



**BALLOT MEASURE ADVOCACY AND THE LAW:**

**LEGAL ISSUES ASSOCIATED WITH**

**CITY PARTICIPATION IN BALLOT MEASURE CAMPAIGNS**

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# INTRODUCTION

The electorate through the initiative and referendum process is increasingly making important policy decisions affecting California cities.<sup>1</sup> Whereas cities have specific statutory authority to participate in the legislative process at the state and federal levels,<sup>2</sup> their authority to take part in the initiative and referendum process is more limited.

What role may cities and city officials play in the initiative and referendum process? The following series of questions and answers provide some general guidelines.

## USE OF PUBLIC RESOURCES TO SUPPORT A BALLOT MEASURE

### **May cities contribute public funds to a ballot measure campaign that has qualified for the ballot?**

No, the courts have made it clear that government cannot use public funds to “take sides” in a campaign.<sup>3</sup> Doing so gives one side an unfair advantage that may distort the electoral process. But this does not mean that cities cannot prepare and disseminate a fair and impartial analysis of the measure.

### **Is there a difference between using public resources to develop a measure for the ballot and to support the measure once it has qualified?**

Yes, public resources may be used to develop a measure for the ballot.<sup>4</sup> And local agencies have prepared ballot measures for years.<sup>5</sup>

### **May cities form a nonprofit corporation and use public funds to finance its operation for the purpose of qualifying a statewide initiative measure that relates to the day-to-day functions of every city in the state?**

No, the money for such an effort may not come from public funds. Because a city cannot directly fund such an operation, it cannot do so indirectly.<sup>6</sup>

### **Is there a difference between the generally accepted practice of using public funds for legislative lobbying efforts and using such funds to promote a ballot measure?**

Yes, courts have drawn a clear distinction between the two activities.<sup>7</sup> Various statutes specifically authorize the use of public funds for lobbying activities, such as traveling to Sacramento to testify at a legislative hearing.<sup>8</sup> There are no similar provisions permitting the use of public funds in election campaigns.<sup>9</sup>

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The legislative process contemplates public involvement to assist in explaining the potential benefits or detriments of proposed legislation. Courts do not see public agency lobbying as undermining or distorting this process.

However, the use of public funds to directly influence the electorate is seen as a potential threat to the integrity of the electoral process. According to California courts, permitting a public agency to “take sides” in an election campaign may give one side an unfair advantage.<sup>10</sup> The importance of governmental impartiality in electoral matters cannot be overstated.<sup>11</sup>

### **What is the difference between “informational” and “express advocacy” materials?**

Purely informational materials present a fair and balanced presentation of the relevant facts.<sup>12</sup> Materials of express advocacy are those that explicitly and by their own terms urge the election or defeat of an identified candidate or the passage or defeat of an identified measure.<sup>13</sup> Express terms of advocacy include “vote for,” “cast your ballot,” and “defeat.”<sup>14</sup>

### **May individual city officials use public resources to support a ballot measure?**

No, a city official may not use public resources to support or oppose a ballot measure or engage in campaign activity.<sup>15</sup> “Public resources” include any property owned by the local agency, including buildings, facilities, funds, equipment, telephones, supplies, computers, vehicles, and travel.<sup>16</sup> The misuse of public resources for campaign purposes may result in civil and criminal penalties.<sup>17</sup>

### **May cities use city staff, equipment, and supplies to generate promotional materials on behalf of ballot measures that have already qualified for the ballot?**

No, just like public funds, cities may not use public resources to support a ballot measure. To do so raises the possibility that the electoral process may be distorted by giving one side an unfair advantage in the campaign.

There are two simple, but very important rules city officials and employees should follow if they want to get involved in campaign activities: Don't use public funds and campaign on your own time.

## **TAKING A POSITION ON A BALLOT MEASURE**

### **May a city council officially endorse or oppose a ballot measure?**

Yes, the decision by a city council to go on record in support of or in opposition to a ballot measure has been held to be a permissible use of public resources. The council's decision should be made during a regular meeting that is open to the public and to the expression of the public's views.<sup>18</sup> If the City Council adopts a resolution endorsing or opposing a ballot measure, the resolution should include a statement that no public funds shall be used in the campaign for or against the measure.

