

## Andrea Gyger

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**From:** Marilyn Marks <marilyn@aspenoffice.com>  
**Sent:** Saturday, July 28, 2012 11:41 AM  
**To:** Suzanne Staiert; Andrea Gyger  
**Cc:** Scott Gessler; Dana Williams; Harvie Branscomb; mary eberle [REDACTED]; Lu Ann Busse 4 Colorado; billbartlett.gpco@gmail.com; americonparty@gmail.com; Elena Nunez (ENunez@CommonCause.org); Luis Toro <ltoro@coloradoforethics.org> (ltoro@coloradoforethics.org); Lu Ann Busse 4 Colorado; Jeff Orrok (statechair@lpcolorado.org); mtierney@kghllaw.com; ryan@cologop.org; rwestfall@halewestfall.com; [REDACTED]; Marty Neilson; Dwight Shellman; Janice Vos; 'Frank Atwood' [REDACTED]; Andrew Cole; Richard Coolidge; [REDACTED]; [REDACTED]; Ralph Shnelvar; Elizabeth Steele (ESteele@commoncause.org); JFlanagan@CommonCause.org  
**Subject:** Suggestion on Rules under consideration from Monday's hearing

Deputy Secretary Staiert,

There is no doubt that the public feedback on the proposed rules was significant and ranged from matters of major policy to legal issues to technical matters.

I understand from the hearing and subsequent conversations that Secretary Gessler prefers to adopt some of these rules, possibly with significant yet to be drafted changes prior to the general election. No doubt everyone supports having clarity and uniformity in advance of the election. However, the majority of the proposed rules seem to require considerable reworking, and many should not be adopted at all.

Given the complexities and implications of some of the proposed rules and the feedback you received, if the Secretary feels that rule changes must be adopted before the election, **please consider conducting another public hearing or less formal public meeting to allow an interactive discussion of the changes under consideration by the department before they are adopted.**

The comments by Pitkin County on Proposed Rule 10.7.4 are good examples of significant voter-disenfranchising unintended consequences of a rule which has not been adequately vetted or discussed, and was not discussed at Monday's hearing. I am concerned about the adoption of such rules without a more interactive dialogue and review. The hearing process as conducted on Monday does not allow for correction of misinterpretations or errors in the discussion, and risks more confusion in the final rule without a meaningful way to discuss the changes the Department is considering.

You suggested in the hearing that the watcher rule may need clarity on the meaning of "witness and verify." While that may be true, many of us are very concerned about the restrictive language in the proposed rule as to WHAT and WHERE such observation may take place. That is why we want no rule changes, particularly when we cannot review the changes under consideration and comment on them before adoption. The statutory language is strong and reasonably clear. Rules may only serve to attempt to dilute the rights of watchers.

After you personally witnessed the manner in which the Canvass Board statutes and rules were abused in the Douglas County recount this week to block transparency, public process and good decision-making, it is surely a timely example of why any rules on canvass board activities and appointment need considerable careful consideration.

There was considerable dialogue between Secretary Gessler and numerous speakers on whether there was time before the election to implement rules, my sense was that the general concern is that there is no process in place to allow the public to review what revised rules may be under consideration before they are adopted.

Without a chance to see what is being considered, many of us would prefer to see no rule changes rather than unknown rule changes.

While I request that no rule changes be adopted, I suggest that if rules are going to be adopted, another public meeting with open discussion is in order to reduce risks of unintended consequences of rule changes just prior to the general election.

Thank you for your consideration.

Marilyn Marks

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**From:** Marilyn Marks <marilyn@aspenoffice.com>  
**Sent:** Saturday, July 28, 2012 12:24 PM  
**To:** Andrea Gyger; Suzanne Staiert  
**Cc:** Harvie Branscomb; mary eberle [REDACTED]; billbartlett.gpco@gmail.com; americonparty@gmail.com; Ralph Shnelvar; [REDACTED]; [REDACTED]; Jeff Orrok (statechair@lpcolorado.org); Elena Nunez (ENunez@CommonCause.org); Luis Toro <ltoro@coloradoforethics.org> (ltoro@coloradoforethics.org); Dwight Shellman; Janice Vos; Lu Ann Busse 4 Colorado; Andrew Cole; mtierney@kghllaw.com; [REDACTED]; 'Colorado Republicans Don Ytterberg (don@cologop.org)' (don@cologop.org)  
**Subject:** Conflict between proposed watcher rule and Colorado Sunshine Laws--comment on proposed rule making

Deputy Secretary Staiert and Ms. Gyger:

I apologize for submitting this comment past the deadline of yesterday for rule making comments after Monday's hearing. However, recent events and another review of the proposed rules brought this issue to light. I hope you will consider it in your rule-making as well as procedural guidance considerations for the upcoming election.

The Secretary proposes limiting watcher rights to only election activities in Article 7 of the code. As I have frequently commented, watcher rights by statute cannot be limited to only those activities. This week's events in the Douglas County recount presented the live example. The canvass board is by statute responsible for conducting a recount. They are a **public body** under the Sunshine Laws. Their procedural decisions, documents under review and deliberations cannot be shut off from the public and watchers as happened in Douglas County this week with direct approval of such information black-out by SOS representatives.

While watchers should never be prevented from attending and listening to canvass board meetings, we **were** excluded from those meetings for 3 days in Douglas under the theory that the "conduct of the election" (Article 7) was not ongoing, and that SOS rules limit canvass board "watching" to minor party watchers with candidates on the ballot. Clerks and canvass board are going to interpret any such restriction in the rules to mean that they may with impunity trump the Open Meetings Laws to exclude watchers and the public from their meetings--as they did in Douglas with numerous attorneys from SOS and Douglas County looking on and approving of the improper restriction for three days.

As you are aware, the result of such shut-down of public access in Douglas County was:

1. Improper selection of machines for use in the recount.
2. Improper and inadequate selection of ballots to be tested.
3. Improper ballot resolution procedures.
4. Failure to perform a required post-recount audit.
5. Refusal to give "interested parties" (under HB12-1036) copies of requested documents.
6. Illegal prohibition on watchers from advising the candidates of discrepancies and problems with the count.
7. Illegal prohibition on candidates from consulting with watchers about discrepancies.
8. Inability to deliver timely information to canvass board members.
9. Numerous important (and improper) decisions being made by the canvass board in "private meetings" even while standing in a public space, but making us stay "behind the ropes" and out of earshot.
10. Reviews of numerous public documents by the canvass board that were kept from the watchers and public in attendance.
11. Certification of known inaccurate totals and refusal to hear, read or consider other discrepancies not known to the canvass board.

It should be noted that prior to the start of the recount, a member of the public, and auditing expert Harvie Branscomb asked with three SOS representatives present that the clerk confirm that we would be able to hear the canvass board's decisions on machine and ballot selection. We were assured that we could, and instead we were quickly isolated to a place "behind the ropes" where we could not hear any such discussions, despite our many complaints to the canvass board, clerk, management, and the SOS representatives. And so it remained for three days.

While I want to object on the record to the SOS representatives' approval of the violations of the Sunshine Laws and watcher rights in Douglas, I also want to urge that you specifically **strike any reference in proposed Rule 8 to limiting the watcher rights to Article 7 activities.**

Thank you for your consideration. Feel free to contact me with any questions.

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