Ballot Measures and Public Agencies

Part 2: Before a Measure is Put on the Ballot

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www.ca-ilg.org/ballot-measure-activities

Important policy decisions affecting local agencies in California are made by the electorate through the initiative and referendum process. Determining what role local agencies and their officials may play in the initiative and referendum process can be quite complicated.

The following series of questions and answers provide general guidelines and analyses of issues regarding activities that occur before a measure is put on the ballot. The purpose of this guide is to provide guidance that represents the Institute's best judgment, based on the law, on how to avoid stepping over the line that divides lawful from unlawful conduct. As a general matter, the Institute believes in not snuggling right up to any such lines, but instead giving them some berth.

It is also important to remember that just because a given course of action may be lawful, it may not satisfy the agency's or the public's notions of what constitutes an appropriate use of public resources. Proper use of public resources is a key stewardship issue for public officials. In determining proper use of public resources, it is important to remember the law creates only minimum standards. In addition, there may be potential political implications of walking too close to the line in terms of the public's overall reaction to a ballot measure and where one wants the public's attention to be focused.

This guide is offered for general information only and is not intended as legal advice. Reasonable attorneys can and do disagree on where the boundaries are on these issues; moreover, the specific facts of the situation are an important element of the analysis. **Always consult an attorney knowledgeable about this area of the law when analyzing what to do in specific situations.**

For more information on legal issues associated with use of public resources and ballot measure activities, see parts 1, 2, and 4 of this resource available at *www.ca-ilg.org/ballot-measure-activities*:

- Part 1: General Framework
- Part 3: Specific Questions
- Part 4: Activities by Individuals

Before a Measure is Put on the Ballot

1. If a public agency wants to draft a measure on the ballot; may public resources be used for that?

Under both the California Elections Code and case law, local agencies may use public resources to draft a measure for the ballot.[1] The theory is that, prior to and through the drafting stage of a proposed ballot measure, the activities do not involve attempting to either persuade the voters or otherwise influencing the vote.[2]

2. What about other activities a local agency may wish to engage in prior to placing a measure on the ballot?

Local agencies do not have specific guidance from a majority of the California Supreme Court on this issue, although there are general principles that can be applied. The Court seems to use a two-part analysis in evaluating public agency activities vis-à-vis ballot measures. One part goes to the issue of whether a particular public agency has the *authority* to spend monies on ballot measure activities. The other is whether that authority oversteps what the courts may perceive as constitutional restrictions on what may be done with public resources.[3]

When placing a measure on the ballot, the California Elections Code answers the authority question for cities and counties.[4] The question is what other kinds of activities can they engage in as part of that effort?

In a case involving a local transportation agency, a court of appeal found the agency had authority under state law to find additional sources of funding for transportation[5] and the agency was following the prescribed steps for putting a measure before the voters (which included such activities as preparing a transportation plan).[6] The court noted that the activities the agency engaged in occurred before the transportation expenditure plan was approved or the ordinance placing a measure on the ballot was finalized.[7]

The fact that the agency's challenged activities occurred well before the measure was put on the ballot was enough for the court. In this regard, the court drew a distinction between activities involving the expenditure of public funds for *governing* and the expenditure of funds for election *campaigning.*[8]

The court in the transportation agency case relied heavily on the analysis of an earlier court of appeal decision. In that case, which involved a county, the court suggested that putting a measure on the ballot was okay, but other activities may be a closer call.[9] The court concluded that:

> On balance, we conclude the power to draft the proposed initiative necessarily implies the power to seek out a willing proponent. We do not perceive the activities of identifying and securing such a proponent for a draft initiative as entailing any degree of public advocacy or promotion, directed at the electorate, of the single viewpoint embodied in the

measure.[10]

The California Supreme Court agrees with this case to the extent that the case interpreted earlier Supreme Court decisions as allowing public agencies to express opinions on the merits of a proposed ballot measure, so long as agencies do not spend public funds to mount a campaign on it.[11] It did not address the issue of what kinds of activities (other than the act of putting a matter on the ballot) are okay.

3. ***Before we put a measure on the ballot, we want to evaluate its likelihood of success by engaging in various forms of public opinion research (for example, polling and focus groups) to understand how the community might feel about such a measure. May we use public resources for that kind of activity?***

Although no court has specifically addressed this, the Attorney General has said "yes," as long as those resources are not being used to promote of a single view in an effort to influence the electorate. For example, the Attorney General has determined that, in preparation for submitting a bond measure to the electorate for approval, a community college district may use district funds to hire a consultant to conduct surveys and establish focus groups to assess the potential support and opposition to the measure, the public's awareness of the district's financial needs, and the overall feasibility of developing a bond measure that could win voter approval.[12] The Attorney General based his analysis on a court of appeal case that allowed pre-qualification activities,[13] noting that the audience for such activities is not the electorate.[14]

4. ***May this research be used by advocacy or opposition groups to inform their strategies?***