## **May an elected official take a position on a ballot measure?**

Yes, a public official has a first amendment right to speak out on governmental matters upon being elected to office.<sup>19</sup> However, a public official should not use public resources to campaign for or against a ballot measure. City officials should not take part in ballot measure campaigns while on “city time” and should be careful to separate their official work from their political and campaign work.

## **May a public employee support or oppose ballot measures?**

Yes, a public employee does not give up his or her constitutional rights upon joining a public agency.<sup>20</sup> With certain exceptions, no restrictions may be placed on the political activities of public employees.<sup>21</sup>

However, public employees must be careful not to use public resources to advocate a position on a ballot measure.<sup>22</sup> As a precautionary measure, many cities prohibit or restrict their employees from engaging in political activities during work hours or while on city property.<sup>23</sup>

## **May cities analyze the effect of ballot measures on cities and publicize this information?**

Yes, cities may use public resources to objectively evaluate a ballot measure’s impact on the city.<sup>24</sup> The results of a fair and impartial analysis may then be made available to the newspapers, advocacy groups, and others who may make use of the information if they choose.<sup>25</sup>

Public funds must be used only for materials that are strictly informational and not for those that expressly advocate a position.

Public resources may not be used for campaign materials that expressly advocate a position on a ballot measure. Terms of express advocacy include:

- Vote for
- Elect
- Cast your ballot
- Defeat
- Vote against

## **CAMPAIGN ACTIVITIES IN SUPPORT OF A BALLOT MEASURE**

### **May city officials respond to telephone calls, letters, and e-mails about a ballot measure while on city time?**

Yes, but only as long as their response is limited to (1) stating that the city has either endorsed or opposed the measure and (2) presenting fair and impartial information about the measure.<sup>26</sup> An official must be careful not use public resources to “take sides” on the measure. Incidental and minimal use of public resources by a local officer is not subject to criminal prosecution.<sup>27</sup>

### **May a public employee respond to a request for information on a public agency’s analysis of or position on a ballot measure?**

Yes, as long as the employee provides a fair and impartial representation of the facts.<sup>28</sup> The response may include speaking to public or private organizations interested in the city’s position.<sup>29</sup>

**May city officials add a link from the city’s website to a ballot campaign website?**

No, this would be an inappropriate expenditure of public resources.

**May city officials hold a campaign rally in support of or in opposition to a ballot measure on the steps of city hall or elsewhere on city property?**

Yes, as long as city officials do not take part in the rally while on city time and the public facility is open and available for the expression of all viewpoints on the measure or for any other political activity.<sup>30</sup> It is a good practice for a city official to inform the audience that he or she is appearing as a private party and not as an official of the city.

**May a public employee wear his or her uniform when engaged in political activities after work hours?**

No, a public employee is specifically prohibited from participating in any sort of political activity while in uniform.<sup>31</sup>

**May a public employee make a presentation on a public agency’s position on a ballot measure at local organizations, such as the Chamber of Commerce?**

Yes, as long as the employee presents fair and impartial information on the ballot measure. It is good practice to use a prepared script that may be used each time the presentation is made.

**FUNDRAISING ACTIVITIES IN SUPPORT OF A  
BALLOT MEASURE**

**May city officials use city funds to attend a fundraiser in support of a ballot measure?**

No, it is a crime to use city funds to attend a political fundraiser.<sup>32</sup>

**May elected officials solicit ballot measure campaign contributions from city vendors?**

Yes, because it is not a conflict of interest for an elected city official to solicit or receive a campaign contribution from a vendor.<sup>33</sup> However, public resources must not be used in making these solicitations. Elected officials should not engage in such fundraising activities while on city time. Any solicitation should admonish and advise vendors that they may not charge back the amount contributed to the city either directly or indirectly.

**City officials and employees may NOT:**

- Distribute campaign materials through the city’s internal mail system.
- Place campaign literature on employee bulletin boards.
- Make public appearances speaking in favor of the ballot measure during compensated work hours.
- Walk precincts, draft campaign ads, or perform other campaign tasks during compensated work hours.
- Use city copy machines, telephones, fax machines, computers, stationery, etc. for campaign purposes.
- Urge other city employees to vote for the measure during compensated work hours.
- Send or receive campaign-related e-mails on city computers.

