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6 **SUPERIOR COURT OF THE STATE OF WASHINGTON**  
7 **FOR MASON COUNTY**  
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9 IN THE MATTER OF:  
10 THE RECALL OF CYNTHIA  
11 OLSEN, Port Commissioner of  
the Port of Tahuya, Washington..

NO.  
PROSECUTING ATTORNEY'S  
MEMORANDUM OF LAW

12  
13 **I. INTRODUCTION**  
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15 The Prosecuting Attorney of Mason County has petitioned the Court  
16 pursuant to RCW 29.82.021 to determine the sufficiency of recall charges filed  
17 against Clynthia Olsen, Port Commissioner of the Port of Tahuya, Washington..  
18 The statement of charges filed by the proponents of the recall is attached to the  
19 Petition as Attachment # 1. The Prosecuting Attorney has also prepared a ballot  
20 synopsis, pursuant to RCW 29.82.021, which is attached to the Petition as  
21 Attachment # 2. This Court is required to hold a hearing on this petition within  
22 15 days of its filing. RCW 29.82.023.

23 The duties of the Prosecuting Attorney in this matter include: (1) drafting  
24 a synopsis of 200 words or less for the statement of charges offered in support of  
25 the recall; (2) certifying those charges and the synopsis to the Superior Court; and  
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1 (3) petitioning the Superior Court for approval of the synopsis and for a  
2 determination of the sufficiency of the charges. RCW 29.82.021.

3 After the petition is filed, the Superior Court makes two determinations:  
4 (1) whether the acts stated in the charges satisfy the criteria for which a recall  
5 petition may be filed (in other words, whether the charges are sufficient); and (2)  
6 whether the ballot synopsis is adequate. The recall proponents and the officer  
7 who is subject to recall may appear before the Superior Court. RCW 29.82.023.  
8 After the filing of this petition with the Court, the Prosecuting Attorney has no  
9 further statutory duties in this matter and does not become an advocate for either  
10 side in the recall matter.<sup>1</sup>

11 Acting primarily as an officer and friend of the Court, the Prosecuting  
12 Attorney offers the following summary of the law of recall. The Prosecuting  
13 Attorney takes no position as to the merits of specific charges but offers the  
14 following legal background in the hope that it will assist the Court and parties in  
15 an area of law that many do not often encounter.

## 16 **II. PROCEDURAL BACKGROUND**

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19 The process of requesting the recall of an elected official in Washington  
20 begins with the filing of a statement of charges with the officer who accepts  
21 declarations of candidacy for elections to the office in question. RCW 29.82.010  
22 (describing the contents of the statement of charges); RCW 29.82.015 (describing  
23 the office with which the statement is filed).

24  
25 <sup>1</sup> The undersigned counsel does not anticipate attending the hearing required by RCW 29.82.023. After  
26 this petition is filed, both the proponents of recall and the officer subject to recall become the litigants before the  
Court.

The individual petitioners named in the recall Petition commenced this recall proceeding by filing a statement of charges with the Mason County Auditor. Upon receipt, the Auditor served the Statement of Charges upon the Office of the Prosecuting Attorney and upon Mrs. Olsen.. RCW 29.82.015. The Prosecuting Attorney prepared the ballot synopsis, attached to the petition as Attachment # 2., and petitioned this Court for a determination of the sufficiency of the charges and approval of the ballot synopsis.

### **III. THE GENERAL PROCESS OF RECALL IN WASHINGTON**

The opportunity to seek the recall of elected officials is a right guaranteed to the people by the state constitution. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 764, 10 P.3d 1034 (2000).<sup>2</sup> Recall is the process by which an elected public officer is removed from office before the expiration of his or her term. *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71 (1984). The recall process in Washington is unusual in that it requires a showing of cause in Superior Court before recall can proceed. *Estey v. Dempsey*, 104 Wn.2d 597, 600, 707 P.2d 1338 (1985).<sup>3</sup> The fundamental requirement in judicial review of the charges is that they must be factually and legally sufficient. *In re Recall of Sandhaus*, 134 Wn.2d 662, 668, 953 P.2d 82 (1998). Therefore, while recall is a constitutional right, in Washington that

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<sup>2</sup> The Washington Supreme Court has decided three cases by that same name. *In re Recall of Pearsall-Stipek*, 129 Wn.2d 399, 918 P.2d 493 (1996) ("*Pearsall-Stipek I*"); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998) ("*Pearsall-Stipek II*"); and *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 10 P.3d 1034 (2000) ("*Pearsall-Stipek III*").

