

## Branscomb comments on July 25 2016 Election Rulemaking

Harvie at electionquality dot com

Rules in italics, changes in capitals and strikeout. I have not edited the proposed rules but have commented on them in separate bold font and separate paragraphs.

*1.1.12 "Damaged ballot" means a ballot that is torn, bent, or otherwise mutilated or rendered unreadable, so that it cannot be processed by the ~~optical scanner ballot reader~~ **BALLOT SCANNER**. Damaged ballots include:*

*6 (a) All ballots that contain a foreign substance that could interfere with the ~~optical~~ **BALLOT** scanner (e.g. food, drink, etc.).*

*8 (b) Ballots that are marked in a medium or manner other than indicated in the ballot instructions **THAT CANNOT BE DETECTED BY A BALLOT SCANNER**.*

*10 (c) Ballots that the elector marked in a way that would disclose his or her identity.*

(c) above is a good thing to have in rule because it encourages election judges opening envelopes to sequester and duplicate ballots with identifiable markings. This protects the privacy of the voter. If redaction is accomplished by duplication as a damaged ballot then everything scanned can be anonymous and no further privacy violations will occur in the normal election process and no redaction is required later when the ballots are requested under CORA. Note also the relevance of the following rules requiring duplication. Ballots marked in a way that would disclose identity will be duplicated. Also of course ballots that are deemed by judges to be unlikely to scan correctly or to be correctly interpreted by machine will also be duplicated prior to scanning.

**18.3.2 Central Count Optical Scan Procedures FOR COUNTING PAPER BALLOTS ON BALLOT SCANNERS AT CENTRAL COUNT LOCATIONS**

**28 (a) DUPLICATION OF DAMAGED BALLOTS. BEFORE TABULATION, A RESOLUTION BOARD MUST DUPLICATE DAMAGED BALLOTS IN ACCORDANCE WITH RULE 18.4. Judges ELECTION JUDGES may complete a visual inspection of every ballot for the limited purpose of ~~separating~~ **SEGREGATING** damaged ballots ~~into a unique batch~~ **FOR DUPLICATION**.**

**33 (b) ~~Judges must resolve, and where applicable, duplicate, every damaged ballot and all ballots sorted by the optical scan machine in accordance with this Rule.~~**

**35 SEGREGATION OF BALLOTS REQUIRING RESOLUTION. A COUNTY MUST SORT BALLOTS THAT REQUIRE RESOLUTION ACCORDING TO THE CAPABILITIES OF ITS VOTING SYSTEM.**

Note this is being updated to account for electronic resolution or adjudication. The removal of "unique batch" is also helpful as it is not better to segregate duplicated ballots for scanning purposes because of potential risks to privacy.

**18.3.2 (c) ~~A resolution board, consisting of a bipartisan team of two election judges for partisan elections or two qualified election judges for nonpartisan elections, must resolve all ballots sorted by the central count optical scan equipment.~~**

**17 RESOLUTION BOARD. A RESOLUTION BOARD MUST DUPLICATE DAMAGED  
18 BALLOTS AND RESOLVE BALLOTS SORTED OR REJECTED FOR RESOLUTION.**

Note that all damaged (including for reasons of identifiable marks) ballots are to be duplicated. Both ballots that are rejected by machine and those that are already sorted out for resolution before they are scanned. Both reasons for resolution/duplication are valid. The special case of segregation for electronic adjudication (18.5.1) is handled separately from duplication.

*2.14.1 Notwithstanding the retention timelines specified in section 1-2-227, C.R.S., the county clerk may destroy paper voter registration records as soon as they have been digitally recorded in SCORE. The SCORE system must retain digital images of voter registration applications in perpetuity in accordance with section 1-5-301, C.R.S.*

Paper registration forms are no longer destroyed as soon as scanned. This is as it should be. That SCORE must retain digital images in perpetuity is also a good thing- this is only the digital data. I see from other comments some uncertainty as to the retention period of the paper records. It should be clear that it is the 25 months of all election records.

**6.9.1 THE CRIMINAL BACKGROUND CHECK MUST BE CONDUCTED BY OR THROUGH THE  
24 COLORADO BUREAU OF INVESTIGATION, THE COUNTY SHERIFF'S DEPARTMENT IN  
25 ACCORDANCE WITH SECTION 24-72-305.6(3), C.R.S., OR SIMILAR STATE OR FEDERAL  
26 AGENCY.**

**27 6.9.2 A PERSON CONVICTED OF AN ELECTION OFFENSE OR AN OFFENSE CONTAINING AN  
28 ELEMENT OF FRAUD MAY NOT HANDLE VOTER REGISTRATION APPLICATIONS OR  
29 CONDUCT VOTER REGISTRATION AND LIST MAINTENANCE ACTIVITIES.**

If the second statement is the entirety of the criterion for rejection as a result of the background check, then this is an acceptable and welcome rule. It should be made clear that the criteria are specific and not left up to the official.

