Ballot Measures and Public Agencies

General Framework

2014 Version
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 pertinent issues associated with the use of public resources and ballot measure activities. 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 2-4 of this resource available at www.ca-ilg.org/ballot-measure-activities:

- Part 2: Before a Measure is Put on the Ballot
- Part 3: Specific Questions
- Part 4: Activities by Individuals

General Framework

1. ***Our agency is interested in a measure that is appearing on an upcoming ballot. We have information that may be helpful to the public in making its decision on how to vote. What do we need to keep in mind as we consider sharing that information with the public?***

Public agencies play an important and ongoing role in contributing to the public's information on important issues affecting the community. The flow of information back and forth between public agencies and residents, as well as among residents, is vital to effective decision-making.

When it comes to issues that either may be or are on the ballot, there are two different areas of law that provide guidance on public agency communication activities:

- One is a body of case law that says what public agencies may and may not do to communicate their views on ballot measures with public resources. "Public resources" includes not only money, but things paid for with public money, including staff time, agency facilities, materials and equipment and agency communications channels.[1]

- The other area of law relates to campaign restrictions and transparency requirements under the state's Political Reform Act. Part of the theory of transparency requirements is that the public has a right to know who is spending what to influence their votes.[2] There also are restrictions on using public resources to mail advocacy materials to voters.[3]

2. ***What is the underlying theory for restricting public agency activities with respect to ballot measure advocacy? Aren't public information efforts relating to what's best for the community a core function for local agencies?***

The reason courts have given for restricting public agency activities with respect to ballot measures is the use of taxpayer dollars in an election campaign could distort the debate[4] and undermine the fairness of the election.[5] More specifically, courts have worried about public agency communications overwhelming voters[6] and drowning out the views of others.[7] Restrictions also are a way of maintaining the integrity of the electoral process by neutralizing any advantage that those with special access to government resources might possess.[8]

That being said, courts have also recognized that public agencies also have a role to play in making sure the public has the information it needs to make informed decisions. One court explained the role this way:

> If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process.[9]

The court also noted that, if public agencies cannot address issues of public concern and controversy, they cannot govern.[10]

3. What guidelines have the courts provided on using public resources relating to ballot measures?

The California Supreme Court has, in essence, created three categories of activities:

a) Those that are usually *impermissible* campaign activities;

b) Those that are usually *permissible* informational activities; and

c) Those that may *require further analysis* under the "style, tenor and timing" test.[11]

Impermissible activities include using public funds to purchase campaign materials: bumper stickers, posters, advertising "floats," television and radio spots and billboards.[12] Another improper activity is using public resources to disseminate advocacy materials prepared by others.[13] The production and mailing of "promotional campaign brochures" is also not allowed, even when those documents contain some useful factual information for the public.[14]

Permissible activities include:

- Taking a position on a ballot measure in an open and public meeting where all perspectives may be shared;[15]
- Preparing staff reports and other analyses to assist decision-makers in determining the impact of the measure and what position to take;[16]
- Responding to inquiries about ballot measures in ways that provide a fair presentation of the facts about the measure and the agency's view of the merits of a ballot measure.[17]
- Accepting invitations to present the agency's views before organizations interested in the ballot measure's effects.[18]

Any activity or expenditure that doesn't fall into either the "usually impermissible" or "usually permissible" category must be evaluated by a "style, tenor and timing" standard against the backdrop of the overarching concern for fairness and non-distortion in the electoral process.[19]

What kinds of things do the courts look for in evaluating "style, tenor and timing"? The safest approach is to deliver the information through regular agency communications channels (for example, the agency's existing website or newsletter), in a way that emphasizes facts and does not use inflammatory language or argumentative rhetoric.[20] Any communications should not encourage the public to adopt the agency's views, vote one way or another, or take any other actions in support of or in opposition to the measure.[21]

4. Are there additional restrictions a public agency should keep in mind with respect to ballot measure communications?

Yes. To complicate matters further, regulations adopted by the Fair Political Practices Commission further prohibit certain kinds of communications using a similar, but not identical, standard as the courts. The regulation prohibits *mailed* communications[22] that *either* expressly advocate the passage or defeat of a clearly identified ballot measure[23] *or*, when taken as a whole and in context, unambiguously urge a particular result in an election.[24] Among the criteria for whether a communication meets this test is whether, considering the style, tenor and timing of the communication, the communication can reasonably be characterized as campaign material (not a fair presentation of the facts serving only an informational purpose).[25]