In the Attorney General opinion on the community college bond measure, the Attorney General noted that the fact that early focus group and polling information might prove to be of use in an ensuing campaign does not, in itself, necessitate the conclusion public funds were expended improperly.[15] The Attorney General did note that donating or providing this information to a political campaign may give rise to campaign reporting obligations under the Political Reform Act.[16]

Note on Public Records

A factor to keep in mind is the degree to which the consultant's research is likely to constitute a public record[17] subject to disclosure upon request to anyone under California's Public Records Act.[18]

5. ***May a public agency use public resources to hire a communications strategist (consultant) to advise the agency on an effort to place a matter on the ballot? Some of the issues the consultant would advise on include:***
    a. *Interpreting and applying the public opinion research and advising on such issues as timing of the election;*
    b. *What kind of balloting method to use;*
    c. *Effective themes and messages to use in describing the measure to the community;*
    d. *Areas where the public may need more information;*
    e. *Communications planning;*
    f. *Community outreach activities;*
    g. *Informational direct mail program;*
    h. *Creating an informational speakers bureau; and*
    i. *Interpreting "tracking poll" data after outreach program to re-assess community support for the measure.*

Some public agencies have ongoing and robust communications and engagement efforts with their communities as part of their philosophy of governance. In such communities, hiring help on community outreach activities and communications planning (or having such capacity in house) is part of how the agency generally operates. Consistency with a public agency's established practices is one of the factors the courts look for in assessing whether a particular use of public resources with respect to ballot measure communications is okay.[19]

The key distinction to keep in mind under the current state of appellate guidance is whether a given use of public resources relates to *governing* as opposed to election *campaigning.*[20] Understanding community sentiment and needs and then developing measures to meet those needs can be part of an agency's ongoing governance and communications practices. So can maintaining regular lines of communications between decision-makers and the community.

However, if these activities are not typically part of the agency's philosophy of governance and regular communications practices, then using public resources for these purposes can be riskier. For example, the Attorney General has concluded that it would be unlawful to use public agency funds to hire a consultant to develop and implement a strategy for building support for a ballot measure (both in terms of building coalitions and financial support for a campaign). The Attorney General said having the consultant assist the district chancellor in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure would be unlawful if the purpose or effect of such actions is to develop a campaign to promote approval of the bond measure by the electorate.[21]

Under this opinion, the key test is whether the "purpose or effect" of a consultant's activities is to develop a campaign to promote approval of the bond measure; if so, those activities should not be undertaken with public resources.[22] The Attorney General said this means public resources should not be used to fund activities that will form the basis for an eventual campaign to obtain approval of a measure.[23] It also means that the safest thing to do is to avoid using public resources for activities that may have the effect of influencing the voters (for example, "developing themes or messages").

If the agency does hire communications consultants, the agency and the consultants should be aware of the transparency requirements that apply to public entity endeavors. This includes the fact that the scope of work in the consultant's contract, the consultant's work product, emails and other writings relating to their work that are in the possession of and regularly retained by the agency will be subject to public disclosure should there be an inquiry.[24]

6. ***Are there any concerns if the communications strategist ultimately becomes either one of the consultants or the sole consultant to the campaign?***

No court decision or Attorney General opinion addresses this specific issue. Having consultants involved in pre-qualification activities (which are not supposed to involve actions designed to develop a campaign to promote approval of a measure) and then become involved in campaign activities may create a greater risk that a court may conclude the pre-qualification activities were truly designed to support a campaign to promote approval of a measure. It also increases the possibility that the pre-qualification expenses will be reportable as in kind support for the campaign.

7. ***May public resources be used to fund signature gathering to qualify a measure for the ballot?***

The Attorney General says "no."[25] The Attorney General reasoned that such activities cross the line to promoting a single point of view and influence the electorate, which cannot occur unless there is clear and explicit authorization for such activities.[26]

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The Institute welcomes feedback on this resource:

- *Email:* ethicsmailbox@ca-ilg.org Subject: *Legal Issues Associated with Use of Public Resources and Ballot Measure Activities Part 3: Before a Measure is on the Ballot*
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References and Resources

Note: Sections in the California Code are accessible at http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

[1] *Vargas v. City of Salinas*, 46 Cal. 4th 1, 36 (2009); *League of Women Voters of California. v. Countywide Criminal Justice Coordination Comm.,* 203 Cal. App. 3d 529 (1988); *Santa Barbara County Coal. Against Auto. Subsidies v. Santa Barbara County Ass'n of Governments*, 167 Cal. App. 4th 1229 (2008). *See also* Cal. Elect. Code §§ 9140 [county board of supervisors], 9222 [legislative body of municipality]; FPPC Advice Letter to Hicks, No. I-98-007 (02/20/98); FPPC Advice Letter to Roberts, No. A-98-125(06/01/98).

[2] *League of Women Voters*, 203 Cal. App. 3d at 550 ("The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence *any* vote."), citing *Miller v. Miller* 87 Cal. App. 3d 762, 768 (1978).

