

November 21, 1995

Advisory Opinion 1995 - No. 18

INTRODUCTION

The State Ethics Act, in subsection 2 of RCW 42.52.180, contains several exceptions from the rule that public resources may not be used to support or oppose a ballot proposition. The board believes that answering the following questions, which the board raises on its own motion, will clarify the reach of these exceptions. Along with this opinion, the board has adopted a rule defining "measurable expenditure" pursuant to RCW 42.52.180(2)(b).

QUESTIONS

1. In response to a constituent's contact regarding a ballot proposition, may the legislator, with staff assistance, provide the constituent with a letter which (1) expresses the legislator's opinion on the proposition, (2) states the reasons for the opinion, and (3) urges the constituent to support the proposition? May the legislator, with staff assistance, provide copies of this letter to other constituents whom the legislator believes might be interested in it?
2. May a legislator, with staff assistance, send a session wrap-up newsletter to the legislator's constituents if the newsletter contains the legislator's opinions on a ballot proposition?
3. May a legislator, with staff assistance, prepare and send a memo to other legislators that, in its entirety, urges them to join the effort to defeat a ballot proposition?
4. May a legislator use an office telephone to make a toll call at state expense to the headquarters of a ballot proposition campaign and make arrangements for yard signs promoting the proposition? Would the answer be different if it were a local call? Would the answer vary with the purpose of the call?
5. May a legislator, in the course of a long state-paid toll call with a constituent concerning a bill, comment on a certain ballot proposition if the comment is not in response to the constituent's inquiry?
6. May a legislator meet with persons in his or her legislative office for the purpose of planning a ballot proposition campaign?
7. May a legislator prepare, with staff assistance, a Voters' Pamphlet argument for a ballot proposition?
8. Using public resources or staff assistance, may a legislator refer to his or her own voting

record or actions in committee or on the floor in arguing for or against a ballot proposition which was the subject of legislative action? What about the voting record or floor comments of another member?

9. May a legislator, with staff assistance, prepare a "guest" editorial advocating or opposing a ballot proposition?

GENERAL PRINCIPLES

In analyzing these questions, the board applies the following general principles. Legislators and legislative employees should apply these principles in deciding whether particular conduct is permissible.

The prohibition on using public facilities for campaign purposes is found in RCW 42.52.180, which reads in pertinent part 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 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:

. . . .

(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. . . .

There are three specific exemptions to this prohibition which are relevant to these questions. First, legislators are permitted to make statements in support of, or opposition to, ballot propositions at an open press conference or in response to a specific inquiry (RCW 42.52.180(2)(b)). The "measurable expenditure" language could be interpreted as limiting the entire exception to instances where there is not a "measurable expenditure." The board rejects this interpretation, because we believe it conflicts with legislative intent and because we are of the opinion that legislators should be encouraged to provide their opinions on public policy issues, including issues presented by ballot propositions.¹ As such, we interpret the "measurable expenditure" language, not as a limitation on a legislator's right, under this exception, to speak out on ballot issues, but as a direction to this board to provide wide latitude to legislators who do speak out, especially when they do so at no "measurable" cost to the state.

Second, legislators and staff are permitted to promote or oppose a ballot proposition if they do so by engaging in "[a]ctivities that are part of the normal and regular conduct" of the legislature or legislative office (RCW 42.52.180(2)(c)). This means activities which are otherwise lawful and customary. Some examples of "activities" that are "normal and regular": Legislators serve on committees appointed to write arguments for the voters pamphlet. The creation of these committees is required by statute and legislators appointed to them historically have used office equipment and legislative staff to write the voter pamphlet arguments. Similarly, responding to ballot proposition inquiries from the media, constituents and other persons is a customary and proper function of legislators for which they also may use legislative equipment and staff to prepare the responses. Thus, this exception for "normal and regular conduct" largely includes the previously discussed exception permitting legislators to make statements at a "press conference or in response to a specific inquiry."

