

HOUSE BILL REPORT

SHB 1286

As Passed House:

February 23, 2009

Title: An act relating to false and defamatory statements about candidates for public office.

Brief Description: Prohibiting false and defamatory statements about candidates for public office.

Sponsors: House Committee on State Government & Tribal Affairs (originally sponsored by Representatives Miloscia, Appleton, Armstrong, Hunt, Newhouse, White, Smith, Rolfes, Roberts, Nelson, Hinkle and Ormsby; by request of Public Disclosure Commission).

Brief History:

Committee Activity:

State Government & Tribal Affairs: 1/20/09, 1/29/09 [DPS].

Floor Activity

Passed House: 2/23/09, 92-2.

Brief Summary of Substitute Bill

- Clarifies that political advertising or electioneering communications that contain a false statement of material fact about a candidate for office must also be made with actual malice and be libelous or defamatory in nature to be a violation of the campaign laws in chapter 42.17 RCW.
- Prohibits a candidate from making a defamatory or libelous statement about his or her opponent in the candidate's statement submitted to the Secretary of State for inclusion in the voters' pamphlet.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Hunt, Chair; Appleton, Vice Chair; Armstrong, Ranking Minority Member; Alexander, Flannigan, Hurst and Miloscia.

Staff: Tracey O'Brien (786-7196)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Candidates for public office are subject to numerous laws regarding campaigning. For example, all written political advertising must include the sponsor's name and address, and radio and television advertising must include the sponsor's name. In addition, at least one photograph of the candidate used in political advertising shall be taken in the last five years and it cannot be smaller than the largest photo of the same candidate in the same advertisement.

There are also certain prohibitions regarding political advertising and electioneering communications. For example, a candidate that falsely represents that the candidate is an incumbent for the office is a violation of chapter 42.17 RCW. A prohibition against political advertising or electioneering communications that contain a false statement of material fact about a candidate for public office was the subject of a recent Washington Supreme Court (Court) decision. In *Rickert v. The Public Disclosure Commission*, 161 Wn.2d 843 (2007) (*Rickert*), the Court invalidated this prohibition as a violation of the First Amendment to the United States Constitution. Applying strict scrutiny, the Court held that because the statute does not require proof of the defamatory nature of the statements, it prohibits its reach and is not limited to the very narrow category of unprotected speech identified in *New York Times v. Sullivan* and its progeny.

Defamation is defined as a statement that tends to cause harm to an individual's reputation as to lower him or her in the estimation of the community or to deter third persons from association or dealing with him or her.

Summary of Substitute Bill:

An intent section establishes that the Legislature is responding to *Rickert*. The Legislature finds that it is a violation of state law if a person sponsors a false statement about candidates in political advertising and electioneering communications when the statements are made with actual malice and are defamatory.

It is a violation of campaign law for a person to sponsor, with actual malice, a statement constituting libel or defamation per se under certain circumstances: the false statement is about a candidate and is in political advertising or electioneering communications; a person falsely represents he or she is an incumbent for the office sought in political advertising or an electioneering communication; or a person directly or indirectly implies the support or endorsement of any person or organization in political advertising or an electioneering communication when in fact the candidate does not have such support or endorsement. A candidate is also prohibited from submitting a defamatory or libelous statement to the Secretary of State for inclusion in the voters' pamphlet about his or her opponent.

For the purposes of this act, "libel or defamation per se" is defined as statements that tend: to expose a living person to hatred, contempt, ridicule, or obloquy, or to deprive him or her of the benefit of public confidence or social intercourse; or to injure any person, corporation, or association in his, her, or its business or occupation. If a person makes a false statement, with actual malice, about himself or herself or falsely represents himself or herself as an incumbent, it is not libel or defamation and is not a violation of the campaign laws. It is also

not a violation of campaign laws for a person or organization to falsely represent that the person or organization supports or endorses a candidate. This is because persons and organizations cannot defame themselves. If a violation is proven, damages are presumed and need not be proven.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) In 2003 the Public Disclosure Commission attempted to enforce the false advertising law; however, the Washington Supreme Court declared the law unconstitutionally overbroad because the law also applied to non-defamatory speech. This bill would prohibit a person from sponsoring, with actual malice, defamatory political ads. It would not apply to non-defamatory speech. This bill will benefit voters, candidates and the integrity of the political process.

(Opposed) While we applaud the changes made from last year's bill, it still makes government the judge of politicians and political debate. The unintended consequence is to chill political speech. In addition, we doubt this bill fixes the constitutional problems with the previous law as it does not require a person to prove actual damages.

Persons Testifying: (In support) Representative Miloscia, prime sponsor; Representative Appleton; and Vickie Rippie and Nancy Krier, Public Disclosure Commission.

(Opposed) Shankar Narayan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.