<sup>3</sup> The *Estey* opinion explains in some detail the basis in public policy and constitutional principle of the requirement that recall proponents establish good cause, to the satisfaction of a court, prior to circulating petitions advocating the recall of an elected public officer. The court has more recently explained that judicial review

1 right can be exercised only on the basis of sufficient cause and not simply because a  
2 voter desires to remove an elected official from office. The Court is required to  
3 review the charges to determine whether they are sufficient to support a recall and  
4 whether the proponent has a basis in knowledge for bringing the charge.  
5 RCW 29.82.023.

6 Any voter can initiate a recall by filing a typewritten charge pursuant to  
7 RCW 29.82.010. The typewritten charge must provide: (1) the name and office of  
8 the officer subject to recall; (2) a recitation that the officer who is subject to recall  
9 has committed an act or acts of malfeasance, misfeasance, or violation of oath of  
10 office, or that such person has been guilty of any two or more of the acts specified  
11 in the constitution as grounds for recall; (3) a concise statement of the act or acts  
12 forming the basis of the complaint; and (4) a detailed description of each of those  
13 act(s). RCW 29.82.010. The statement making the charge or charges must be  
14 signed by the person or persons bringing the charge, verified under oath that the  
15 person or persons believes that the charge or charges are true and that he or she has  
16 knowledge of the alleged facts upon which the stated grounds for recall are based.  
17 RCW 29.82.010.

18 The statement is then filed with the election officer whose duty it is to  
19 receive and file a declaration of candidacy for the office at issue. The elections  
20 officer then shall promptly (1) serve a copy of the charge upon the officer whose  
21 recall is demanded, and (2) certify and transmit the charge to the preparer of the  
22 ballot synopsis provided in RCW 29.82.021. RCW 29.82.015.

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25 serves a "gateway function" in order to protect public officials from petitions based on "frivolous or  
26 unsubstantiated charges". *In re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001).



1 (1993); *In re Recall of Hurley*, 120 Wn.2d 378, 379, 841 P.2d 756 (1992); *In re*  
2 *Recall of Wade*, 115 Wn.2d 544, 547, 799 P.2d 1179 (1990).<sup>4</sup>

3 **A. Factual Sufficiency**

4 The first requirement for sufficiency is that the charges must be factually  
5 sufficient. This involves an inquiry into whether they state in detail the acts  
6 complained of, as well as whether they demonstrate that the petitioner knows of  
7 identifiable facts that support the charge. *Pearsall-Stipek III*, 141 Wn.2d at 765.  
8 The Supreme Court has explained this requirement at length:

9 The charges must be made “with sufficient precision and detail  
10 to enable the electorate and the challenged official to make informed  
11 decisions in the recall process.” *Jenkins v. Stables*, 110 Wn.2d 305,  
12 307, 751 P.2d 1187 (1988). Although charges may contain some  
13 conclusions, they must state sufficient facts to “identify to the electors  
14 and to the official being recalled acts or failure to act which without  
15 justification would constitute a prima facie showing of misfeasance,  
16 malfeasance, or a violation of the oath of office.” *Chandler v. Otto*,  
17 103 Wn.2d 268, 274, 693 P.2d 71 (1984). “Misfeasance” and  
18 “malfeasance” both mean “any wrongful conduct that affects,  
interrupts, or interferes with the performance of official duty.” RCW  
29.82.010(1). “Misfeasance” also includes the performance of an  
official duty in an “improper manner”, and “malfeasance” includes the  
commission of an unlawful act. RCW 29.82.010(1)(a); *In re Hurley*,  
120 Wn.2d 378, 380, 841 P.2d 756 (1992). “Violation of the oath of  
office” means the “willful neglect or failure by an elective public  
officer to perform faithfully a duty imposed by law.” RCW  
29.82.010(2).