The regulation goes on to say that, when considering the style, tenor and timing of an item, factors to be considered include (but are not limited to) whether the item:

- Uses inflammatory or argumentative language (an indicator of an advocacy piece);
- Is funded from a special appropriation related to the measure (possibly another indicator of an advocacy piece);
- Is consistent with normal communications patterns for the agency (possibly an indicator of an informational piece); and
- Is consistent with the style of other agency communications (possibly an indicator of an informational piece).[26]

These restrictions expand previous Fair Political Practices Commission interpretations of what constitutes a prohibited mass mailing.[27] The basic prohibition is very broad: "No newsletter or other mass mailing shall be sent at public expense."[28] The original ballot measure materials relating to this section indicate that the target of this prohibition was mailings by elected officials to raise their profile with voters.[29]

Mass mailing restrictions apply to 200 or more substantially similar pieces of mail. Under the Fair Political Practices Commission regulation, items are "substantially similar" if they both expressly advocate or unambiguously urge the passage or defeat of the same ballot measure.[30]

5. What about transparency requirements under the Political Reform Act?

Local agencies engaged in activities related to ballot measures should also be mindful of campaign expenditure reporting requirements when the agency produces materials which either expressly advocate or unambiguously urge a particular result in a ballot measure election.[31] These reporting requirements apply both *before and after* a measure has qualified for the ballot.[32]

In this regard, it is important to distinguish between transparency requirements and prohibitions. The earlier discussion in this guide relates to the *prohibition* against using public resources for campaign purposes. The Political Reform Act's campaign disclosure requirements, however, are *transparency* requirements: the message is that the public has a right to know who is spending what amounts of money to influence elections.

For state and local agencies, the Fair Political Practices Commission's regulations say that public agencies must report the direct and indirect costs of materials and activities that either expressly advocate or unambiguously urge the qualification, passage or defeat of a ballot measure.[33] Communications meet these criteria if they:

- Are clearly campaign material or activities (bumper stickers, billboards, door-to-door canvassing, or mass media advertising, including but not limited to television and radio spots); or

- Can reasonably be characterized as campaign materials considering their style, tenor and timing and do not involve a fair presentation of the facts serving only an informational purpose.[34]

Again, the regulation goes on to say that, when considering the style, tenor and timing of an item, factors to be considered include (but are not limited to) whether the item:

- Is funded from a special appropriation related to the measure;

- Is consistent with normal communications patterns for the agency;

- Is consistent with the style of other agency communications; and

- Uses inflammatory or argumentative language.[35]

However, the regulations accept certain communications from reporting requirements. For example, these exceptions include communications providing internal analyses of a measure to a member of the public on request, reports of an agency's position in the minutes of a meeting, agency arguments in a voter's pamphlet, presentations by public employees on the agency's position requested by organizations, and communications "clearly and unambiguously" authorized by law.[36]

These transparency requirements present tricky issues for local agencies. Local agencies may be inclined to report any costs incurred relating to ballot measure communications out of an abundance of caution. However, in so doing, an agency may be creating a basis for someone to challenge an agency as having made an impermissible expenditure of public resources under the case law and Fair Political Practices regulations discussed under questions 3 and 4, respectively. This is one of the many reasons it is wise to be in close contact with agency counsel regarding issues relating to ballot measure activities.

6. What are the consequences of stepping over the line dividing permissible from impermissible uses of public resources with respect to ballot measure activities?

The stakes are high for those involved in misuses of public resources. Public officials face personal liability—criminal and civil—for stepping over the line.

Improper use of public resources is a crime.[37] Criminal penalties include a two- to four-year state prison term and permanent disqualification from public office.[38]

Civil penalties include a fine of up to $1,000 for each day the violation occurs, *plus* three times the value of the resource used.[39] Other consequences may include having to reimburse the agency for the value of the resources used.[40] Those charged with improper use of public resources may have to pay not only their own attorneys fees, but also those of any individual who is challenging the use of resources.[41]

In addition, conflicting perspectives on whether there might be a "*de minimus*" defense makes relying on such a defense risky. [42] This includes relying on the defense that one has reimbursed the value of using public resources improperly.