**May a city official obtain a list of city vendors for fundraising activities?**

Yes, if such a list exists, it is a public record and therefore is available to anyone asking for it. If no vendor list exists, it is not a misuse of public resources if the city would create a list for anyone who asked for such a list. If the city creates the list for the purpose of allowing fundraising from the list, this would be a misuse of public resources.

**May city officials solicit financial support from their colleagues for a ballot measure?**

No, city officials may not directly or indirectly solicit campaign contributions from other local officials or employees. The only exception is if the solicitation is part of a general effort that incidentally includes local officials and employees.<sup>34</sup>

**May a public employee ask his or her fellow public employees for contributions to a ballot measure campaign?**

No, local public employees may not solicit contributions from fellow employees unless:

- The solicitation is made to a significant segment of the public in which the fellow employees are included,<sup>35</sup> or
- The funds are solicited to promote or defeat a ballot measure affecting the rate of pay, working hours, retirement, civil service, or other working conditions.<sup>36</sup>

Such solicitations should not take place during city time or make use of public resources.

In addition, an employee or officer of one city may solicit contributions from officials and employees of a different city.

**May an elected official contribute his or her own campaign political action committee funds to qualify, support, or oppose a measure for the ballot?**

Yes, as long as the contribution is reasonably related to a political, legislative, or governmental purpose of the committee.<sup>37</sup> However, there may be federal income tax implications for doing so. Candidate campaign funds are tax-exempt under Internal Revenue Code section 527 only when used primarily for "exempt functions."<sup>38</sup> Such purposes are generally limited to expenditures for a candidate to get elected or for officeholder purposes once a candidate is elected.<sup>39</sup>

**How should such contributions from campaign funds be reported?**

**City officials and employees MAY:**

Work on the campaign during their personal time, including lunch hours, coffee breaks, vacations, etc.

Make a campaign contribution to a ballot measure campaign committee using personal funds, and/or attend a campaign fundraiser during personal time.

Make public appearances during personal time advocating the ballot measure.

Have the city council adopt a resolution at a public meeting that officially endorses the ballot measure and confirms the prohibition on using governments funds for political purposes.

The Fair Political Practices Commission says the recipient of the funds should report the receipt of funds as contributions received; the local official's campaign committee should report the contribution as an expenditure made and as a contribution made.<sup>40</sup>

### **Are there any other restrictions in the Political Reform Act that might restrict a local elected official's participation in ballot measure campaigns?**

The Fair Political Practices Commission notes that a local elected official who also serves as an appointed, voting member of another agency (e.g., a Local Agency Formation Commission, special district board, joint powers authority or regional planning agency) may, under certain circumstances, be prohibited from accepting, soliciting, or directing contributions on behalf of a ballot measure committee.<sup>41</sup>

## **CIVIL AND CRIMINAL PENALTIES FOR MISUSE OF PUBLIC RESOURCES**

### **Are there potential criminal consequences for misusing public resources?**

Yes, improper use of public resources can be a criminal offense.<sup>42</sup> Local officials should be careful to separate their official city work from their political and campaign work. One potential consequence of a criminal conviction for misappropriation of public resources is disqualification from holding any office in the state.<sup>43</sup>

### **Are there potential civil consequences for misusing public resources?**

Yes, the individual involved may be required to reimburse the agency for the value of the resources used.<sup>44</sup> The person may also be responsible for the attorney fees of the party challenging the use of resources.<sup>45</sup> In addition, engaging in such activities gives rise to reporting obligations for public agencies under the Political Reform Act.<sup>46</sup> Failure to comply with the requirements may subject an agency to additional penalties.<sup>47</sup>

## **CONCLUSION**

Public officials and employees have many ways to exercise their right to promote or oppose ballot measures. The key is **not to use the public's time, money, or other resources** to do so. Public resources may be used, however, to provide objective analysis and information about a ballot measure.

Charges that a city official or employee has misused and misappropriated public resources are extremely serious. When the propriety of any activity is in doubt, it is the League's view to err on the side of caution.

**A city official should always first consult with the city's attorney concerning the propriety of any given course of conduct.**

## ENDNOTES

<sup>1</sup> Through the initiative process, groups originate and seek to pass laws and constitutional amendments without resort to the Legislature. No subject is exempt from the process and the only constitutional restrictions are that an initiative proposal must deal with only one main subject and must not constitute a “revision” (as opposed to a mere “amendment”) of the state Constitution. *See* Cal. Const. art. II, § 8.