19 A charge also must sufficiently “specify why [the challenged]  
20 acts constitute misfeasance, malfeasance or violation of the oath of  
21 office as defined in RCW 29.82.010.” *Teaford v. Howard*, 104 Wn.2d  
580, 587, 707 P.2d 1327 (1985). Furthermore, “where the petition  
charges the official with violating the law, the petitioners must at least

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22 <sup>4</sup> Other principles that affect civil litigation in general can also, under proper facts, arise in recall  
23 actions. For example, “*res judicata* bars a successive recall petition when a comparison of the two charges shows  
24 that ‘the charges share an identity of subject matter, cause of action, persons and parties, and the quality of the  
25 persons for or against whom the claim is made.’” *Pearsall-Stipek II*, 136 Wn.2d at 260 (quoting *Pearsall-Stipek I*,  
129 Wn.2d at 402). On some occasions, different petitioners may be treated as the same parties for *res judicata*  
26 purposes if their interests are sufficiently similar. *Id.* at 261. Additionally, as in any civil litigation, the court may  
award attorney fees “under CR 11 and the equitable powers of the court in the case of bad faith.” *In re Recall of*  
*Ackerson*, 143 Wn.2d 366, 377, 20 P.3d 930 (2001).

1 have knowledge of facts which indicate an intent to commit an  
2 unlawful act.” *In re Wade*, [115 Wn.2d 544] at 549 [799 P.2d 1179  
3 (1990)]. Although the recall statutes do not require firsthand  
4 knowledge of the facts underlying the charges, the petitioners must  
5 have some form of knowledge of the facts upon which the charges are  
6 based rather than simply a belief that the charges are true. *In re Zufelt*,  
7 112 Wn.2d 906, 912, 774 P.2d 1223 (1989).

8 *Jewett v. Hawkins*, 123 Wn.2d 446, 447-48, 868 P.2d 146 (1994) (quoting *In re*  
9 *Lee*, 122 Wn.2d 613, 616-17, 859 P.2d 1244 (1993)).<sup>5</sup>

10 The quoted passage outlines a number of elements necessary for a finding of  
11 factual sufficiency. First among those is the requirement that the charges be made  
12 “with sufficient precision and detail to enable the electorate and the challenged  
13 official to make informed decisions in the recall process.” *In re Lee*, 122 Wn.2d at  
14 616. The voters must be allowed to determine whether they believe the charges and  
15 therefore must have sufficient information upon which to base such a decision. *In*  
16 *re Recall of McNeill*, 113 Wn.2d 302, 305, 778 P.2d 524 (1989). Charges that are  
17 merely conjectural are insufficient to enable the electorate to make an informed  
18 decision. *Pearsall-Stipek I*, 129 Wn.2d at 404-05. However, “a petition should not  
19 fail for a mere technical violation of RCW 29.82.010 if the electorate has sufficient  
20 information to evaluate the charge and the elected official has sufficient notice to  
21 respond to the charge.” *In re Kast*, 144 Wn.2d at 814.

22 The factual sufficiency of the charges is determined from the face of the  
23 statement of charges. *In re Carey*, 132 Wn.2d 525, 527, 939 P.2d 1221 (1997).  
24 However, the Court may take testimony to clarify the proponent’s basis in  
25 knowledge of the alleged facts. *See, e.g., In re Anderson*, 131 Wn.2d at 94; *see*  
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<sup>5</sup> This passage has become the court’s standard explanation of the analysis of factual sufficiency. *See, e.g., In re Shipman*, 125 Wn.2d 683, 684-85, 886 P.2d 1127 (1995); *In re Beasley*, 128 Wn.2d 419, 425, 908 P.2d 878 (1996); *see also In re Anderson*, 131 Wn.2d 92, 95, 929 P.2d 410 (1997).