Finally, engaging in such activities gives rise to reporting obligations for public agencies under the Political Reform Act.[43] Failure to comply with these requirements subjects an agency to additional penalties.[44]

7. Are there general strategies a public agency should employ to make sure that it doesn't step over any lines?

The first is to make sure that public agency employee and officials are aware of these restrictions.

Another strategy is to review the issues in this guide with agency counsel at the outset of any ballot measure related activities to be clear on how he or she interprets the law in this area. In many areas, the law is not clear and an agency is well-advised to understand their attorney's interpretations of what is allowed and what is risky. The next strategy is to have a practice of consulting with agency counsel on the application of these restrictions to specific issues that arise.

Finally, documenting an agency's respect for these restrictions is another important strategy. Attorneys refer to this as creating a *record.* Potential challengers to an agency's activities will review the record and other materials (including emails, for example) to determine whether to file a lawsuit. A court will examine the record in deciding whether any missteps occurred. The agency will want to be able to point to documentation that demonstrates that all actions were well within the boundaries dividing lawful from unlawful conduct.

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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 1: General Framework*
- *Mail:* 1400 K Street, Suite 205 ▪ Sacramento, CA ▪ 95814

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] *See Stanson v. Mott*, 17 Cal. 3d 206, 210-11(1976) (referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). *See also People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983). *But see Bardolph v. Arnold*, 435 S.E. 2d 109, 113 (N.C. App 1993) (local government may expend public funds to create support for qualified ballot measure), *rev. denied*, 439 S.E.2d 141 (1993).

[2] *See* 2 Cal. Code Regs. § 18420.1 (defining campaign-related expenditures as either reportable independent expenditures or contributions).

[3] *See* 2 Cal. Code Regs. § 18901.1 (prohibiting campaign mailings sent at public expense).

[4] *See Vargas*, 46 Cal. 4th at 31-32.

[5] *Vargas*, 46 Cal. 4th at 36-37.

[6] *See Vargas*, 46 Cal. 4th at 23-24, 32, citing *Stanson v. Mott*, 17 Cal. 3d 206, 216-217 (explaining that, as a constitutional matter, "the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave[s] to the 'free election' of the people (see Cal. Const., art. II, § 2) . . . present[s] a serious threat to the integrity of the electoral process"). *See also Keller v. State Bar*, 47 Cal.3d 1152, 1170-1172, (1989), *reversed on other grounds* 496 U.S. 1 (1990).

[7] *Vargas*, 46 Cal. 4th at 46 (concurring opinion).

[8] *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Sch. Dist.*, 46 Cal.4th 822, 845 (2009).

[9] *Miller v. Comm'n on the Status of Women*, 151 Cal. App. 3d 693, 701 (1984).

[10] *Id.*

[11] *Vargas*, 46 Cal. 4th at 7, citing *Stanson*, 17 Cal. 3d at 222 & n. 8.

[12] *Vargas*, 46 Cal. 4th at 24, 32, 42.

[13] *Vargas*, 46 Cal. 4th at 24, 35.

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[14] *Vargas*, 46 Cal. 4th at 39 n. 20.

[15] *Vargas*, 46 Cal. 4th at 37. *See also Choice-In-Education League v. Los Angeles Unified Sch. Dist.*, 17 Cal. App. 4th 415, 429-30 (1993).

[16] *Vargas*, 46 Cal. 4th at 36-37.

[17] *Vargas*, 46 Cal. 4th at 24-25, 33.

[18] *Vargas*, 46 Cal. 4th at 25, 36, *citing Stanson*, 17 Cal. 3d at 221.

[19] *Vargas*, 46 Cal. 4th at 7, 30, 40.

[20] *Vargas*, 46 Cal. 4th at 34, 40 (compare with the tone of the newsletter described in footnote 20).

[21] *Vargas*, 46 Cal. 4th at 40. Here is the full text of the *Vargas*' court's conclusion:

> In sum, a variety of factors contributes to our conclusion that the actions of the City that are challenged in this case are more properly characterized as providing information than as campaigning: (1) the information conveyed generally involved past and present facts, such as how the original UUT was enacted, what proportion of the budget was produced by the tax, and how the city council had voted to modify the budget in the event Measure O were to pass; (2) the communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to