Up through the 1998 election, over 560 initiatives have appeared on California ballots, with about one-fourth of them being approved. The average cost to qualify an initiative for the ballot was approximately \$700,000. (It is believed that average cost to qualify an initiative for the ballot in 2003 would be over \$1 million.)

Bernard L. Hyink & David H. Provost, *Politics and Government in California* 98-103 (15<sup>th</sup> ed. 2001).

<sup>2</sup> Government Code section 50023 provides:

The legislative body of a local agency, directly or through a representative, may attend the Legislature and Congress, and any committees thereof, and present information to aid the passage of legislation that the legislative body deems beneficial to the local agency or to prevent the passage of legislation that the legislative body deems detrimental to the local agency. The legislative body of a local agency, either directly or through a representative, may meet with representatives of executive or administrative agencies of the state, federal, or local government to present information requesting action that the legislative body deems beneficial to, or opposing action deemed detrimental to, such local agency. The cost and expense incident thereto are proper charges against the local agency.

Cal. Gov't Code § 50023.

<sup>3</sup> *See Stanson*, 17 Cal.3d at 217. *See also Schroeder v. Irvine City Council*, 97 Cal.App.4<sup>th</sup> 174, 118 Cal.Rptr.2d 330 (4<sup>th</sup> Dist. 2002) (governmental agency cannot spend public funds for a partisan campaign advocating the passage or defeat of a ballot measure).

<sup>4</sup> *See League of Women Voters v. Countrywide Criminal Justice Coordination Committee*, 203 Cal.App.3d 529, 250 Cal.Rptr. 161 (2<sup>nd</sup> Dist. 1988).

<sup>5</sup> *See* Cal. Elec. Code § 9222.

<sup>6</sup> *See* California Legislative Counsel Op. No. 154 (September 18, 1980).

<sup>7</sup> *See Stanson v. Mott*, 17 Cal.3d 206, 130 Cal. Rptr. 697 (1976) (holding that California Department of Parks and Recreation could not spend public money to prepare promotional material and pay for speakers expenses to support a 1974 park bond measure).

<sup>8</sup> *See* Cal. Govt. Code §§ 50023, 53060.5, 82039, and 86300.

<sup>9</sup> *See Stanson*, 17 Cal.3d at 218.

<sup>10</sup> *See id.* at 217.

<sup>11</sup> *See id.* at 218-219.

<sup>12</sup> *See Stanson*, 17 Cal.3d at 220 (discussing with approval *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 179-180, 98 A.2d 673, 676 (1953), which recognized the broad legislative and fiscal authority possessed by locally autonomous schools boards to make reasonable expenditures to give voters relevant facts to aid them in making an informed judgment when voting).

<sup>13</sup> *See Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4<sup>th</sup> 449, 125 Cal.Rptr.2 534 (1<sup>st</sup> Dist. 2002).

<sup>14</sup> See Cal. Code Regs., tit. 2, § 18225(b)(2).

<sup>15</sup> California Government Code section 8314 provides:

It shall be unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes that are not authorized by law.

Cal. Gov't Code § 8314(a). See also Cal. Gov't Code § 54964.

<sup>16</sup> See Cal. Gov't Code 8314(b)(3).

<sup>17</sup> California Government Code section 8314 provides for civil penalties including fines of up to one thousand dollars for each day a violation occurs, plus three times the value of the unlawful use of public resources. California Penal Code section 424 provides for criminal penalties of up to four years in state prison. Furthermore, a conviction disqualifies the party from holding any office in the state. See also *People v. Battin*, 77 Cal.App.3d 635 (1978) (county supervisor prosecuted for misusing public funds for improper political purposes); *People v. Sperl*, 54 Cal.App.3d 640, 126 Cal.Rptr. 970 (2<sup>nd</sup> Dist. 1976) (county marshal convicted of Penal Code section 424 for having deputies make telephone calls in connection with testimonial dinner for political candidate).

