harvie@electionquality.com>
Date: Thursday, June 11, 2015 at 4:13 PM
To: "coloradovoter@googlegroups.com" <coloradovoter@googlegroups.com>
Subject: [Colorado Voter].4982 Fwd: Memo to Election Watcher Panel

This is my memo in preparation for tomorrow's 10AM meeting of the watcher advisory panel in Denver at the SOS office.

Please feel free to attend or listen in our page at the SOS site is here:
<http://www.sos.state.co.us/pubs/elections/watcherPanel/index.html>

PDF attached is identical.

Harvie

To Election Watcher Advisory Panel for delivery prior to Friday June 12 meeting

From Harvie Branscomb

6/11/2015

These briefings to the panel are becoming increasingly difficult to write but are becoming increasingly important. It has become apparent that a majority of this panel is not going to defend the existing statutory right of watchers to witness and verify all steps in the conduct of an election and participate in the correction of discrepancies. *I agree*. Only very few on the panel have addressed a widespread lack of watching in Colorado after election processing was increasingly centralized and mechanized. Watching remains largely focused on VSPCs that more closely resemble the precinct polling place where almost all watching once took place. The agenda for the panel is apparently being driven by the SOS office to who the eventual advice will be given. It

may be that more independence is needed by this panel to provide complete and meaningful advice. *The panel may benefit from more watchers with extensive experience who understand first hand important details that are being ignored, for example the important, vulnerable, yet virtually unverified, work of the printers who print, insert, organize and mail ballots to the voters.*

By far the greatest need is for watching to be facilitated and encouraged and appreciated at central count facilities. But in addition there are likely hidden steps in the conduct of the election such as the assignment of election judges, the ballot print and fulfillment process, the LAT, envelope intake and cure processes. These are examples of activities that are not frequently conducted by election judges. Entire days may go by in a county during the election process prior to certification when election judges are not brought in, yet watching surely must be made possible if not expected. *Therefore the determination of when watchers may observe activities should not be based on partisan judges' involvement. The statutes permit ALL activities in the conduct of the election to be observed.*

Watching for partisan challenge of eligibility (or defense against that) is only one function of watching yet it is the one that could be too often focused on in our committee discussions. I suspect that many members of the committee are unfamiliar with the quantity of election process errors and omissions that are being discovered through recent instances of watching. *Agreed!* In my case it is a rare election watching experience when I do not witness an error that can be corrected once I notify about it. Election quality is visibly enhanced by the participation of watchers who are focused on election integrity. Opportunities for this kind of watching to take place must not be curtailed by the work of this panel. *To date it appears that the goal of the panel is to curtail watcher activities to allow what is convenient for the election officials, rather than what is needed by the candidates and watchers.*

Watching is not a pre-scheduled activity like election judging. Watching is an opportunity for various interests in the election to bring eyes but not hands to bear to see the process being performed, to check the integrity of ballot chain of custody, to verify that ballots are prepared and sent properly, to check that post election process is fully and properly executed and to verify if election judge decisions are responsible. Watchers collect information and provide input in the form of information that can but does not have to be used to correct discrepancies and errors. They do not act as a substitute for election judges. On the other hand and more importantly, election judges cannot function as a substitute for watchers. *We have frequently heard the red herring argument that watchers are attempting to act as judges if they require rights to verify all aspects of the election. Election judges are to make decisions. Election watchers are to verify and test and at times challenge those decisions. These are two separate and distinct functions.*

I am capable of reporting many instances of errors in elections that I discovered while watching. Unfortunately the format and size of panel does not give me much time to provide such examples. The panel does apparently appreciate examples like my description of watching at the Health Care Facility. But my example was only used to curtail potential future watching. In one instance another example was used to lead the panel astray. The implication that watching negatively affected the desire of a Garfield printer to accommodate watchers seemed incomplete. I checked with Jean Alberico and confirmed that she is talking about a reaction to an event where I was present at the printer in Glenwood Springs in a court ordered discovery process. This was not watching and I see no reason why the printer would react negatively to watchers as a result.

