



## SEATTLE COMMUNITY COUNCIL FEDERATION

July 30, 2007

Wayne Barnett, Executive Director  
Seattle Ethics and Elections Commission  
700 Fifth Avenue, Suite 4010  
P.O. Box 94729  
Seattle, Washington 98124

RE: Proposed Changes in Ethics Rules

Dear Mr. Barnett and Members of the Ethics and Elections Commission:

At its July 26 meeting, the Seattle Community Council Federation reviewed your memorandum of July 9, 2007 suggesting phase one of possible amendments to the Ethics Code. We offer the following comments.

The proposed amendments to the Ethics Code aim at reducing overlapping sections and making the code a bit easier to understand. In some respects it does so, in some respects it doesn't.

The current Ethics Code was drafted by a committee of distinguished citizens appointed by the City, including several lawyers. Prior to issuing its recommendations in a formal report, the Committee considered RCW Chapter 42.18, the Executive Conflict of Interest Act for state employees, especially RCW 42.18.170 and 42.18.220 (now repealed) and two definitions, "Assist," (RCW 42.18.05) and "participate" (42.18.080).

In preparing legislation, the drafter needs to consider the primary purpose and audience. Is it the administrators, a special group or technicians who will work with it, or the general public? Words are intended to communicate and the phrasing and style should aim at clarity to the intended audience. With the Code of Ethics, the intended audience should be the layman, e.g. city employees who get ordinance sections in an employee handbook, lay appointees to city boards and commissions and citizens/reporters who want to hold public officers accountable.

The amendments to SMC 4.16.070.4 and 4.16.075 would tuck a substantive limitation in the scope of a prohibition into the definition of "confidential information." The substantive limitation allows a former employee to disclose or use information of public knowledge or available under the public disclosure law. It ought to appear as a separate substantive section or in the statement of the prohibited conduct. Lay people refer to a definitions section mainly when they don't know the meaning of a word. Most lay people have an idea of what "confidential

information" means, e.g. matters ordinarily kept secret. Lawyers are trained to check definitions and even they may forget where the qualification lurks. A lawyer may miss it on a computerized search if he or she fails to type in the exact term.

The amendment would replace "represent" with "appear" in the prohibition of a former employee advocating a matter with an agency where he or she had been employed. The original drafting committee chose the word "represent" for SMC 4.16.075 B 2 over "appear" in RCW 42.18.220. We suspect the drafting committee had reservations about the term, "appear:"

- (a) To most lay people it means "come into sight." To lawyers, it means to file a notice of appearance, have one's name affixed as an author of a document, or stand as counsel at the bar of a court or agency. Most lay readers will assume they know the meaning and bypass the definitions. As a general rule, when a term is used only once in a code, good drafters work the definition of the term into the substantive section where it appears. Since "appear" comes up only in SMC 4.16.075 B 2", that section should define it as an appended sentence or the subsection should delete "appear" and substitute its definition, "Communicate in any form." The subsection would then have two sentences. The first would start with the phrase: "Communicate in any form on behalf of any person in proceedings..." and the second would contain the definition: "Communicate includes, without limitation, personally....telephone."
- (b) "Represent" is a more limiting concept. It means to stand in for as an advocate. It skirts around the issues of the right of petition protected by the First Amendment of the U.S. Constitution and Article I, Section 4 of the Washington Constitution. "Communicate" runs directly into over breadth issues. Take this example: City Attorney Mark Sidran secured passage of an ordinance making a sweeping expansion of the authority of the Department of Parks and Recreation ("Parks") to banish an individual from City parks. The ordinance authorized Parks to prepare implementing rules. The City's administrative code requires city departments to hold a public hearing before promulgating rules. Parks prepared some very draconian rules and scheduled its hearing before the Board of Park Commissioners. The Seattle Community Council Federation (and the Public Defender Association, the American Civil Liberties Union, et al.) spoke out against the worst provisions of the draft rules at the hearing. Would a layman, who within the previous twelve months had left Parks, the mayor's or city council staff, or been a dissenter on Mark Sidran's advisory committee, be barred from speaking out at the public hearing on behalf of habitués' of parks (the homeless, the drunks, or errant youth etc.) or presenting a letter from a civil liberties organizations? Yes, with "appear" as communicate; no, if properly handled, with "represent."

The amendment also changes the focus. The proposed amendment narrows the persons involved, but expands the scope of the prohibition when it applies.

The current prohibition of "represent" covers the partnership or association so that a lawyer, architect, or engineer leaving city employment cannot send an associate to present a matter on which the lawyer had worked before any city agency or office. The current section was enacted when professional firms were smaller. Its counterpart in RCW 42.18.220 (4) had used the word, "assist," which RCW 42.18.050 defined. At that time, the "Chinese wall" practice was beginning to develop within professional firms; it isolates a member with a potential conflict of interest from work assignments, the flow of information, and profits so that the remainder of the firm would not be affected.

The proposed amendment would bar the former employee only. The prohibition against "assisting" would not bar the firm from practicing before the City as long as other members of the firm do the work and a "Chinese wall" applies to isolate the former employee. Now, to the expansion: the prohibition applies to the former employee with respect to the agency regardless of whether he or she had ever worked on the matter. Take this hypothetical case loosely drawn from a real situation: In mid-2000, an expert on energy usage, forecasting, and rates, left City Light to start his own firm. In 2001, the energy crunch came. The Mayor and City Light asked the City Council for an enormous increase in rates. Industry hired the expert to analyze it. The expert concluded that much of the increase was inevitable, but, if City Light would follow certain recommended steps, the increase could be less and for a shorter duration. Industry paid the expert to present his findings to the City Council Energy Committee, which was considering the Mayor/City Light proposal. There was no violation of the current code because the expert was applying his expert knowledge to rate increases not even thought of in mid-2000 and the new set of facts presented by the energy crunch. However, the proposed amendments would bar him from presenting his findings to the City Council without going through a waiver process.

The proposed amendment concludes with "previously employed." "Employed" can mean "worked for pay" or "worked on." It needs clarification. The City now has "contract employees," whom the City and they themselves often consider to be independent contractors.

Finally, the traditional style of ordinance drafting writes numbers in both English and Arabic numerals. The proposed amendment drops the Arabic numbers. It shouldn't. The argument for the deletion is the dual statement is repetitious; the argument for retention is based on good communication. It recognizes that the human mind works in the way it is been trained or has learned—quite differently from a computer. Many lay readers scan passages, especially those who use the internet often. The dual system makes the time deadline easier to find for scanners and to remember. Arabic numbers in parenthesis stand out and make a deeper impression on the eye-minded. Many people expect to see time deadlines in both forms. Others forget numbers as quickly as they forget names. Those people will miss the time limit or forget it more quickly if it is in words alone.

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Thank you for considering the recommendations of the Seattle Community Council Federation.

Sincerely,

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