

# Ask not what the other City Councilperson said about you...

By Reed Hardesty

Elected Officials help formulate and communicate community goals into your organizational goals. Elected Officials often work together and foster reasonable compromises and reasonable expectations, allowing a community to implement a vision. When Elected Officials turn campaign tactics into governance habits, it can lead to confusion and a less nimble approach to challenges. When Elected Officials use campaign tactics against other Elected Officials, staff can become mired in the dispute. Disputes occasionally spill over into liability claims filed by an Elected Official against the organization.

State law provides some clarification for campaign season speech:

[RCW 42.17A.335\(1\)\(a\)](#) provides: "It is a violation of this chapter for a person to sponsor with actual malice ... political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office."

So "lock her up" and "deplorables" are likely robust political speech used to inform the electorate and not defamatory statements.

But what happens when an Elected Official censures or attempts to censure another Elected Official through a City Council process. Does liability attach for defamation if the rest of City Council votes down the motion? Does liability attach if the rest of City Council approves the motion but later the allegation is proven otherwise? These are litigation questions to be answered with the costs and obligations of your risk pool and defense attorneys.

The legal standard of actual malice is a high standard for the Plaintiff Elected Official to meet in political campaigning speech. State law also gives some guidance for the day to day speech of Elected Officials and the lower liability standard of a discretionary decision.

[RCW 4.24.470](#) states: "An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body."

In one instance, a City Councilperson decided to take the confidential legal analysis given to the City Council and hand the written document to the citizens group at a City Council meeting. The citizens group opposed the approval of four-story building that would block the scenic views of neighboring properties. The Council as a group censured and fined that Councilperson for acting outside the Council's direction. The Council also censured the Councilperson because

the Council did not want to waive attorney client privilege for the legal analysis that discussed strengths and weaknesses of potential positions. The individual Councilperson is obliged to respect the work of the Council as a whole even when an individual Councilperson advocated for a competing outcome. The individual Councilperson filed a claim that came to WCIA. The Councilperson sought recovery of the fine and his personal legal expenses for outside legal analysis he personally engaged. The claim was successfully denied. It was within the Council's discretion to keep the legal analysis private during an active dispute. It was not discretionary for the individual Councilperson to overrule the decision of the Council as a whole. Even though the neighbor group received the City's private legal analysis, the City Council's clear direction was known and the neighbor group was not allowed to use the City's legally confidential document as an exhibit in litigation. Though their attorney did read the document and learned analysis they were not entitled to have, which was concerning to the City Council and WCIA.