RYAN BOYD ROBERTSON
ATTORNEY AT LAW

800 Fifth Avenue
Suite 4000
Seattle, Washington 98104
(206) 892-2094
ryan@ryanrobertsonlaw.com

August 12, 2010

Wayne Barnett
Executive Director
Seattle Ethics and Election Commission
P.O. Box 94729
Seattle, WA 98124-4729

RE: Ed McKenna for Judge Candidate Statement

Mr. Barnett,

Mr. McKenna has asked that I write to you concerning your denial of his candidate statement for the 2010 Seattle Voters' Pamphlet. Specifically, your denial is based on Seattle Ethics and Elections Commission Voters' Pamphlet Administrative Rule (hereinafter "Seattle rule") 4.3. Mr. McKenna counters that his statement conforms with rule 4.4, and the present denial conflicts both factually and legally with *Cogswell v. City of Seattle*, 347 F.3d 809 (9th Circ. 2003) and *Johnson v. Poway Unified School District, et al*, 2010 WL 768856 (S.D. CA. 2010).

Seattle Rule 4.3 states, "The written submission must not discuss the candidate's opponent(s)."

Seattle Rule 4.4 states, "Guidelines: The purpose of the Voters' Pamphlet is to introduce the candidates to the public. Therefore, candidates are encouraged to do the following in their written submissions:

· tell who you are,
· show that you understand this community and its concerns,
· explain where you stand,
· be forthright, and
· set a respectful tone."

Mr. McKenna has submitted a candidate statement wherein he includes the following statement:

> "I believe the citizens of Seattle deserve better than a judge who was rated the very lowest in a recent King County Bar Association judicial evaluation survey."

The Seattle voters' pamphlet is a limited public forum. *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Circ. 2003). Because a limited public forum is a type of non-public forum, a local government can restrict the content of the pamphlet as necessary to meet the purpose for which it created the forum. *Cogswell*, at 818. The test to evaluate government regulations within a limited public forum is (1) does the restriction discriminate according to the viewpoint of the speaker, and (2) is the restriction reasonable? *Cogswell*, at 814. The *Cogswell* court held Seattle rule 4.3[1] did not amount to view point discrimination, and it was a reasonable restriction within the context of the pamphlet. *Cogswell*, supra.

In *Cogswell*, a candidate for City Council sought to include the following statement in the voters' pamphlet:

> "Sound Transit refuses to consider Monorail even though Seattle voted for it twice. The incumbent, **Council member McIver**, was originally appointed-not elected-to his seat on the city council in 1996. Since taking office, **McIver** has served as a key board member and lobbied against grants for Monorail from that agency; voted for legislation that repealed the first Monorail Initiative; hesitated to stand against the forces on regional committees who want more lanes on SR 520, and is failing to pursue sensible public transportation solutions for the city and the region." [Emphasis added]

This statement clearly addressed the incumbent and criticized his views on pertinent issues before the City Council. Cogswell challenged the restriction on the grounds the restriction violated the First Amendment and lost. The Court found the restriction reasonable.

Based on the *Cogswell* decision Mr. McKenna does not challenge the existence on Seattle Rule 4.3. Rather, he contends the rule is being unfairly applied to his proposed statement. He contends his statement does not violate Rule 4.3. To the contrary, his statement conforms with Rule 4.4, and the decision to reject the statement amounts to view point discrimination.

[1] At the time the rule was found at SMC 2.14.060(c).

According to *Cogswell*, government may not regulate speech based on its substantive content or the message it conveys. *Cogswell*, at 814; citing *Rosenberger v. Rector & Visitors of the Univ. of VA*., 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). The First Amendment forbids government regulation of speech that favors some viewpoints or ideas at the expense of others. Cogswell, at 814; citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993). The Court noted that the line between acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one. *Cogswell*, at 815. If the speech at issue does not fall within an acceptable subject matter otherwise included in the forum, the State may legitimately exclude it from the forum it has created. *Cogswell*, at 815. [Emphasis added] However, if the speech does fall within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker. *Id*.