1 *also Jewett*, 123 Wn.2d at 450. The ultimate questions are whether the voters are  
2 provided sufficient information to evaluate the charges and whether the proponent  
3 has a basis in knowledge of the charges. *In re Carey*, 132 Wn.2d at 527.

4 The charge must state the act or acts complained of in concise language,  
5 giving a detailed description, including the approximate date, location, and nature  
6 of each act. *In re Lee*, 122 Wn.2d at 616. Although the charges may contain some  
7 conclusions, conclusory allegations alone are insufficient to state a factually  
8 sufficient basis for recall. *In re Beasley*, 128 Wn.2d at 426.

9 If the charges allege that the official violated the law, then intent to commit  
10 an unlawful act is also a required element. *Pearsall-Stipek II*, 136 Wn.2d at 263.  
11 Where the petition charges the official with violating the law, the petitioner must at  
12 least have knowledge of facts which indicate an intent to commit an unlawful act.  
13 *In re Kast*, 144 Wn.2d at 813. “This means that for the factual sufficiency  
14 requirement to be satisfied, the petitioner is required to demonstrate ‘not only that  
15 the official intended to commit the act, but also that the official intended to act  
16 unlawfully.’” *Pearsall-Stipek III*, 141 Wn.2d at 765 (*quoting Pearsall-Stipek II*,  
17 136 Wn.2d at 263). Additionally, an unlawful act must be committed “in office”.  
18 RCW 29.82.010. The Court has not determined whether this statutory language  
19 means that recall can only be based on actions taken in an official capacity or  
20 whether it might also include private conduct committed during the term of office.  
21 *In re Pearsall-Stipek III*, 141 Wn.2d at 769.

22 Although the recall statutes do not require firsthand knowledge of facts  
23 underlying the charges, the petitioners must have some form of knowledge of the  
24 facts upon which the charges are based rather than simply a belief that the charges  
25 are true. *In re Recall of Ackerson*, 143 Wn.2d at 372. It is not necessary, however,  
26

1 for this knowledge to satisfy the rules of evidence for admissibility as testimony. *In*  
2 *re Zufelt*, 112 Wn.2d at 912.

3 **B. Legal Sufficiency**

4 The second requirement is that the charges must be legally sufficient. The  
5 charge must not only demonstrate the facts supporting the charge but must show  
6 that the acts are wrongful. *In re McNeill*, 113 Wn.2d at 306. “To be legally  
7 sufficient, the petition must state with specificity substantial conduct clearly  
8 amounting to misfeasance, malfeasance or violation of the oath of office.” *In re*  
9 *Recall of Lakewood City Council Members*, 144 Wn.2d 583, 585, 30 P.3d 474  
10 (2001). Charges are legally insufficient where the acts complained of amount to  
11 “insubstantial conduct” by the officer or if the elected official acted with a legal  
12 justification. *In re Kast*, 144 Wn.2d at 815 (citing *Greco*, 105 Wn.2d at 671-72).

13 With regard to discretionary actions:

14 An elected official cannot be recalled for appropriately exercising the  
15 discretion granted to him or her by law. If a discretionary act is the  
16 focus of the petition, the petitioner must show that the official  
exercised discretion in a manifestly unreasonable manner.

17 *Jewett*, 123 Wn.2d at 448 (citing *Chandler*, 103 Wn.2d at 274, and *Greco v.*  
18 *Parsons*, 105 Wn.2d 669, 672, 717 P.2d 1368 (1986)). A clear abuse of discretion  
19 may be shown by setting forth facts demonstrating that the officer exercised his or  
20 her discretion in a manner that was manifestly unreasonable or exercised on  
21 untenable grounds for untenable reasons. *Cole v. Webster*, 103 Wn.2d 280, 284-85,  
22 692 P.2d 799 (1984). Mere disagreement with a discretionary decision, in contrast,  
23 is not sufficient. *In re McNeill*, 113 Wn.2d at 308; *Jewett*, 123 Wn.2d at 450-51.

