

# Legislative Ethics Board

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## ADVISORY OPINION 2021 – No. 1

Updated Campaign Opinion  
Takes Effect on June 9, 2022

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This Advisory Opinion is submitted on the Board’s own motion pursuant to RCW 42.52.320 and Board Rule 1.M.

### I. BACKGROUND

In 2021, in furtherance of its mission to educate those subject to the Ethics in Public Service Act (Act), the Board decided that it would benefit the legislative community to review its previously issued Advisory Opinions. Some opinions were outdated and, as a result, of limited precedential value. Other issues of concern addressed in some of the older opinions have been resolved either by statutory amendments or subsequent opinions.

The 70 advisory opinions issued between 1995 and 2017 are being reviewed and the Board decided to begin with those opinions in which campaign issues were addressed because the election year restrictions begin on the first day of the declaration of candidacy filing period specified in RCW 29A.25.050<sup>1</sup> in the year of a general election for a state legislator’s election to office and continuing through the certification of the general election. Furthermore, to ensure this Advisory Opinion is comprehensive, the relevant Complaint Opinions will also be noted. As of the date of this Opinion, the prior Opinions cited herein are still the opinions of the Board.

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<sup>1</sup> RCW 29A.24.050 provides as follows: “Except where otherwise provided by this title, declarations of candidacy for the following offices shall be filed during regular business hours with the filing officer beginning the Monday two weeks before Memorial day and ending the following Friday in the year in which the office is scheduled to be voted upon:

(1) Offices that are scheduled to be voted upon for full terms or both full terms and short terms at, or in conjunction with, a state general election; and

(2) Offices where a vacancy, other than a short term, exists that has not been filled by election and for which an election to fill the vacancy is required in conjunction with the next state general election.

This section supersedes all other statutes that provide for a different filing period for these offices.”

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### III. ELECTION YEAR RESTRICTIONS

During an election year, there are several restrictions that apply to both legislators and legislative staff. Some of these restrictions (mailing and website) are statutory and will be discussed in this opinion; however, both the House of Representatives and the Senate have additional policies that apply to conduct that occurs during an election year. The general rule is that from the first day of the declaration of candidacy filing period, all outreach activities – town halls, speeches, press releases, op-eds etc. – are presumed to be campaign activities. It is important for members and staff of both chambers to familiarize themselves with the particular policies that apply.

### IV. DEFINITION OF “LEGISLATOR”

During the 2022 legislative session, RCW 42.52.180 was amended to add a definition of the term “legislator,” and the definition of “legislator” in RCW 42.52.185 was also amended. The definition used in both statutes is the same: “Legislator” means a legislator who is a “candidate” as defined in RCW 42.17A.005, for any public office. “Legislator” does not include members of the legislature who have announced their retirement from elected public office and have not filed a declaration of candidacy by the

end of the candidacy filing period specified in RCW 29A.24.050. The definition applies only to the term “legislator” as used in either RCW 42.52.180 or .185.

## V. MAILING RESTRICTIONS

### A. Purpose of Mailing Restrictions

The purpose of mailing restrictions is to reduce the advantage in elections that incumbent legislators previously enjoyed through mailings at public expense during the last year of their terms. This purpose is generally accomplished by limiting the number and kind of mailings that legislators may mail during that year. *Advisory Opinion*, 1995 – No. 19; *In re Spanel, Loveland, Sheldon, B.; Wojahn & Snyder*, 1996 - No. 10. <sup>2</sup> (It should be noted that while these opinions use a date different from that in the current statute, the analysis remains pertinent.)