Third, legislators are permitted to promote or oppose a ballot proposition if their use of public facilities to do so is "de minimis" (RCW 42.52.180(2)(d)). "De minimis use" means no cost or an actual cost to the state which is very small or insignificant, and which does not interfere with the performance of the official's normal duties. Because of the difficulties in determining what is a "de minimis use" under this exception and because of the controversy and distrust of legislators that reliance on this exception can generate, the board will narrowly construe this exception.

The board recognizes that both the Senate and the House of Representatives have adopted very restrictive policies governing the above discussed exceptions. Generally, under these policies, legislators are given wide latitude to use office facilities to respond to questions on ballot propositions, but little leeway to use office facilities to initiate comments, especially written, on such propositions. The board believes that these policies are prudent and legally sound.

¹ See: *Final Report of the State of Washington Commission on Ethics in Government and Campaign Practices*, p. 13 (1994).

Consistent with Senate and House policies, the board advises that office facilities should not be used for direct appeals to vote for or against a ballot proposition. Language such as "Vote for Referendum 5" or "Support our children and do not vote for Referendum 6" are not within these exceptions. This type of direct appeal language goes beyond the statutory exception, which allows legislators to express their views or opinions on ballot propositions. Voter Pamphlet arguments are an exception to this rule against direct appeals, as explained in the answer to question number 7.

The proper role of legislative employees assisting members whose conduct falls under one of the exceptions has frequently been questioned. The board believes that to the extent legislators are permitted to engage in conduct under an exception, it is also proper for legislative employees to assist legislators to engage in that conduct. For example, a legislative employee may assist a legislator to prepare for a press conference at which the legislator will make a statement supporting a ballot proposition; or pursuant to the legislator's instructions, a legislative employee may prepare a letter for the legislator's signature setting forth the legislator's opinion on a ballot proposition.

Proper staff activity also includes analysis and explanation of ballot measures. It is "normal and regular" for legislative staff to analyze and explain the content of an initiative measure, as well as the arguments for and against the measure. It is also normal and regular to explain and analyze the legal and policy options which the legislature might consider if the ballot measure is approved by the voters. However, presentation or distribution of such information in any manner that suggests it is intended to solicit support or opposition to a measure is improper and would be a violation.

What is a "ballot proposition"? The State Ethics Act does not contain a definition. The Public Disclosure Act, in RCW 42.17.020, generally defines the term as any state or local government measure that is:

proposed to be submitted to the voters of the state or . . . [any local government] from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency prior to its circulation for signatures.

We believe this is an appropriate definition and will use it for purposes of RCW 42.52.180. As applied to state measures, under this definition a measure for which voter signatures are required to qualify it for the ballot will become a "ballot proposition" when the measure is filed with the secretary of state. A measure referred to the voters by the legislature, either as a referendum or proposed constitutional amendment, will become a "ballot proposition" when it passes the legislature. While the status of an initiative to the legislature is unclear under this definition, we will also treat this initiative as a "ballot proposition" when it is filed with the secretary of state. However, 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.

OPINION

1. *Response to a constituent contact.* With regard to the three categories of information to be provided in the legislator's letter, we conclude that (1) and (2) are permissible activities authorized under both RCW 42.52.180(2)(b) and (2)(c) and that (3) would be a violation of the statute. Our conclusion that (1) and (2) are permissible is based on our assumption that the letter is in response to the matters raised by the constituent. With regard to the additional distribution of the letter, consistent with existing Senate and House policies, we conclude that sending the letter to persons who have not contacted the legislator regarding the ballot proposition would also be a violation of the statute.

2. *Newsletter comments.* Explanatory material would be part of the normal and regular exemption, but extensive direct comment on the merits of a ballot proposition, which would be permitted in response to an inquiry, is not permissible in a newsletter, unless the subject matter of the ballot measure was before the legislature in the immediately preceding session. If it was before the legislature, it may be discussed in the newsletter to the same extent as the legislator may comment on any other legislation in a newsletter. (Refer also to the answer to question 8.)

