

June 12, 1997

**Advisory Opinion 1997 - No. 5  
Legislator Initiatives**

The Board has received a request for an advisory opinion from Representative Scott Smith, who has waived confidentiality.

**QUESTION**

The request asks for clarification of the Board's interpretation of the prohibition on the use of state facilities for campaign purposes, RCW 42.52.180, which was previously addressed in Advisory Opinion 1995 - 18. The prior opinion did not specifically address the situation where a legislator is the primary proponent of an initiative to the legislature. Representative Smith asks whether that status would affect the Board's interpretation of the statute. Specifically, the request includes the following questions (re-numbered for purposes of this opinion):

I. Is there a difference in the application of the prohibition where the legislator is running the campaign himself?

A. Did the Legislature intend, by not specifically addressing the situation, to draw a distinction between situations in which the legislator is running the campaign and those in which the legislator has nothing to do with the campaign, other than that he is a state legislator?

B. Does the exception for statements made at open press conferences mean that a legislator can ask staff to prepare a statement to deliver at an open press conference announcing the filing of the initiative?

II. Does the Board draw any distinctions where the initiative is an initiative to the Legislature rather than an initiative to the people?

III. Does the prohibition on the use of public facilities apply to actions in a legislative office that do not involve the use of any legislative equipment or staff?

A. If a legislator is sitting alone in his or her legislative office writing notes for a speech in support of the initiative on a privately-owned pad of paper with a privately-owned pen, is there a violation?

B. If a legislator makes a telephone call to the campaign office on a private cellular phone while sitting in a legislative office, is that a violation?

C. If so, is the violation avoided if the legislator moves outside the office and into the hall? Or, must the legislator conduct the call outside the building? Or, is the capitol campus considered state property and, therefore, off-limits?

**OPINION**

No special status attaches to a legislator-sponsor of an initiative which would result in a different analysis of campaign activities.

Staff assistance for press conferences is limited to statements in response to questions about existing ballot measures at a press briefing. It is improper to use staff assistance to announce a campaign for an initiative, or to assist such a campaign in any other way.

The occasional use of physical office space without using other equipment or resources for activities related to a ballot measure may not necessarily be a violation, but is strongly discouraged.

## **ANALYSIS**

The use of state facilities and staff for campaign assistance is prohibited, with certain exceptions, by RCW 42.52.180, which reads as follows:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(b) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

(3) As to state officers and employees, this section operates to the exclusion of RCW 42.17.130.

The statute applies broadly to "the promotion of or opposition to a ballot proposition." The exceptions are for activities tied to performance of official duties. As we noted in Advisory Opinion 1995 - No. 18, the "open press conference" exception should be interpreted to encourage legislators to express their views on public policy issues, including ballot propositions. We also cited favorably, however, House and Senate policies allowing greater leeway when responding to inquiries than when initiating comments. That distinction applies here. While elected officials are expected as part of their official duties to comment on matters that affect the state, they are not expected to use publicly sponsored and supported press conferences to initiate and promote ballot measures.

Similarly, the Board does not see any basis in the statute to draw a distinction between initiatives to the people and initiatives to the Legislature, except to the extent noted in Advisory Opinion 1995 - No. 18. In that opinion the Board stated that "during a legislative session, it is within the 'normal and regular conduct' of legislative office for legislators to discuss an initiative to the legislature, or to argue for or against it, as they would any other legislative measure." In recognizing this situation, the Board also noted that an initiative to the legislature is a ballot proposition when it is filed with the Secretary of State to begin the signature gathering process. The Board finds that a legislator involved in the promotion of such an initiative is in no different position than a private citizen. While an initiative may eventually result in legislation, the legislator's official duties relate to consideration of such a measure during a session, not promoting and obtaining the signatures needed to bring the proposition to the legislature.

The use of the office space for what are arguably campaign activities is the most difficult part of the request. In Advisory Opinion 1995 - No. 18, the Board made it clear that there is a no-tolerance policy with respect to use of facilities to assist a campaign. The opinion includes a finding that holding a campaign meeting in a legislative office, or using the telephone for a campaign call, would be violations. The request asks the Board to consider the next step, which is much more difficult to enforce as a practical matter and to interpret from the statute. Some might equate such activities with the mere thinking about a ballot campaign in one's office, and, to be sure, the Board could say that it is a violation to think about a ballot measure when a legislator is in his or her office. But that would clearly be absurd. We do not hold that thinking about a campaign in a legislative office is a violation of the prohibition. Similarly, pulling out a pocket notebook and writing down a thought about a campaign is not automatically a violation, nor is the campaign phone call on a personal cellular phone.

While conceding that such personal activities may not always be technical violations of the statute, the Board strongly discourages such activity. In the event of a complaint alleging such actions, the Board will carefully examine the full extent of such behavior. If there is a pattern of activity going beyond the truly occasional or inadvertent, then the Board may find a violation.

The request also asks about hallways and other parts of the capitol buildings outside the offices and chambers. The Board does not find that such public use areas are covered by the prohibition, if such areas may be used for campaign purposes by any member of the public on an equal access basis. The capitol steps, for example, are often used for political rallies without violating the prohibition. If a rental fee is charged, it must be charged equally and consistently. Therefore it would not be a violation to conduct such activities in public use areas.