### B. Statutory Basis for Restriction

RCW 42.52.185 provides as follows:

*(1) During the period beginning on the first day of the declaration of candidacy filing period specified in RCW 29A.24.050 in the year of a general election for a state legislator's election to office and continuing through the date of certification of the general election, the legislator may not mail, either by regular mail or email, to a constituent at public expense a letter, newsletter, brochure, or other piece of literature, except for routine legislative correspondence, such as scheduling, and the legislator may, by mail or email, send an individual letter to (a) an individual constituent who has contacted the legislator regarding the subject matter of the letter during the legislator's current term of office; (b) an individual constituent who holds a governmental office with jurisdiction over the subject matter of the letter; or (c) an individual constituent who has received an award or honor of extraordinary distinction of a type that is sufficiently infrequent to be noteworthy to a reasonable person including, but not limited to: (i) An international or national award such as the Nobel prize or the Pulitzer prize; (ii) a state award such as Washington scholar; (iii) an Eagle Scout award; and (iv) a Medal of Honor.*

*(2) A violation of this section constitutes use of the facilities of a public office for the purpose of assisting a campaign under RCW 42.52.180.*

*(3) The house of representatives and senate shall specifically limit expenditures per member for the total cost of mailings. Those costs include, but are not limited to, production costs, printing costs, and postage costs. The limits imposed under this subsection apply only to the total expenditures on mailings per member and not to any categorical cost within the total.*

*(4) For purposes of this section:*

*(a) "Legislator" means a legislator who is a "candidate," as defined in RCW 42.17A.005, for any public office. "Legislator does not include a member of the legislature who has announced their retirement from elected public office and who does not file a declaration of candidacy by the end of the candidacy filing period specific in RCW 29A.24.050.*

*(b) Persons residing outside the legislative district represented by the legislator are not considered to be constituents, but students, military personnel, or others temporarily employed outside of the district who normally reside in the district are considered to be constituents.*

The Board has previously held that the mailing restrictions do not apply to joint House/Senate committees with an even partisan balance and which are established by statute or concurrent resolution. Correspondence sent by only the chair of such a committee would be subject to the mailing restrictions although correspondence sent by the entire committee would not. *Advisory Opinion* 1997 – No. 12.

## C. Specific Topics Under Mailing Restrictions

### 1. Newsletters

#### a. *Definition*

Under RCW 42.52.185(1), a legislator may not mail newsletters from the first day of the declaration of candidacy filing in the election year until the general election is certified. Although the term “newsletter” is not defined in the statute, the Board has previously determined that the ordinary meaning of the term should apply. “Newsletter” is defined in WEBSTER’S NEW WORLD DICTIONARY, COLLEGE EDITION, as “a report issued by a . . . governmental agency . . . to keep employees or the public informed of pertinent matters.” *In re Sommers & Silver*, 1996 – No. 3. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY defines the term to include “a printed sheet . . . containing news or information of current interest to or bearing upon the interest of a special group.” *In re McMahan*, 1996 – No. 2.

#### b. *Expression of Opinion in a Newsletter*

It is generally acceptable for members to express their opinions in partisan terms about legislative issues they either dealt with during the past session or those they will be dealing with in the current or upcoming session. *In re Sommers & Silver*, 1996 – No. 3; *In re Appelwick & Nafziger*, 1996 – No. 8; *In re Sheahan*, 1999 – No. 4. It is not acceptable for legislators to include, in a newsletter, partisan materials not related to legislative issues. *In re Huff*, 1998 – Nos. 4 & 5.

#### c. *Inclusion of Questionnaires or Directories in a Newsletter*

The question has arisen in the past whether the inclusion of a questionnaire in a newsletter renders the document something other than a newsletter. The Board, in holding that the inclusion of a questionnaire in a newsletter does not change its characterization as a newsletter, stated “while a questionnaire does not directly fit the concept of informing the public on pertinent matters, it does directly inform the constituents about matters that the legislator considers to be important legislative issues. It then provides a convenient method for constituents to respond to the legislator with their own views of legislative issues.” *In re Sommers & Silver*, 1996 – No. 3, pg. 3. However, a legislator should not solicit information from constituents on broad topics<sup>3</sup> because the legislator’s response to such requests could resemble a newsletter in scope of coverage. *Advisory Opinion* 1995- No. 19. In *Advisory Opinion* 1996 – No. 4, the Board stated that the mailing of questionnaire results could be considered a newsletter if, in appearance, it resembled a newsletter. If the items mailed in response are identical pieces portraying the results of the questionnaire, the Board would consider them to be a newsletter. However, if the questionnaire responses are in the form of individualized letters with a named individual in the address and in the salutation, then the Board would consider them as authorized individual letters responding to a constituent contact. RCW 42.52.185(1). *See also In re Goings*, 1996 – No. 9.