Advocacy statements within an otherwise permissible newsletter are considered to be "initiated" by the legislator, within the meaning of the exception in RCW 42.52.180(2)(d). Therefore "de minimis" use (so small as to be insignificant) is permitted. A short sentence or paragraph within a long newsletter is allowable, as long as it does not include a direct appeal for a specific vote or campaign assistance. A newsletter, or even a significant portion of a page within a newsletter, devoted entirely to advocating or opposing a ballot measure would be a violation, unless the statements relate to the legislator's action or position on the same subject matter during the legislative session.

3. *Memorandum to other legislators.* This memo would be permissible under the "normal and regular conduct" exception if the ballot proposition were an initiative to the legislature that was pending before the legislature and the legislator's memo urged legislative defeat of the initiative. Otherwise, it would be a violation for the legislator, using public resources, to send a memo to other legislators urging them to defeat a ballot proposition.

4. *Use of telephone to call campaign headquarters.* This activity would be prohibited. As stated in the hypothetical, the purpose of the call is to arrange for yard signs. This would clearly be assistance to the campaign for which none of the exceptions apply. This campaign assistance would not be in response to an inquiry under RCW 42.52.180(2)(b), not be an "activity within the normal or regular conduct of" legislative office under RCW 42.52.180(2)(c), and not be a "de minimis use of public facilities incidental to . . . permissible communications" under RCW 42.52.180(2)(d). Therefore the campaign assistance call would be a violation, even if it were a local one.

The call would not be a violation, even if it were a toll call, if it were made for purposes other than campaign assistance. For example, a call to another legislator at a campaign office to

discuss legislative business would not be a violation.

5. *Ballot proposition comment within a telephone conversation.* The answer to this question is the same as the answer to the newsletter question (question number 2). Comment is permissible under the guidelines stated in that answer, but a direct appeal for specific votes or campaign assistance would be a violation.

6. *Campaign meeting in legislative office.* Meeting in a legislative office to plan campaign strategy would be assisting a campaign, and it would not be permitted under any of the exceptions.

7. *Preparation of Voters' Pamphlet argument.* This activity is permitted, because it is "part of the normal and regular conduct" of the office. Chapter 29.81 RCW, which provides for the voters' pamphlet, specifically involves the legislature in the preparation of the arguments for and against state constitutional amendments, referenda, and initiatives. The Senate and House have traditionally interpreted this law as sufficient authority for the activity, and the board adopts that interpretation.

8. *Use of voting records and other legislative action.* The answer to this question depends on the legislator's comments or statements and to whom they are delivered. For example, the legislator in a legislative newsletter to constituents may discuss his or her voting record and legislative actions on an initiative to the legislature or on a bill the substance of which was subsequently filed as a ballot proposition. This discussion is within the "normal and regular conduct" exception. However, the legislator, in the newsletter, may not urge the constituents to support or oppose the initiative or proposition and may not provide copies of the newsletter, at public expense, to a list of persons involved in the campaign for the initiative or proposition. The board cautions members to be careful in commenting on other members' voting records or statements regarding a ballot proposition. Besides the risk or perception of violating the rule against proposition campaigning at public expense, such comments also carry a risk or perception of violating the rule against candidate campaigning at public expense.

9. *"Guest" editorials.* It would be a violation for the legislator to prepare, with staff assistance, an advocacy or opposition editorial. The board finds that the general rules for newsletters and other self-initiated communication apply equally to newspaper publications. If a legislator's "guest" editorial is a factual explanation of a ballot proposition and not an argument for or against it, then the legislator could use legislative staff and equipment to prepare it. However, if the editorial is an advocacy piece or includes a direct appeal for votes or campaign assistance, then, legislative staff or equipment should not be used in its preparation.

CONCLUSION

The board has stated its opinion regarding several specific hypothetical situations. Legislators and staff are cautioned that different facts may result in different opinions. In any case in which

the legislator or staff person is in doubt, the board urges conduct which will avoid even the appearance of a violation.

This opinion constitutes the board's interpretation of the applicable statutes. The Senate and the House of Representatives are free to adopt more stringent rules and policies on this issue if they choose.