

# Memo

To: Seattle Ethics and Elections Commissioners

From: Wayne Barnett, Executive Director

Date: April 27, 2005

Re: Voters' Pamphlet and Video Voters' Guide Rules Barring Candidates from Discussing Their Opponents

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## Recommendation

Retain the rules barring candidates from mentioning their opponents.

## Discussion

### *Value of Policy*

Staff vary in our opinions as to the value of the rule barring candidates from discussing their opponents. One view is that, at some level, many elections are a referendum on the incumbent, and whether he or she has earned another term. That view questions the wisdom of a rule barring challengers from making the case in the voters' pamphlet and video voters' guide that the incumbent has not earned reelection.

The opposing view is driven by a concern that the pamphlet and video voters' guide would devolve into just another forum for candidates to attack each other. Taxpayer dollars should, this perspective argues, provide only a forum where candidates are required to explain why **they** should be elected, not why their opponent should not be.

### *Effect of Legal and Enforcement Considerations*

The Commission has three options if it is going to continue to publish candidates' free-form statements in the voters' guides: (i) it can repeal and not replace the existing bar, (ii) it can retain the existing bar, or (iii) it can replace the existing bar with the state standard, which states as follows: "Any statements by a candidate shall be limited to those about the candidate himself or herself." RCW 29A.32.230.

Simply repealing the existing bar would raise concerns under state law. RCW 29A.32.230 states that the administrative rules governing voters' pamphlets "shall include" a number of provisions, including: "The basis for rejection of any explanatory or candidates' statement or argument deemed to be libelous or otherwise inappropriate. Any statements by a candidate shall be limited to those about the candidate himself or herself."

I recommend the Commission avoid any questions regarding compliance with state law. This leaves the Commission with two choices: retain the existing bar, judged constitutional by the Ninth Circuit in October 2003, or adopt the state standard (never tested or interpreted in court) limiting candidates to discussing only themselves. The former is the legally safer of the two choices, for the simple reason that the City's application of the rule has already been judged constitutional. If the Commission adopts the state standard, our efforts to interpret and enforce the restriction would invite further litigation.

From an enforcement standpoint, I note that the current bar is simple to administer, while it is not clear to me or to others on my staff how staff would apply the state standard.

## **Conclusion**

While some question the value of the rule barring candidates from discussing their opponents, I believe that the proper forum for opponents to the rule is Olympia, not the Seattle Ethics and Elections Commission. Insofar as state law would appear to require that the Commission have in place some limitation on the subject matter of voters' pamphlet statements, I believe that the Commission should retain its current rule, which is relatively easy to apply and has been tested, and not adopt a standard that would be difficult to apply and would invite a new legal challenge.

## **Documents Included**

- Ordinance 121543, amending SMC 2.14 to, inter alia, delete the legislative requirement for a commission rule preventing candidates from discussing their opponents. The ordinance states: "[T]he City Council has determined that the issue of whether candidates' campaign statements may discuss their opponent(s) is best left to the Ethics and Elections Commission to regulate pursuant to its rulemaking authority."
- RCW 29A.32.230, the state law governing local voters' pamphlets.
- Opinion of Judge Lasnik holding unconstitutional the bar on candidates discussing their opponents.
- Opinion of the Ninth Circuit Court of Appeals reversing Judge Lasnik, and affirming the constitutionality of the rule barring candidates from discussing their opponents.