The Board has also been asked whether the inclusion of a multi-page directory of officials in a newsletter changes the characterization of the document as a newsletter. The Board stated that while the

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<sup>3</sup> “Education” would be considered a broad topic, while “higher education tuition,” “merit pay for teachers,” or “class size” would be narrow topics. “Crime” would be a broad topic while “the death penalty” or “sentencing guidelines” would be narrow topics. A request for information on all issues before the Education Committee would be a broad topic request, a request for a particular bill would be a narrow topic. *Advisory Opinion* 1995 – No. 19.

directory does not directly fit the concept of informing the public on pertinent matters, it does provide information of interest to the constituents to whom it is mailed. In holding that the inclusion of a directory does not change the classification of the newsletter, the Board opined that “the directory provides them [constituents] information which may be needed in order to communicate their concerns and needs to their elected and appointed governmental officials.” *In re McMahan*, 1996 – No. 2.

d. *Correspondence to Constituents During Election Restrictions*

Contrary to an older Board opinion,<sup>4</sup> legislators may communicate with constituents even though the mailing restrictions are in place. RCW 42.52.185 provides that during election restrictions, a legislator may mail to a constituent an individual letter in response to a constituent inquiry during the legislator’s current term of office. The response must be limited to the subject matter of the constituent inquiry.

e. *Congratulatory Letters*

Under a prior version of the mailing statute,<sup>5</sup> legislators could not mail congratulatory letters to constituents unless the constituent had first contacted the legislator. Pursuant to subsequent amendments to RCW 42.52.185(1)(c), legislators now may use public resources to send congratulatory letters to constituents who have received an extraordinary award, honor or civic distinction. “Extraordinary” is defined as going beyond what is usual, regular, or customary: exceptional to a marked degree. MERRIAM-WEBSTER.COM.

The standards for sending congratulatory letters are the same whether or not election restrictions apply.<sup>6</sup> Before using state resources to send a congratulatory letter, the award, honor or distinction which is the subject of the letter must meet the definition of extraordinary. Additional factors to consider to determine whether the letter meets the criteria are as follows: the level of the award (local, state, national); the frequency or number of recipients; and whether it is an outside award or employment incentive recognition. *Advisory Opinion* 2005 – No. 1. The greater the number of recipients, the more likely the award, honor or distinction is not extraordinary. Furthermore, state and national awards are more likely to be considered extraordinary than local awards.

The Board has held the following are examples of non-extraordinary awards and honors:

- most birthdays and anniversaries
- members of a high school choir for a good performance
- constituent generally known in the community to be a good volunteer
- each student in school district or class who completed DARE
- 4th grade students in school district who made significant improvements in their test scores
- all graduates of a high school
- mass mailings.

*See Advisory Opinion* 2005 – No. 5

f. *Placement of Information on the Internet*

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<sup>4</sup> See eg., *Advisory Opinion* 1996 – No. 12.

<sup>5</sup> See *Advisory Opinion* 1996 – No. 7

<sup>6</sup> The award must have been received at the time the letter is sent; however, the requirement that the legislator receive a request before writing the letter is no longer required.