Application of this latter rule is found in *Johnson v. Poway Unified School District, et al*. Johnson was (and presumably still is) a high school teacher within the school district. The school district had a long standing policy allowing teachers to display on their classroom walls messages and other items that reflect the teacher's personality, opinions, and values, as well as political social and religious concerns so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom. Johnson displayed religious material in his classroom that did not disrupt the classroom. However, because of its Christian content, another teacher objected.

The Court found the classroom constituted a limited public forum. Citing to *Cogswell*, the Court stated the rule written above - If certain speech "fall[s] within an acceptable subject matter otherwise included in the forum, the State may not legitimately exclude it from the forum based on the viewpoint of the speaker." *Johnson*, supra; *Cogswell v. City of Seattle*, 347 F.3f 809, 815 (9th Circ. 2003). The distinction with *Cogswell* was that the school district had a rule permitting a teacher to display religiously based material in the classroom on the condition it was not disruptive. Johnson complied with this rule. Therefore, the school district's decision to order him to take his display down amounted to view point discrimination; his expression under the rule could not be displayed, while others could.

According to *Cogswell*, the stated purpose of publishing a candidate's statement in a voter's pamphlet is to "introduce the candidates to the voters." Rule 4.4 furthers this purpose by encouraging candidates to write within their statements: (1) tell who you are, (2) show that you

understand this community and its concerns, and (3) explain where you stand.

Mr. McKenna's statement tells voters who he is. He is a city prosecutor with years of experience, has implemented change to help the people of Seattle, and has the endorsement of several persons and organizations.

The statement tells the voters Mr. McKenna understands the community and its concerns. He wants the city judiciary to comply with financial rules to make it more efficient.

The statement tells voters where Mr. McKenna stands. He wants a judiciary that is transparent and accountable. He wants it to run efficiently. He wants to bring new leadership. He wants the court to have the people's respect. **He believes the citizens of Seattle deserve better than a judge who was rated the very lowest in a recent King County Bar Association judicial evaluation survey.**

This latter statement differs from the statement in *Cogswell* in two important respects: (1) the opponent's name is not mentioned; and (2) the statement identifies a belief held by the candidate which furthers the forum's intended purpose – to introduce the candidate to the voters.

The Seattle rules must be applied equally to all candidates. To provide a forum for candidates to introduce themselves to voters is an invitation for candidates to express their beliefs which compel them toward public office. Candidates for the local school board may believe in the need for better teachers or schools. Candidates for a local fire district may believe in financial oversight and better infrastructure investment. Candidates for city council may believe in rent subsidies to protect the poor or a better police response to crimes. Whatever the case, candidates for office will generally hold strong beliefs to differentiate oneself from other candidates. The voters' pamphlet restricts speech to a description of the candidate. Yet parameters of this restriction incorporates beliefs held by a candidate. A statement that expresses a core belief of a candidate should therefore be in compliance with the Seattle rules.

A decision to exclude Mr. McKenna's statement conflicts with *Johnson*. Mr. McKenna's statement satisfies the requirements under Seattle Rule 4.4. This "subject neutral" rule applies to all candidates. This is similar to the rule in *Johnson* by the school district that allowed teachers to display religious and spiritual material within the classroom. Johnson's display of Christian based material in his classroom was no different an expression of speech, and no less in compliance with the rule, than another teacher's display of the lyrics to the Beatles' song "Imagine." Forcing Johnson to take down his material constituted view point discrimination.

Likewise, Mr. McKenna's statement should be viewed as being no different than any other candidate's statement insofar as it expresses his beliefs underlying his decision to run for Municipal Court Judge. His statement is no different than any other judicial candidate expressing a belief compelling them to run. In addition, this statement is not profane, is factual, and is not defamatory. (Seattle Rule 3.10) Forcing Mr. McKenna to change his statement would amount to view point discrimination since such decision establishes that his belief is inappropriate.

Mr. McKenna and his campaign appreciate your time and attention reviewing this letter. It is our hope this letter explains Mr. McKenna's position regarding his statement. We therefore ask for your consideration and reverse your earlier decision and publish Mr. McKenna's statement in its entirety.

Sincerely,

Ryan B. Robertson
Attorney at Law