**7.5.1 The county clerk must adequately light all stand-alone drop-off locations and use  
either  
32 an election official or a video security surveillance recording system as defined in Rule  
33 1.1.42 to monitor each location.**

**34 (a) Freestanding drop-off locations must be monitored ~~at all times~~ WHEN THEY ARE  
35 OPEN TO RECEIVE BALLOTS.**

**(b) If the drop-off location utilizes a drop-slot into a 1 building, the ballots must be  
2 collected in a locked container, and both the drop-slot and container must be  
3 monitored ~~at all times~~.**

**4 (c) Signage at each drop-off location must inform voters that it is a violation of law  
5 for any person to collect more than ten ballots for mailing or delivery in any  
6 election, and that electioneering is prohibited within 100 feet of any drop-box.**

**7 (d) The minimum number of drop-off locations must be open during reasonable  
8 business hours as defined in Rule 7.9.1(a) and from 7:00 a.m. through 7:00 p.m.  
9 on election day.**

**10 (E) VIDEO SECURITY SURVEILLANCE IS AN ELECTION RECORD UNDER SECTION 1-1-**

**11 104(11), C.R.S. AND MUST BE RETAINED BY THE COUNTY CLERK IN  
12 ACCORDANCE WITH SECTION 1-7-802, C.R.S.**

**(E) is a welcome improvement because it makes the video available to officials and CORA requestors. Note that the requirement to monitor the "slot" will arguably not be satisfied by a video camera at 50 yards and certainly not one that does not have a view of the side of the box with the slot. There are many cases of boxes inadequately "monitored" by video and some perhaps not monitored at all.**

**8.1.5 A watcher must complete a training provided by or approved by the Secretary of State  
15 before observing election activities where confidential or personally identifiable  
16 information may be within view. TO VERIFY COMPLETION OF THE TRAINING, A WATCHER  
17 MUST PROVIDE HIS OR HER TRAINING CERTIFICATE OF COMPLETION WITH THE  
18 CERTIFICATE OF APPOINTMENT.**

**This training course is available on the SOS website. It takes 30 minutes. The certificate is downloadable and printable from the website, and this is acceptable.**

**8.15.8 HAVE IN HIS OR HER POSSESSION A MOBILE PHONE OR OTHER ELECTRONIC DEVICE  
WHILE  
21 WATCHING ELECTION ACTIVITIES IN AREAS WHERE CONFIDENTIAL OR PERSONALLY  
22 IDENTIFIABLE INFORMATION MAY BE WITHIN VIEW.**

**This requirement to prevent use of electronic devices where PII "may be within view" is too loose. This rule may come from me using a smart phone to time the decisions of election judges in Jefferson County. That kind of use ought not be prevented by such a rule. I understand that photos may not be taken in this situation, but there is a blanket rule against photos and recordings taken by watchers. So I think this rule is simply not necessary and may be obstructive. What does "in possession" mean? Could this lead to searches of watchers for cell phones in a pocket? This rule portion ought to be deleted.**

**11.10.1 (3) FOR JUDICIAL RETENTION QUESTIONS, THE CONTEST NAME MUST  
15 INCLUDE THE COURT AND THE TITLE AND LAST NAME OF THE JUSTICE OR  
16 JUDGE STANDING FOR RETENTION (E.G., "SUPREME COURT – JUSTICE  
17 ERICKSON," "COURT OF APPEALS – JUDGE JONES," "1<sup>ST</sup> JUDICIAL  
18 DISTRICT– JUDGE SMITH," "ADAMS COUNTY COURT – JUDGE DOE,").**

**Election Night Reporting requirements to include identifying information for each contest are good. The same requirements should apply to the voter choice ballot format that is created by the ballot marking devices of the uniform voting system. In previous experience with VVPAT from DRE the contest title might not include enough information to identify the subject of the contest such as a judge name. Existing systems do not enforce a requirement that the contest be sufficiently recognizable. This will help.**