Placing information on the internet is considered a passive placement of information because the person must go to that location to see the materials. Because this passive placement is not an affirmative act of sending a message to a recipient, it is not analogous to regular mail like email and faxes are and is therefore not covered by the mailing restrictions. However, if the materials directly support a campaign, are campaign- oriented or are designed to assist a campaign purpose in any other way, then they will directly violate the Act. *Advisory Opinion 1997 – No. 2.*

## V. USE OF “FACILITIES OF AN AGENCY” TO ASSIST A CAMPAIGN

### A. Statutory Basis

RCW 42.52.180 contains the remaining statutory provisions relating to campaigns and provides 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)(i) The maintenance of official legislative web sites throughout the year, regardless of pending elections. The web sites may contain any discretionary material which was also specifically prepared for the legislator in the course of his or her duties as a legislator, including newsletters and press releases.*

*(ii) The official legislative web sites of legislators seeking reelection or election to any office shall not be altered, other than during a special legislative session, beginning on the first day of the declaration of candidacy filing period specified in RCW 29A.24.050 through the date of certification of the general election of the election year. As used in this subsection, “legislator” means a legislator who is a “candidate,” as defined in RCW 42.17A.005, for any public office. “Legislator” does not include a member of the legislature who has announced their retirement from elected public office and who does not file a declaration of candidacy by the end of the candidacy filing period specific in RCW 29A.24.050.*

*(iii) The web site shall not be used for campaign purposes;*

*(d) Activities that are part of the normal and regular conduct of the office or agency, which include but are not limited to:*

*)i) Communications by a legislator or appropriate legislative staff designee directly pertaining to any legislative proposal which has been introduced in either chamber of the legislature; and*

(ii) Posting, by a legislator or appropriate legislative staff designee, information to a legislator’s official legislative website including an official legislative social media account, about:

(A) Emergencies;

(B) Federal holidays, state and legislatively recognized holidays established under RCW 1.16.050, and religious holidays;

(C) Information originally provided or published by other government entities which provide information about government resources; and

(D) Achievements, honors, or awards of extraordinary distinction; and

(e) De minimis use of public facilities by statewide 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 42.17A.555.

(4) As used in this section, “official legislative website” includes, but is not limited to, a legislator’s official legislative social media account.

## B. General Considerations

### 1. Intent Not Required; Act Construed Liberally

Even if a legislator or legislative employee did not intend to violate the Act, intent is not required to establish a violation of RCW 42.52.180. *In re Carrell*, 2008 – No. 3. Furthermore, .180 prevents legislators from having unfettered use of state resources to assist their campaigns and the legislature has declared that the Act “shall be construed liberally to effectuate its purposes and policy . . . RCW 42.52.901.” *See also In re Stambaugh*, 2016 – Nos. 8 & 13.

### 2. “Zero Tolerance” and “Assisting a Campaign”

The Board enforces the Act with a “zero tolerance” view toward campaign related activities with the use of public resources even if there has been no actual assistance to the campaign. *In re Hudgins*, 2020 – No. 13; *In re Hunt*, 2019 – No. 3; *In re Young*, 2017 – No. 41; *In re Hargrove*, 2012 – No. 1; *In re Johnson*, 1996 – No. 1; *Advisory Opinion* 1995 – No. 18.

### C. “Facilities of an Agency”<sup>7</sup>

RCW 42.52.180(1) includes a non-exclusive list of what constitutes “facilities of an agency.” The Board has determined that the following, while not specifically included in the definition, constitutes “facilities of an agency”:

- Legislative badges are a public resource and as public resources they are “facilities of an agency” and may not be used directly or indirectly to assist a campaign. *In re Appleton & Rolfes*, 2010 – Nos. 4 & 5
- Mere notice of a legislative event contained in campaign materials cannot be reasonably interpreted to be a “facility of an agency.” *In re Gordon*, 2010 – No. 2.

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<sup>7</sup> In the opinions, the terms “public resources” and “state resources” are used interchangeably with “facilities of an agency.”