However it is clear that private entities have a right to exclude persons from their facilities. It appears to me that if a crucial function that belongs to an election is to occur at a private facility then the relevant portions of that facility must be open to oversight that law provides for. This example ought not serve as an explanation for why watchers should be excluded from the printing process. (Not at all.) *Harvie is completely correct. If a private contractor undertakes election functions (such as issuance of ballots), they must comply with the law and*

permit verification of those activities. Creating an incentive to privatize election processes to avoid election oversight should be avoided. Just as when private homes or churches or other private buildings are used for polling places, the owners must agree to all election activities being conducted on site. The owner cannot dictate that there will be no watchers on his site.

I perceive from the expressions and votes thus far that this panel has a majority of members who appear to expect that election quality will follow simply from trust of election officials. *(and voters.) Yet we know that without strict controls and oversight, human nature will drive elections to the levels of corrupt chaos that existed in the late 19th century.)* But if we as a panel advise the Secretary based on this expectation the result of our work will naturally breed public distrust as well as less than optimal elections. Only when elections officials encourage watching and other forms of public involvement will meaningful trust be built. Our role as I see it is to advise in a way that will help those officials to move in that direction whenever possible.

Under current clerk discretion, election judges may be assigned to certain statutory steps in the conduct of elections and not others. And county staff may be delegated to become deputy clerks and or election judges. This delegation itself is not a transparent process and there is no easy means for a member of the public or a watcher to learn who is and who is not an election judge. If watchers are to be approved by election officials and only given access when election judges are present watchers may easily be prevented from witnessing and verifying all meaningful steps in the conduct of an election. Instead of requesting that they be trusted, officials should be requesting and facilitating verification. *This was be a major dilution of current law.* Our panel seems to be taking the approach that by structurally limiting watching or giving officials the tools to make obstacles to watching we will return to trust in our officials. This will not work.

Here are some of the major points that I maintain will provide for adequate constructive watching and that I will promote for inclusion in our panel report even if it represents a minority viewpoint:

- 1) Watchers must be allowed adequate access to all steps in the conduct of the election – but this does not imply that there must always be facilitation for all possible watchers that could be legally allowed. A broad definition of what constitutes “steps” is essential.
- 2) Watchers should have access to a means for correcting discrepancies that allows timely input and feedback about the result and preferably a means to witness the process of correction.
- 3) All “steps” cannot be listed in a manner to be all inclusive or prescriptive. Steps depend on many variations in process. The definition of steps must remain flexible to apply to the instance. Specific facilitation of specific activities can be beneficial to the watching function.
- 4) Watching is limited to collecting and sharing information to be used to correct process immediately, or for a HAVA complaint or an election contest or for other legal remedial measures – watching does not and must not imply participation in the election judge function of decision-making. Training of watchers and judges can be helpful to achieve this important distinction.
- 5) Unlike election judging, watching does not require a balance of interests. This is because watching is primarily a passive information gathering function. Because one party does not field as many watchers should not prescribe a maximum to be allowed for another party.

- 6) Space is not to be an apriori determinant of the maximum accommodation for watching although in real time decisions will have to be made to curtail accommodation when space becomes limited. There may be minimums set that a county must at some point accommodate, but existing choices and uses of facilities are not to be the driver for for maximum opportunities for watching.
- 7) Means to communicate in order to collect adequate information for watcher purposes must be made available either at the time the information is being used or afterwards, but before an irrevocable step is taken in the election process pursuant to the decision. This will be better facilitated if there is DEO discretion to make a policy where watchers may make inquiries of limited scope to election judges, staff and vendors who may be present.
- 8) Means to communicate for the purposes of correcting discrepancies must be provided in a form that is both timely and accountable. Eligibility challenge must be facilitated with appropriate forms and processes including a way for a watcher to follow up on the resulting process.
- 9) Watchers must be able to establish their credentials at the location to be watched without requiring prior interaction with another election official elsewhere. If this necessitates carrying documentation showing eligibility proof and authority of the authorizing entity as well as the actual authorization signed by that entity and oath signed by the watcher, then those are the documents that should be required- but none requiring approval by the DEO. *That is of course what the law requires.*

I will be editing these points and adding to them during the next few weeks. I encourage an email discussion over these points and others as long as the email is provided to the entire panel. Thanks very much!

Harvie Branscomb 4:04 PM Thursday June 11

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