> take other actions in support of or in opposition to the measure; and (3) the information provided and the manner in which it was disseminated were consistent with established practice regarding use of the Web site and regular circulation of the city's official newsletter. Furthermore, we emphasize that the principles that we have applied in this setting are equally applicable without regard to the content of whatever particular ballot measure may be before the voters-whether it be a tax-cutting proposal such as that involved in this case, a "slow-growth" zoning measure restricting the pace of development, a school bond issue providing additional revenue for education, or any other of the diverse local ballot measures that have been considered in California municipalities in recent years. (See, e.g., Cal. Elections Data Archive, Cal. County, City & School District Election Outcomes: 2004 Elections: City Offices and Ballot Measures, City Report, table 1.2, pp. 21-43 <http:// www. csus. edu/ isr/ isr 3. html> [as of Apr. 20, 2009].) In any of these contexts, a municipality's expenditure of public funds must be consistent with the standard set forth in *Stanson, supra*, 17 Cal.3d 206, 130 Cal.Rptr. 697, 551 P.2d 1.

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).

[22] *See* 2 Cal. Code Regs. § 18901.1(a)(1) (referring to "tangible item[s] . . . delivered, by any means . . .").

[23] *See* 2 Cal. Code Regs. § 18901.1(a)(2)(A).

[24] *See* 2 Cal. Code Regs. § 18901.1(a)(2)(B).

[25] *See* 2 Cal. Code Regs. § 18901.1(c)(2).

[26] *See* 2 Cal. Code Regs. § 18901.1(e).

[27] *See* 2 Cal. Code Regs. § 18901.1.

[28] Cal. Gov't Code § 89001.

[29] *See* California Voters Pamphlet, Proposition 9, Legislative Counsel Analysis, (June 4, 1974) ("[This initiative" would prohibit the mailing of legislative newsletters or other mass mailings at public expense by or on behalf of any state officer after he has filed as a candidate for office.").

[30] *See* 2 Cal. Code Regs. § 18901.1(d) ("For purposes of subdivision (a)(4), an item is "substantially similar" to another item if both items expressly advocate or unambiguously urge the election or defeat of the same candidate or measure.")

[31] Cal. Gov't Code § 82013(b), 84200.2 Cal. Code Regs., § 18225(b)(2). *See also Yes on Measure A v. City of Lake Forest,* 60 Cal. App. 4th 620, 625-626 (1997).

[32] 2 Cal. Code Regs. § 18225(b) (defining an expenditure as monetary and non-monetary payments used for communications with expressly advocate the qualification, passage or defeat of a clearly identified ballot measure).

[33] *See* 2 Cal. Code Regs. § 18420.1(a), (c).

[34] *See* 2 Cal. Code Regs. § 18420.1(b).

[35] *See* 2 Cal. Code Regs. § 18420(d).

[36] *See* 2 Cal. Code Regs. § 18420(e).

[37] *See* Cal. Penal Code §§ 72.5(b) (use of public funds to attend a political function to support or oppose a ballot measure); 424 (misappropriation of public funds); 484-87 (theft). *See also People v. Battin*, 77 Cal. App. 3d 635 (1978) (prosecution of county supervisor for engaging campaign activities during county business hours using county facilities), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983).

[38] Cal. Penal Code § 424.

[39] Cal. Gov't Code § 8314(c)(1).

[40] *Stanson*, 17 Cal. 3d at 226-227 (finding that "public officials must use due care, *i.e.*, reasonable diligence in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of due care"). *See also Harvey v. County of Butte*, 203 Cal. App. 3d 714, 719 (1988).

[41] *See generally Tenwolde v. County of San Diego*, 14 Cal. App. 4th 1083 (4th Dist. 1993), *rev. denied*.

[42] *See People v. Battin*, 77 Cal. App. 3d at 65 (1978) (Penal Code section 424's "proscription is not limited to the misuse of public funds in a particular monetary amount. Rather it proscribes *any* misuse, no matter how small." [emphasis in original]). *See also People v. Bishop*, A081989 (1st Dist. 2000) (this unpublished opinion follows *People v. Battin* and holds that reimbursement is not a defense). *But see DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236 (2010) (majority found that sending an editorial against a ballot measure via email on one's lunch hour constituted advocacy, but involved a minimal use of public resources—note dissenting opinion disagreeing with majority's minimal-use-of-public-resources conclusion).

[43] Cal. Gov't Code § 84203.5 (requiring independent expenditure reports by committees spending more than $500 each year in support or opposition to a ballot measure).

[44] *See, for example*, Cal. Gov't Code §§ 83116, 91001(b), 91000(a), 91001.5, 91002, 91004, 91005, 91012.