- An official newsletter is a “facility of an agency.” Using the language, graphics, layout and photo of an official newsletter in the production and layout of a campaign flyer constitutes use of public resources to support a campaign. *In re Muri*, 2016 – No. 16.
- An official letter using state letterhead is a state resource and direct posting of a photo of the letter on an unofficial social media site containing campaign content is a violation. *In re McEwen*, 2016 – No. 15.
- Legislative staff are considered “facilities of an agency.” *In re Doglio*, 2020 – No. 10; *In re Hargrove*, 2016 – No. 2.
- Photographs and videos produced by legislative staff constitute “the use of state employees of the agency during working hours” and “publications of the agency” and therefore meet the definition of “facilities of an agency.” *In re Doglio*, 2020 – No. 10; *In re Stambaugh*, 2016 – Nos. 8 & 13.
- A “tweet” drafted, edited, approved and released by legislative staff is considered a “facility of an agency.” *In re MCC*, 2016 – No. 9.
- A video produced at state expense by state employees is a “facility of an agency.” *In re Kochmar*, 2016 – No. 7.
- Official social media accounts are considered “facilities of an agency.” *In re House Democratic Caucus*, 2019 – No. 13.
- A legislative office is a “facility of an agency.” *In re Ericksen*, 2021 – No. 7; *In re Van Werven*, 2020 – No. 9; *In re Hargrove*, 2012 – No. 1.
- A legislative website created and updated with the use of legislative staff and legislative equipment is a public resource. *In re Keiser*, 2009 – No. 2.

Public areas of the capitol campus such as the steps leading to the Legislative Building or the Capitol Rotunda are under the control of the Department of Enterprise Services and insofar as they are available for political and campaign use on an equal basis, the Act does not prohibit legislators from using them for those purposes. *In re Hunt*, 2019 - No. 3; *In re Hunt*, 2012 – No. 4; *In re Hargrove*, 2012 – No. 1; *Advisory Opinion* 1997 – No. 5.

#### D. Campaign Documents Containing Legislative Contact Information

Legislative contact information is a “facility of an agency.” Legislative contact information includes the legislative hotline telephone and regular telephone numbers and mailing and email addresses. *In re O’Brien*, 2004 – No. 3. *See also In re Short*, 2009 – No. 1. RCW 42.52.180 does not permit the legislature’s toll-free hotline number, use of personal legislative addresses, including the member’s legislative email address, or phone numbers in a campaign document because the inference is that incumbents running for re-election are inviting people to use the public resources for campaign purposes. A disclaimer in the document or some directive that these public numbers and addresses should only be used for legislative purposes, are insufficient to satisfy the requirements of the statute. *In re West*, 2002 – No. 2; *In re Marine*, 2001 – No. 5. Legislative website addresses may be provided in printed campaign materials. *In re Hargrove*, 2012 – No. 3.

#### E. Exceptions to Prohibition

The general prohibition on the use of public resources for campaign purposes does not apply to a limited number of situations including: action taken at an open public meeting; certain statements by legislators



concerning ballot measures; activities that are part of the “normal and regular conduct” of the office; and *de minimis* use of public facilities. Each of these exceptions will be discussed below.

## 1. Normal and Regular Conduct

### a. *Statutory Definition*

RCW 42.52.180(2)(d) considers the following activities to be “normal and regular conduct” of legislators:

- Communications by a legislator or designated legislative staff regarding legislation introduced in either chamber;
- Posting to an official website or social media account information about:
  - ♦ Emergencies;
  - ♦ Holidays, including religious holidays;
  - ♦ Information originally published by other government agencies; and
  - ♦ Achievements, honors and awards of extraordinary distinction.<sup>8</sup>

### b. *“Normal and Regular Conduct” Construed by Board*

Until the 2022 session, the statute did not include a definition of “normal and regular conduct.” As a consequence, the Board construed this phrase over the years in various opinions as applied to various fact patterns. The term “normal and regular conduct” has generally meant activities that are otherwise lawful and customary.