## **Rule 18. Uniform Ballot Counting Standards FOR PAPER BALLOTS**

**18.2.1 In accordance with section 1-7-309, C.R.S., and Rule 18.6 18.5, judges counting ballots**

**36 ~~on election day~~ must consider the intent of the voter.**

This recognition of the spread of time for tabulation is a big improvement and it is important to remember that we are a voter intent state. The question is when do the judges actually get access to ballots to consider the intent of the voter. With UVS it is only when the ballot is damaged and duplicated or when an overvote is detected or the mark density is within the two thresholds that trigger adjudication. Or during a recount when under previous rules “undervote rejection” is turned off. These rules must also specify how the Dominion device is to be set for a recount- presumably the lower threshold for ambiguous mark would be set to zero. It would be a terrible mistake to remove the extra adjudication that takes place with a recount- either a full hand count should be done or a much more accurate retabulation of the paper that does check for eligibility concerns and chain of custody as well as account for other sources of error in machine interpretation of voter intent such as out-of-target written messages, write-ins without filled targets, and very light or marks otherwise invisible to the scanner. In order to verify accuracy of resolution, the original ballots (that were originally duplicated as “damaged ballots” ) must be hand tabulated during a recount rather than duplicates machine-retabulated.

**18.3.2 (c) (1) ~~The board must be observed by two additional election judges, who in~~  
~~20 any partisan election must be representatives of each major political~~  
~~21 party.~~ IN PARTISAN ELECTIONS, A RESOLUTION BOARD MUST CONSIST OF  
22 AT LEAST TWO ELECTION JUDGES AFFILIATED WITH DIFFERENT MAJOR  
23 POLITICAL PARTIES.**

This new language is intended to reduce the need for election judges in adjudication from four to two. Resolution is the term used in the Hart world; adjudication in the Dominion world. The thought is that four might be too many hovering around a computer screen. Some counties project the resolution process onto a large screen to accommodate 4 judges plus a staff operator and watchers so the option to go with more judges is appreciated.

But written this way this language also reduces the number of judges required for manual duplication and that is a mistake. For manual duplication either four judges with two monitoring the process or a requirement to crosscheck duplication of ballots by an additional and different pair of judges is needed. It is not sufficient to ask the same pair of judges to cross check their own work.

The work effort is the same in both cases but the elapsed time required is longer if separate checking is used. Even if Runbeck Simulo is used for duplication arguably two judges are needed to enter the data but two different judges are surely required for confirmation checking. When two judges are involved in duplication (one reading, one writing) either of them can introduce an error that will not be discovered until separate judges check them,

either at the time of the first copy or later. When two judges are working together to check the quality, they should both make a visual or auditory indication of acceptance so that a watcher can confirm that the two judges are satisfied before moving on. The same kind of watchable indication of intention is needed during voter intent adjudication (resolution) by two judges.

**(3) IN COUNTIES WITH A VOTING SYSTEM THAT DOES NOT SUPPORT DIGITAL RESOLUTION, THE COUNTY MUST HAVE A SINGLE RESOLUTION BOARD. IN COUNTIES WITH A VOTING SYSTEM THAT SUPPORTS DIGITAL RESOLUTION, A RESOLUTION BOARD MUST WORK AT EACH RESOLUTION WORKSTATION.**

This paragraph says that multiple resolution teams may only be used in counties with electronic adjudication. Why? If consistency is the reason then something else will need to be done to provide for consistency in the case of multiple teams for electronic adjudication, and in the case where multiple teams might want to be used in non-electronic adjudication counties such as El Paso and Jeffco. There is a new policy for auditing the electronic adjudication in case only two member teams are used. This audit process should be scheduled so that it can be watched.

Proposed replacement of first sentence: **EVERY COUNTY MUST HAVE AT MINIMUM TWO RESOLUTION BOARDS EACH OF TWO JUDGES OF OPPOSING PARTIES OR AT LEAST ONE RESOLUTION BOARD OF FOUR JUDGES EQUALLY REPRESENTING OPPOSING PARTIES.**

**18.4.1 A DAMAGED BALLOT WILL REQUIRE RESOLUTION IF IT IS A BLANK BALLOT OR CONTAINS OVERVOTES, WRITE-IN VOTES, OR OTHER AMBIGUOUS MARKINGS. THE VOTER'S MARKINGS FROM THE DAMAGED BALLOT, AS RESOLVED BY THE RESOLUTION BOARD, MUST THEN BE MARKED ON THE DUPLICATED BALLOT DURING THE DUPLICATION PROCESS.**