24 The Court has explained that:

25 In the context of recall petitions, “misfeasance” and “malfeasance”  
26 both mean “any wrongful conduct that affects, interrupts, or interferes

1 with the performance of official duty.” RCW 29.82.010(1).  
2 “Misfeasance” also means “the performance of a duty in an improper  
3 manner”, and “malfeasance” includes “the commission of an unlawful  
4 act.” RCW 29.82.010(1)(a), (b).

5 *In re Recall of Amend*, 128 Wn.2d 836, 839, 912 P.2d 492 (1996). “Violation of  
6 the oath of office” means the willful neglect or failure by an elective public officer  
7 to perform faithfully a duty imposed by law. RCW 29.82.010(2). *See also In re*  
8 *Lee*, 122 Wn.2d at 616; *In re Hurley*, 120 Wn.2d at 380.

9 The requirements of factual and legal sufficiency relate to each other in the  
10 following way. The requirement of factual sufficiency requires the person bringing  
11 the recall charges to explain the facts underlying the charge, as well as his or her  
12 basis in knowledge of those facts. *Jewett*, 123 Wn.2d at 447-48. To be legally  
13 sufficient, the charges must clearly state conduct that, if true,<sup>6</sup> would constitute  
14 misfeasance, malfeasance, or a violation of the officer's oath of office. *In re*  
15 *Beasley*, 128 Wn.2d at 426.

## 16 **V. THE ADEQUACY OF THE BALLOT SYNOPSIS**

17 The Superior Court shall correct any ballot synopsis it deems inadequate.  
18 Any decision regarding the ballot synopsis by the Superior Court is final, although  
19 the Court’s decision on the merits is subject to direct review by the Supreme Court.  
20 RCW 29.82.023. This suggests that if the Court finds the charges insufficient, it  
21 should retain jurisdiction in order to further consider the ballot synopsis if the  
22 Supreme Court were to reverse that decision. This would provide the Court with an  
23 opportunity to review the synopsis after the nature of charges is finally determined.  
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1 This may be particularly important in cases in which the proponent seeks recall  
2 based on multiple charges, raising the possibility that following appellate review,  
3 some (but not all) grounds may be found sufficient. In such a circumstance, the  
4 synopsis should address only those charges found sufficient.

5 The statute also directs the Court to certify and transmit the ballot synopsis to  
6 the officer subject to recall, and either to the Secretary of State or the county  
7 auditor, as appropriate. *Id.* In this case, since the Mason County Auditor is the  
8 filing officer for declarations of candidacy, the Court should transmit the ballot  
9 synopsis to that office.

10 The ballot synopsis should provide the voters with sufficient information  
11 upon which to determine what acts the elected official is charged with committing  
12 and whether they believe those facts to be true. The synopsis, however, cannot  
13 provide more information than the proponent presents in the statement of charges.  
14 The charges are evaluated based upon the face of the statement filed by the  
15 proponent. *In re Carey*, 132 Wn.2d at 527. In the present case, while the synopsis  
16 may provide less than an ideal level of information to the voters, no additional  
17 relevant information could be gleaned from the face of the charges.

## 18 19 **VI. CONCLUSION**

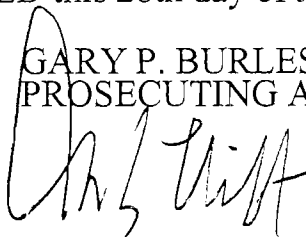
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21 The foregoing has been submitted by the Prosecuting Attorney as a friend of  
22 the Court to assist the Court in its determination of the sufficiency of the recall  
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24  
25 <sup>6</sup> It is important to recall that the court, in determining the sufficiency of the charges, “shall not consider  
26 the truth of the charges, but only their sufficiency.” RCW 29.82.023. The determination of whether the charges  
are true is ultimately a question for the voters.

1 | charges and the adequacy of the ballot synopsis.

2 |  
3 | RESPECTFULLY SUBMITTED this 28th day of July 2004.

4 | GARY P. BURLESON  
5 | PROSECUTING ATTORNEY

6 | 

7 | MIKE E. CLIFT, WSBA # 14302  
8 | Chief Deputy Prosecutor  
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