The Board considers it “normal and regular conduct” for a legislative newsletter to reference a ballot measure so long as it does not contain extensive direct comment on the merits of the measure and the ballot measure relates to the legislator’s action or position on legislation. *In re Simpson*, 2003 – No. 10. The Board has also previously held that it is “normal and regular conduct” for legislators to use public resources to express their positions on legislative issues even when election restrictions are in place. *In re McCune*, 2010 – No. 1. Further, it is “normal and regular conduct” for a legislator to report to constituents the positions the legislator intends to take on issues in a legislative session and to do so in partisan terms. *In re Hargrove*, 2016 – No. 2. It is “normal and regular conduct” for legislators to be requested by political parties and legislative candidates to appear at party functions and legislative fundraisers on a complimentary basis absent any involvement by a third party in paying for the attendance. *Advisory Opinion* 1996 – No. 2. Legislators may also obtain electronic copies of public records produced by staff and place those materials on a private non-campaign website. *Advisory Opinion* 2004 - No. 1. Materials available to all are public documents but they cannot be used by the legislator on these non-legislative, non-campaign web sites in an election year as that use would constitute a violation of RCW 42.52.180. *Id.* However, any social media site that contains campaign material, even if that site is not the official campaign site, is nevertheless considered a campaign site. *In re Stambaugh*, 2016 – Nos. 8 & 13.

The question of whether “doorbelling” constituents to discuss legislative issues, present them with legislative material and obtain their opinions on legislative issues constitutes “normal and regular conduct” was presented to the Board in *Advisory Opinion* 1997 – No. 7. The Board acknowledged that the general public perception is that “doorbelling” is a campaign activity but did not state that such activity could never be considered “normal and regular-conduct.” Rather, the Board stated that the closer it is to the election date, the more likely such activity would be deemed to be for campaign purposes. Any use of

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<sup>8</sup> Added by SHB 2046

legislative material in doorbelling after the first day of candidacy filing week of the year a member is up for election would be a violation of RCW 42.52.180.

The Board further cautioned legislators that a legislator cannot conduct a multiple-purpose visit, including campaign discussion or material in addition to legislative business and while no material should be prepared at public expense solely for doorbelling purposes, if other conditions are met, it is permissible to use newsletters or other previously prepared legislative materials when doorbelling for legislative purposes.

A legislative hearing on a ballot measure would fall within the “normal and regular conduct” exception if it has a clearly stated legislative purpose, presents a public policy issue within the committee’s jurisdiction and is limited to objective information gathering and its legal and policy implications. *Advisory Opinion* 1997 – No. 9. A legislator can also include explanatory information about a ballot measure in a newsletter because this information would fall under the “normal and regular conduct” exemption. *Id.* It is also “normal and regular conduct” to explain and analyze the legal and policy options which the legislature might consider if the ballot measure is approved by the voters. *In re Schmidt & Huff*, 1998 – No. 3.

The Board has held that the following activities do *not* fall under the “normal and regular conduct” exemption:

- Videos and photos taken or created by legislative staff and used for campaign purposes unless the photos are purchased from the legislature. *In re Doglio*, 2020 – No. 10.
- The sponsorship of and advocacy by a legislator for an initiative to the legislature by a legislator. *Advisory Opinion* 1997 – No. 5.
- Initiating communication at state expense which urges particular electoral activity by constituents. *Advisory Opinion* 2015 – No. 2.
- Initiating state-funded communication in close proximity to an election. *Id.*
- Commenting on how to vote. *In re Das*, 2019 – No. 10.

c. *What is an Emergency?*

In determining what qualifies as an emergency under the amendment to SHB 2046, the Board relies on *Advisory Opinion* 2020 – No. 1. In that opinion, the Board defined an “emergency” as a serious, unexpected and often dangerous situation requiring immediate action. Page 5. The Board further stated as follows: “Clearly, natural disasters like mudslides, earthquakes or volcanic eruptions would be considered emergencies permitting a legislative response with the use of state resources. Emergencies would also include situations in which a recent revenue forecast is significantly lower than the previous forecast of the issuance of a court opinion that significantly impacts the legislature in some fashion.”

