



August 13, 2010

### **By Electronic Mail**

Ryan B. Robertson, Esq.  
800 Fifth Avenue  
Suite 4000  
Seattle, WA 98104

### **Re: Rejection of Ed McKenna's Voters' Pamphlet Statement**

Dear Mr. Robertson:

I am denying your request that I reconsider my rejection of Ed McKenna's voters' pamphlet statement. 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" – plainly violates Voters' Pamphlet Administrative Rule 4.3 ("Rule 4.3"), which provides that a candidate's "written submission must not discuss the candidate's opponent(s)."

As you acknowledge, Rule 4.3 was upheld by the Ninth Circuit Court of Appeals in *Cogswell v. City of Seattle*, 347 F.3d 809 (9<sup>th</sup> Circ. 2003). Your attempts to distinguish Mr. McKenna's statement from the statement rejected in the *Cogswell* case are not persuasive.<sup>1</sup>

While it is true that Mr. Cogswell referenced his opponent by name whereas Mr. McKenna does not, to paraphrase *Buckley v. Valeo*, 424 U.S. 1, 45 (1976), I would "naively underestimate the ingenuity and resourcefulness" of candidates "to believe that they would have much difficulty" crafting statements that skirted the use of their opponent's name while nevertheless clearly referring to their opponent. This office has never taken such a crabbed view of its obligations to fairly, consistently, and reasonably administer Rule 4.3. Mr. McKenna's statement plainly violates Rule 4.3 by referring unmistakably to his opponent. See City's Top Judge Gets Lowest Rating, at <http://slog.thestranger.com/slog/archives/2010/06/07/citys-top-judge-gets-lowest-rating> (visited August 13, 2010)

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<sup>1</sup> Your letter also raises the specter that my rejection falls outside of *Cogswell* because it discriminates against Mr. McKenna's viewpoint, but does not cogently develop either (i) the viewpoint Mr. McKenna is expressing or (ii) how my rejection discriminates against that viewpoint. Each of the cases you cite features discrimination against the expression of religious views, which is obviously not at issue in this case. See also, *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992) (striking down as viewpoint restriction municipal ordinance applicable "only to fighting words that that insult, or provoke violence, on the basis of race, color, creed, religion or gender.") (Internal quotations omitted.)



And while it is true that Mr. McKenna frames his reference to his opponent as a “belief held by the candidate,” that, too, is not enough to take the statement beyond the reach of Rule 4.3. Again, the effect of such an interpretation could only be to reward artful drafting, no different in effect than repealing Rule 4.3.<sup>2</sup>

You have five calendar days in which to appeal my rejection. If you do not either appeal or submit a statement that complies with the Voters’ Pamphlet Administrative Rules, I will transmit the statement to King County without the sentence at issue. If you do decide to appeal, I would respectfully request that you alert me as soon as possible, since it is August, the Commissioners are all volunteers, and we would need to amass a quorum “as soon as practicable.” SMC 2.14.070.B.

I do not doubt that the campaign views this dispute as a “heads I win, tails my opponent loses” proposition.<sup>3</sup> The grounds on which I would expect to prevail at a hearing can only draw attention to the survey at issue, and a hearing would likely garner far more attention than any sentence in the voters’ pamphlet ever could. But those considerations are irrelevant to my determination; my role is to fairly, consistently and reasonably administer Rule 4.3. It is my determination that Mr. McKenna’s statement violates that rule.

Very truly yours,



Wayne Barnett  
Executive Director

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<sup>2</sup> Adopting the reasoning of your letter, I would be compelled to print a statement reading: “I believe that the incumbent officeholder has violated the public trust and does not deserve your vote.”

<sup>3</sup> I would caution the campaign against discounting, though, the public’s capacity to see this exercise as a political stunt, undertaken without the seriousness expected of a candidate for high office.