[3] *See Vargas*, 46 Cal. 4th at 29:

> As we have seen, in *Stanson, supra*, 17 Cal.3d 206, this court, after explaining that a "serious constitutional question . . . would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning" (*id.* at p. 219, italics added), reaffirmed our earlier holding in *Mines, supra*, 201 Cal. 273, that the use of public funds for campaign activities or materials unquestionably is impermissible in the absence of " 'clear and unmistakable language' " authorizing such expenditures. (*Stanson*, at pp. 219-220.) Section 54964 does not clearly and unmistakably authorize local agencies to use public funds for campaign materials or activities so long as those materials or activities avoid using language that expressly advocates approval or rejection of a ballot measure. Instead, the provision prohibits the expenditure of public funds for communications that contain such express advocacy, even if such expenditures have been affirmatively authorized, clearly and unmistakably, by a local agency itself. Although section 54964, subdivision (c) creates an exception to the statutory prohibition for communications that satisfy the two conditions set forth in that subdivision, subdivision (c) (like the other provisions of section 54964) does not purport affirmatively to grant authority to local entities to expend funds for communications that fall within its purview.

[4] *See* Cal. Elect. Code §§ 9140 (authorizing boards of supervisors to place measures on the ballot); 9222 (authorizing city councils to place measures on the ballot).

[5] *See Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1239-40, (The Local Transportation Authority and Improvement Act (Act), which the court described as "a comprehensive statutory

scheme to 'raise additional local revenues to provide highway capital improvements and maintenance and to meet local transportation needs in a timely manner'" citing Cal. Pub. Util. Code, § 180000-180003).

[6] *See Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1234., (The agency had retained a private consultant to survey voter support for an extension of the sales tax. The consultant determined the arguments in favor of extension that were received most favorably by the voters polled, potential arguments in opposition, and the best strategy to maximize voter support. In addition, agency staff and committee members attended public meetings with civic groups during which staff presented information regarding the transportation expenditure plan, and the importance of extending an earlier sales tax to satisfying the county's transportation needs).

[7] *See Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1240.

[8] *See Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1241.

[9] *League of Women Voters*, 203 Cal. App. 3d at 553 ("Whether CCJCC legitimately could direct the task force to identify and secure a willing sponsor is somewhat more problematical.")

[10] *League of Women Voters*, 203 Cal. App. 3d at 554.

[11] *Vargas*, 46 Cal. 4th at 36.

[12] 88 Ops. Cal. Att'y Gen. 46 (2005).

[13] *League of Women Voters*, 203 Cal. App. 3d at 552-54.

[14] 88 Ops. Cal. Att'y Gen. at 49-50 (noting that "not every activity in connection with a bond measure will necessarily be proper if taken before the measure is placed on the ballot. Activities directed at swaying voters' opinions are improper, even pre-filing.")

[15] 88 Ops. Cal. Att'y Gen. at 50, citing *League of Women Voters*, 203 Cal. App. 3d at 554.

[16] 88 Ops. Cal. Att'y Gen. at 50, citing Cal. Gov't Code, § 81000 and following, 2 Cal. Code Regs. § 18215; *Hoffman Advice Letter*, No. A-00-074 (Cal. Fair Political Practices Comm'n March 28, 2000); *Fair Political Practices Comm'n. v. Suitt*, 90 Cal. App. 3d 125, 128-132 (1979).

[17] *See* Cal. Gov't Code § 6252(e) ("Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.").

[18] *See* Cal. Gov't Code § 6253 (a), (b) ("Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. . . Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.").

[19] *Vargas*, 46 Cal. 4th at 40. *See also* Cal. Gov't Code § 54964(a), (b)(3) (prohibiting local public agency expenditures for activities that expressly advocate the approval or rejection of a clearly identified ballot measure).

[20] *See Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1241.

[21] 88 Ops. Cal. Att'y Gen. at 52.

[22] 88 Ops. Cal. Att'y Gen. at 52.

[23] 88 Ops. Cal. Att'y Gen. at 52, citing *League of Women Voters,* 203 Cal. App. 3d at 558 (expenditures made in anticipation of supporting a measure once it is on the ballot come within reporting requirements of Political Reform Act of 1974); *In re Fontana* (1976) 2 FPPC Ops. 25 (expenditures made in support of proposal become reportable after proposal becomes a ballot measure).

[24] *See* Cal. Gov't Code § 6250 and following (California Public Records Act). The breadth of what records are subject to disclosure was recently reviewed by the California Sixth District Appellate Court, which vacated a superior court ruling holding that emails sent and received on officials' personal (non-agency) email accounts are subject to disclosure, see *City of San Jose v. Superior Court of Santa Clara*, --- Cal.Rptr.3d ---, 2014 WL 1515001 (Cal.App. 6 Dist., 2014).

[25] 73 Ops. Cal. Att'y Gen. 255 (1990).

[26] *See* 73 Ops. Cal. Att'y Gen. at 266 (finding no distinction between an initiative or referendum or whether the measure was a state or local one).