The Board also believes that emergencies do not always impact the state or districts equally. Therefore, the Board believes that before considering a post on official websites or social media to be considered “normal and regular conduct,” there must also be a sufficient personal nexus between the emergency and the legislator who is addressing the emergency. The question to be answered is does the legislator have a special connection to the emergency and would the public expect to hear from the legislator about the emergency? For example, the public would expect to hear from a legislator whose district experienced

significant flooding but would not expect to hear from a legislator on the east side of the state about the same issue.

## 2. Ballot Measures<sup>9</sup>

There are three exemptions to the general prohibition on the use of state resources to affect a campaign pertaining to ballot measures.

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).

Second, legislators and staff are permitted to promote or oppose a ballot measure if they do so by engaging in activities that are part of the “normal and regular conduct” of the legislature or legislative office. RCW 42.52.180(2)(d). Examples of permitted “normal and regular conduct” pertaining to activities involving ballot measures include: (1) legislators may use office facilities and staff to write voter pamphlet arguments about a ballot proposition; (2) legislators may respond to a constituent inquiry regarding a ballot proposition<sup>10</sup> and express their opinion on the measure and state the reason for such opinion. However, they (legislators) may not urge the constituent to support or oppose the measure; (3) legislators may use staff to respond to such an inquiry. *Advisory Opinion* 1995 – No. 18; (4) legislators cannot provide copies of their response on the ballot measure to other legislators unless the ballot measure is currently pending before the legislature in which case, legislators, with staff assistance, can prepare a memo to other legislators urging defeat of a ballot measure. *Id.*

The third exemption permits legislators to promote or oppose a ballot measure if their use of public resources to do so is *de minimis*. “*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 *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.” *Advisory Opinion* 1995 – No. 18 (p. 3).

Legislators may not include extensive direct comment on a ballot measure in a newsletter unless the measure was before the legislature in the immediately preceding session. *Advisory Opinion* 1995 – No. 18. A short sentence or paragraph within a long newsletter is permitted if it does not include a direct appeal for a specific vote or for campaign assistance. *Advisory Opinion* 1997 – No. 8. If the measure was before the legislature in the preceding session, it may be discussed in the newsletter to the same extent as the legislator may comment on other legislation in a newsletter.

There is no basis for drawing a distinction between initiatives to the people and an initiative to the legislature except during session when it is “normal and regular conduct” to discuss initiatives to the legislature just like discussing any other bill before the legislature. *Advisory Opinion* 1997 – No. 5. The board will grant “greater leeway when responding to inquiries than when initiating comments. . . . While

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<sup>9</sup> Additional information about what constitutes “normal and regular conduct” pertaining to ballot measures can also be found in subsection 1 of this section.

<sup>10</sup> A ballot measure or proposition is defined as any “measure” as defined by RCW 29A.04.091, or any initiative, recall, or referendum proposition proposed to be submitted to the voters of the state or any municipal corporation, political subdivision, or other voting constituency from and after the time when the proposition has been initially filed with the appropriate election officer of that constituency before its circulation for signatures. RCW 42.17A.050(4).

An initiative to the legislature is considered a ballot proposition when it is filed with the Secretary of State to begin the signature gathering process. *Advisory Opinion* 1997 – No. 5.

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.”

The use of a legislative telephone to call the ballot campaign headquarters to order yard signs would violate .180. So too would meeting in a legislative office to plan a ballot campaign strategy. It would also be a violation for a legislator, with staff assistance, to prepare an advocacy or opposition editorial on a ballot measure. If the 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. *Advisory Opinion* 1995 – No. 18.