The sentence above is written as if the only definition of a damaged ballot is one that is rejected by the scanner for adjudication. That case is covered in 18.5.1 and need not be repeated here. Here is where actions related to reasons for duplication instead of resolution need to be listed. The 1.1.12 definition clearly contains reasons for duplication beyond what would cause a voting system to reject or send ballots to adjudication. Counties using non UVS equipment regularly duplicate ballots for reason that the scanner is not expected to tabulate the ballot correctly. That case must be included here. It would be preferable if the term duplication instead of resolution were used to distinguish from electronic adjudication for cases where duplication is needed prior to scanning. In the definition of damaged ballot 1.1.12, the case of a ballot with identifying marks is included. Appropriate replacement sentences for the above could be: **A BALLOT THAT IS REJECTED BY THE SCANNER WILL REQUIRE RESOLUTION IF IT IS A BLANK BALLOT OR CONTAINS OVERVOTES, WRITE-IN VOTES OR OTHER AMBIGUOUS MARKINGS PER 18.5.1. A DAMAGED BALLOT CHARACTERIZED AS SUCH FOR REASON OF IDENTIFYING MARKS MUST BE DUPLICATED PRIOR TO SCANNING TO REMOVE THE IDENTIFYING MARKS. A DAMAGED BALLOT CHARACTERIZED AS SUCH FOR**

**REASON THAT IT MAY FAIL TO BE CORRECTLY INTERPRETED BY THE SCANNER MUST BE DUPLICATED.**

The above language will substantiate existing practices in non-electronic-adjudication counties and also provide for minimal cost and delay for access to ballots as public records pursuant to CORA. It will also best protect the privacy of the voters who accidentally mark ballots with their initials, names or signatures by minimizing the exposure of the record to other officials. This practice best conforms to the constitutional requirement of anonymity of the ballot while allowing the ballot to be counted.

**18.4.2 A RESOLUTION BOARD MUST REVIEW THE ORIGINAL BALLOT AND THE DUPLICATED 38 BALLOT, AND CONSULT THE VOTER INTENT GUIDE IF NECESSARY, TO ENSURE THAT 39 EACH DAMAGED BALLOT HAS BEEN PROPERLY AND ACCURATELY DUPLICATED AND, TO 40 THE EXTENT APPLICABLE, RESOLVED.**

Here we have a requirement to cross check but the original resolution team might be doing the cross check. This check should be done by a different team to achieve best accuracy. For this reason it is better to have at least two resolution teams rather than only one. (See 18.3.2 c (3) above)

**Solution "A SEPARATE RESOLUTION BOARD MUST..."**

**18.4.6 THE RESOLUTION BOARD MUST DEPOSIT ALL DAMAGED BALLOTS THAT HAVE BEEN 19 DUPLICATED AND THE DUPLICATION LOGS IN A SEALABLE CONTAINER THAT IS CLEARLY 20 MARKED TO IDENTIFY ITS CONTENTS (E.G., "DAMAGED BALLOTS"). THE COUNTY MUST 21 MAINTAIN CHAIN-OF-CUSTODY AND SEAL LOGS FOR THE DAMAGED BALLOT CONTAINER 22 AT ALL TIMES DURING THE STATUTORY ELECTION RECORDS RETENTION PERIOD.**

This requirement appears to require sealing the duplicate ballot log with the duplicate ballots. The log need not be sealed but does require retention. It should not be necessary to obtain election judges to sign off on broken seals in order to get access to these logs. Note that in general there should be a stated rule regarding the policy about location and retention of seal logs. Seal logs that are contained within the sealed container may not be examined without breaking the seal and creating a question for chain of custody. This is an impediment to verification of chain of custody. Seal logs would ideally be sealed in a transparent envelope that is visible on the exterior of the container to be sealed.

Propose delete "AND THE DUPLICATION LOGS".

**(B) If a voter uses a consistent alternate ballot marking method that deviates 13 from the method specified by the voting instructions (such as circling or placing 14 a check mark behind a candidate's name or ballot response) and does not place 15 an "X", check or other appropriate mark in the ANY target area, the voter will be 16 considered to have voted for the appropriate candidates and or ballot responses 17 and the ballot must be duplicated. But THE RESOLUTION BOARD MUST RESOLVE 18 THE BALLOT IN ACCORDANCE WITH THE VOTER'S INTENT BY COUNTING THE**

19 VOTES INDICATED BY THE ALTERNATE BALLOT MARKING METHOD. THIS RULE  
20 DOES NOT APPLY if a-THE voter marks any of his or her choices by placing an  
21 “X”, check or other appropriate mark in any target area on the voter’s ballot, IN  
22 WHICH EVENT only those choices where the target area is marked may be  
23 counted.

