Proposals for May 15 meeting of CO SOS Watcher Advisory Panel- Harvie Branscomb

1) Watcher eligibility:

   By district:

   Watchers are being appointed by credible authorities. Therefore the basis for eligibility of watching should be at most restricted to an eligible Colorado elector and not restricted to an eligible elector in a district in the election. Effective watching is an learned skill that is not readily available. Credible authorities should have access to expert watchers from other districts if they so choose. The current law means that small election district elections such as municipal and special district discriminate against watching.

   By party:

   Eligibility for watching should not require same party affiliation including for major parties. Otherwise this invokes an unfair discrimination against affiliated electors. It was necessary for me to unaffiliate in order to watch for the Green and Libertarian parties in 2014. At a minimum unaffiliated electors should be able to watch for any party, as currently in law and rule.

2) Watcher appointment:

   Who checks/approves:

   Watcher eligibility should be checked and affirmed on the credential by the appointing official not by the DEO or other election official. DEO approval stands as an obstacle to watching. In several counties I was required to obtain a county seal or approval from the clerk who may be in a separate location from where the watching is to take place. Arapahoe works this way. In Larimer County I arrived at the central count facility to find I was locked outside but two staff people were inside. I was required to drive to the clerk's office to obtain approval for my watcher credentials and drive back to the central count facility. This was unnecessary and wasteful. Since watching is not a decision-making function and very different from judging it is not necessary for credentials to be structurally checked beforehand. Discovery of ineligibility after the fact is sufficient for good enforcement. Individual responsibility (as the SOS mentioned on radio this morning) is sufficient on the part of the watcher and the appointing party official or candidate to insure compliance.

   Appointment by more than one party:

I have experienced a refusal to allow watching under two appointments and two credentials simultaneously in Boulder. I was credentialed by the state Green and Libertarian parties but allowed to watch for only one. Rules must therefore specify that watching for more than one party or candidate is possible. The reason for this is to accommodate compliance with the one watcher per appointing party per area rule. When another watcher arrives for a given party, if another watcher has two certifications they should be allowed to remain in place. Also if both parties wish to have a record of a watcher present, they should be allowed to.

Appointment when no county party official available

There is a potential for confusion when obtaining credentials for watching from a state party when a county party official is not or might not be available. Rules could be clarified so that there is always a clear means for a watcher to be appointed.

3) Watcher oath

The watcher oath must be sufficiently restrictive to allow protection of privacy during access to all election materials that can be accessed by election judges. And that access must then be provided to watchers. Without this, the scope of "every step in the conduct of the election" cannot be fulfilled. On the other hand it must not prevent communication of watchers with the public for anything except material specifically designated as confidential by rule and law. Currently there is no such specific designation for election confidentiality and CORA has been used when this becomes an issue. CORA is not adequate for this purpose as CORA does not address restricted flow of confidential information under protection of an oath. Watchers must also be able to document instances of violations of rule and law as well as examples of best practices. The watcher oath should be written such that both the privacy protection and facilitation of communication and documentation are served. In particular, watchers must not be prohibited from revealing election results at any point after 7PM on election day. This has been an issue in elections I have watched in several counties.

CRS 1-7-108 (1) Watchers shall take an oath administered by one of the election judges that they are eligible electors, that their name has been submitted to the designated election official as a watcher for this election, and that they will not in any manner make known to anyone the result of counting votes until the polls have closed.

Rule 8.5 In addition to the oath required by section 1-7-108(1), C.R.S., a watcher must affirm that he or she will not: 8.5.1 Attempt to determine how any elector voted or review confidential voter information; 8.5.2 Disclose or record any confidential voter information that he or she may observe; or 8.5.3 Disclose any results before the polls are closed.

The rule should clarify that "submission to the DEO" is not a requirement for approval by the county clerk and that an email without response is sufficient. In fact the rule would best interpret "DEO" as the election official locally responsible for the voting location as was probably intended. "Eligible electors" should be clarified to mean in the State. The Rule should change so that the oath does not prevent watcher review of confidential voter information but does prevent disclosure or removal of any record of confidential information from the location.

The printed oath that I have seen requires no disclosure of election results until after the DEO has made a formal released. This printed text is too restrictive and has led to attempts to prosecute watchers in Pueblo. The watcher oath should allow sharing of election results at and after 7PM just as our law once required election judges to post local results immediately on the door. The watcher oath should simply be sufficient to provide for privacy of the voter intent and the confidentiality of aggregate results until 7PM.

4) Limitations on watcher activity outside of the oath

If Rule 8.6 is addressed at the May 15 meeting:
Rule 8.6 A watcher may not: 8.6.1 Personally interrupt or disrupt the processing, verification, and counting of any ballots or any other stage of the election. 8.6.2 Write down any ballot numbers or any other identifying information about the electors. 8.6.3 Touch or handle the official signature cards, ballots, mail ballot envelopes, provisional ballot envelopes, voting or counting machines, or machine components. 8.6.4 Interfere with the orderly conduct of any election process, including issuance of ballots, receiving of ballots, and voting or counting of ballots. 8.6.5 Interact with election judges except for the supervisor judge. 8.6.6 Use a mobile phone or other electronic device to make or receive a call in any polling location or other place election activities are conducted. 8.6.7 Use any electronic device to take or record pictures, video, or audio in any polling location or other place election activities are conducted. 8.6.8 Attempt to determine how any elector voted. 8.6.9 Disclose or record any confidential voter information as defined in section 24-72-204(8), C.R.S., that he or she may observe. 8.6.10 Disclose any results before the polls have closed.

Rule 8.6.1 must be adjusted to allow interruption sufficient for collection of data appropriate to a voter or mail ballot envelope challenge, SOS complaint or election contest.

Rule 8.6.2 suggests that ballot numbers are appropriate as identifying information about electors and must be changed. They are not. If ballot numbers are visible with voter intent that is identifiable to an elector then the watcher should be able to document and report this fact. Any numbers visible on ballots at a time when they are identifiable are a violation of privacy that is accessible to judges and watchers must be able to witness this and report. To stop the watchers from writing down numbers is a mistake. The correct practice is to make sure the numbers are either anonymous or not related to voter intent. It is part of a watchers role to verify this.

Rule 8.6.5 is problematic when a supervisor judge has not been identified. It is also problematic when there are many areas and activities and only one supervisor judge. I have experienced obstacles to watching when the supervisor judge is inaccessible, not identified, or otherwise engaged. We need a more flexible rule to accommodate smaller venues where only two judges are in the area and there is no supervisor, or places where it is appropriate for watchers to communicate with judges, or where judges initiate the communication with the watchers. I have been yelled at in Adams County for silently paying attention to judges having a conversation between themselves as if I have been involved. This rule can be used to prevent or dissuade or render watching ineffective.

Rule 8.6.6 prevents only uses of cell phones to make a call. This is sufficient as long as texting and emailing from a phone is allowed as it currently is. This will make the watcher less obtrusive from an acoustical point of view.

Rule 8.6.7 disallows any electronic recording any place election activities are taking place. This is too restrictive and prevents watchers from documenting activities that are not involving confidential information but are needed for further consideration by election challenge, SOS complaint or judicial contest. In particular when a public meeting is being conducted in a place with “election activities” all manner of recording (without interference) must be allowed.

Rule 8.6.9 refers directly to CORA. This must be revisited in view of the specifics of public voter information and the oath. Here the disallowance of recording may again be a problem. Better that any “recording is not to be released to the public” than “may not record.” The presence of confidential information must become better identified and physically consolidated so that it will not be casually viewed by anyone- official or watcher.