### 3. “*De Minimis*” Use

The Board opinions dealing with this exception all pertain to the application of the exemption to ballot measures. However, the language of the statute<sup>11</sup> contemplates the use of this exemption in other situations.

#### F. Maintenance of Official Legislative Websites

Official legislative websites, including official social media sites, can be maintained even though election restrictions are in place. RCW 42.52.180(2)(c)(i). The websites can contain discretionary materials specifically previously prepared for the legislator including newsletter and press releases.

A legislator’s official website, including official social media accounts, cannot be altered beginning on the first day of the declaration of candidacy filing period through the date the general election is certified.

#### G. Voting

A legislator can, if requested, mail a voter registration form or provide a website or address where one may register to vote absent any comment on how to vote. Further, a legislator can have voter registration forms available at legislative town halls, in district or Olympia offices without comment on how to vote. It would violate the Act to conduct a mass mailing of voter registration forms. *Advisory Opinion* 2004 – No. 2.

Further, the Board has previously held that, “while members remain free to voice their views on electoral participation, the use of public resources to solicit constituents to register to vote, or solicit requests from constituents for voter registration forms or to advise on how to vote, is not “normal and regular conduct” for a legislative office and would violate RCW 42.52.180.” *See also In re Das*, 2019 – No. 10.

#### H. What is a campaign website?

RCW 42.52.180 and Board Rule 3(D)(1) do not allow for any campaign related personal use of legislative facilities. Whether or not a member’s personal website or social media page is an official

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<sup>11</sup> De minimis use of public facilities by statewide 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.

campaign site is irrelevant because the prohibition extends to any website or social media page that is involved in campaign activity or contains any campaign materials. *In re Stambaugh*, 2016 – Nos. 8 & 13

### I. Linking v. Embedding or Posting

RCW 42.52.180 allows a legislator to create a link from a site used for campaign purposes to a legislative video and other legislatively prepared materials. The link must take the user out of the campaign webpage, campaign social media site or any site which is involved in campaign activity and redirect the user to the original, legislatively approved hosting site. *In re Rodne & Hickel*, 2016 – No. 1 & 5. If the video or other legislative materials can be viewed on a campaign site without leaving that site, the materials have been “posted” or “embedded” which violates RCW 42.52.180. *In re Marr*, 2010 – No. 3. Notice of new legislative materials (RSS feed) which may be found on official legislative websites may be included in a campaign website; however, the notice must be a brief and factual description of the material with a link that takes the visitor directly to the material. *Advisory Opinion* 2015 – No. 2.

## VI. ARCHIVED OPINIONS

The following Advisory Opinions are archived and no longer have precedential value:

- *Advisory Opinion* 1996 – No. 6 (mailing restrictions issue under previous statute);
- *Advisory Opinion* 1996 – No. 7 (congratulatory letter under previous statute);
- *Advisory Opinion* 1996 – No. 11 (press releases – *see Advisory Opinion* 2020 – No. 1 for current guidance);
- *Advisory Opinion* 1996 – No. 12 (updating constituent under previous statute);
- *Advisory Opinion* 1997 – No. 3 (*mailing restrictions under previous statute*);
- *Advisory Opinion* 2000 – No. 2 (only one link from campaign to legislative website);
- *Advisory Opinion* 2000 – No. 4 (press releases – *see Advisory Opinion* 2020 – No. 1 for current guidance);
- *Advisory Opinion* 2005 – No. 1 (only the examples of extraordinary awards is not of precedential value unless the award otherwise meets the definition of “extraordinary” adopted in this opinion); and
- *Advisory Opinion* 2009 – No. 1 (website linkages and removal of discretionary materials from website).

ON BEHALF OF THE LEGISLATIVE ETHICS BOARD, this opinion is signed on the \_\_\_\_ day of May, 2022.

\_\_\_\_\_/s/\_\_\_\_\_  
Judge Terry Lukens, ret., Chair