It is incorrect to include "X" or "check" along with the phrase "appropriate mark" considering that neither X nor check is an appropriate mark according to instructions on ballots in Colorado. The language that appears in both sentences should refer only to the absence of an appropriate mark that in Colorado is a fully filled in target. I and many election judges seem to agree that this rule as written will produce incorrect interpretation of voter intent. And both sentences produce the same misinterpretation of voter intent. I do not agree that the presence of one appropriate mark is sufficient to invalidate a number of alternate voter marks that are clear in voter intent. This rule should be corrected to make the result conform better to voter intent. This rule as written has produced too many discussions among election judges who ought to be the final arbiters of voter intent. These two sentences seem to be written to match the inability of the voting machines to correctly capture voter intent rather than enabling the much needed human factor in determining voter intent when the machine fails to be accurate. Propose deletion of " “X”, check or other”.

#### 18.3.2 (f) ~~Recount Procedures for Optical Scan~~

~~14 (1) Optical scan equipment must be set to consistent sensitivity standards for  
15 each system type, must be tested before the recount, and must be  
16 programmed to sort undervotes for the individual race(s) or ballot  
17 measure(s) being recounted.~~

Apparently the settings of the voting system scanner for recount has not been updated for the UVS type equipment. Instead the paragraph in the original rules has simply been deleted. Furthermore, the treatment of duplicated ballots in a recount has not been specified. Clearly the original ballots that were once duplicated should be examined by hand for voter intent and hand tabulated during a recount and included in the count. Duplicates should not be recounted by machine. This will produce a much more accurate Colorado election in case of narrow victory margins that are subject to recount. This language must be revisited and reinserted in the rule with proviso for Dominion such as “SET THE LOWER THRESHOLD FOR ADJUDICATION OF AMBIGUOUS MARKS TO ZERO”.

#### 18.5.3 RESOLUTION OF WRITE-IN votes

(a) If a voter designates a vote for a named candidate on the ballot and writes in the name of the same candidate in the write-in area, the vote FOR THE NAMED CANDIDATE must be counted.

This case is not exemplified in the voter intent guide and should be.

21.4.14 Ballot-level Cast Vote Records and Exports. All voting systems certified by the Secretary

3 of State for use in Colorado on or after January 1, 2016 must meet the following  
4 requirements for ballot-level cast vote records and exports on or before December 31,  
5 2016:

6 (a) The voting system must capture a ballot-level cast vote record (CVR) consisting  
7 of a single record for each ballot tabulated, showing the manner in which the  
8 voting system interpreted and tabulated the voter's markings on the ballot, as  
9 adjudicated and resolved by election judges, if applicable.

10 (b) The voting system must be able to aggregate in a single file and export all CVRs  
11 in comma-separated value (CSV) text format.

12 (c) The CVR export must contain the following fields, with values or data populated  
13 by the voting system:

14 (1) CVR Number. A sequential number from one to the number of CVRs in  
15 the export file. This can be used as an alternate method to identify each  
16 CVR.

17 (2) Batch ID. Identifies the batch in which the paper ballot corresponding to  
18 the CVR is located.

19 (3) Ballot Position. Identifies the position of the paper ballot corresponding  
20 to the CVR within the batch. Target cards scanned to identify the batch  
21 must not be included in this count.

22 (4) Imprinted ID. If the scanner model supports imprinting a unique  
23 character string on the ballot during the scanning process, the voting  
24 system must populate this field with the unique character string.

25 (5) Ballot Style. Indicates the ballot style of the paper ballot corresponding  
26 to the CVR.

27 (6) Device ID. Identifies the scanning device by model, serial number,  
28 and/or scanning station identifier.

29 (7) Contest and Choice Names. Each contest and choice on any ballot in the  
30 election must have its own field so that voters' choices in all contests can  
31 be easily and independently tabulated after the CVR export is imported  
32 into a spreadsheet application.

33 (a) (D) The header or field names in the CVR export must unambiguously correspond to  
34 names of the contests and choices on the paper ballots. The use of choice ID and  
35 contest ID to identify each choice must be avoided because they require cross36  
referencing to other sources to determine the choice and contest names.

37 (b) (E) The contests and choices must be listed in the same order as they appear on the  
38 ballots.

(c) (F) A vote for a choice must be indicated by 1 a "1". No vote for a choice or an  
2 overvoted condition must be indicated by a "0". Choices that are not applicable  
3 to the CVR must be left blank.

The definition of a cast vote record report is reiterated in this rule process even though there  
are no significant changes to it. It isn't as good as it could be in that it does not specify the  
location of detected overvotes as separate from undervotes. It also does not provide room for  
optional data such as the mark density as detected by the voting system.