<sup>18</sup> See *League of Women Voters*, 203 Cal.App.3d at 560. See also *Choice-in-Education League v. Los Angeles Unified School District*, 17 Cal.App.4<sup>th</sup> 415, 21 Cal.Rptr.2d 303 (2<sup>nd</sup> Dist. 1993) (schools district's expenditure of funds to broadcast a public meeting where the school board adopted a resolution opposing an initiative was permissible and serves purposes unrelated to advocating a partisan position on an initiative.)

<sup>19</sup> See *City of Fairfield v. Superior Court of Solano County*, 14 Cal.3d 768, 780-82, 122 Cal.Rptr. 543, 550-51 (1975) (city councilman has not only a right but an obligation to discuss issues of vital concern with his constituents).

<sup>20</sup> See *Bagley v. Washington Township Hospital District*, 65 Cal.2d 499, 55 Cal.Rptr. 401 (1966) (hospital district's prohibition of employees from participating in any ballot measures pertaining to the district was unconstitutionally overbroad); *Rosenfield v. Malcolm*, 65 Cal.2d 559, 55 Cal.Rptr. 505 (1967) (holding that county cannot dismiss a county employee on the grounds that it disagrees with the employee's activities).

<sup>21</sup> See Cal. Gov't Code § 3207.

<sup>22</sup> California Government Code section 54964(a) provides:

An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure or the election or defeat of a candidate, by the voters.

Cal. Gov't Code § 54964.

<sup>23</sup> See *Fair Political Practices Commission v. Suitt*, 90 Cal.App.3d 125, 153 Cal.Rptr. 311 (3<sup>rd</sup> Dist. 1979) (state employees may not participate in campaign activities during work hours or use public resources for campaign activities).

<sup>24</sup> See *Stanson*, 17 Cal.3d at 221. See also Cal. Elec. Code § 9212 (permitting local agency to prepare a report analyzing the effects a proposed local initiative measure may have on the city).

<sup>25</sup> See *id.* at fn.6 (The need for the dissemination of a fair and impartial analysis of a ballot measure by a local agency is somewhat diminished by the preparation of pro and con ballot arguments and an impartial analysis of the ballot measure by the Legislative Analysis. But nothing "suggests that other public agencies are foreclosed from providing objective information on a proposed ballot measure").

<sup>26</sup> California Government Code section 8314(d) provides:

Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the information activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

Cal. Gov't Code § 8314(d).

<sup>27</sup> California Government Code section 8314(e) provides:

The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code.

Cal. Gov't Code § 8314(e).

<sup>28</sup> *See Stanson*, 17 Cal.3d at 221, 130 Cal.Rptr. at 707-08.

<sup>29</sup> *Id.*

<sup>30</sup> *See* Cal. Gov't Code § 3207 (allowing local agencies to prohibit or restrict officers and employees from engaging in prohibited activity during work hours and on the local agency's premises).

<sup>31</sup> *See* Cal. Gov't Code § 3206.

<sup>32</sup> California Penal Code section 72.5(b) provides:

Every person who, knowing a claim seeks public funds for reimbursement of costs incurred to gain admittance to a political function expressly organized to support or oppose any ballot measure, presents such a claim for allowance or for payment to any state board or officer, or to any county, city, or district board or officer authorized to allow or pay such claims is punishable either by imprisonment in the county jail for a period of not more than one year, by a fine of not exceeding one thousand dollars (\$1,000), or by both such imprisonment and fine, or by imprisonment in the state prison, by a fine of not exceeding ten thousand dollars (\$10,000), or by both such imprisonment and fine.

Cal. Penal Code § 72.5.

<sup>33</sup> *See* Cal. Gov't Code § 82030. *See also Breakzone Billiards v. City of Torrance*, 81 Cal.App.4th 1205 (2000) (an elected official does not have a financial interest in a contract between a vendor and the city).

<sup>34</sup> California Government Code section 3205(a) provides:

An officer or employee of a local agency shall not, directly or indirectly, solicit a political contribution from an officer or employee of that agency, or from a person on an employment list of that agency, with knowledge that the person from whom the contribution is solicited is an officer or employee of that agency.

Cal. Gov't Code § 3205(a).

<sup>35</sup> *See* Cal. Gov't Code § 3205

<sup>36</sup> California Government Code section 3209 provides:

Nothing in this chapter prevents an officer or employee of a state or local agency from soliciting or receiving political funds or contributions to promote the passage or defeat of a ballot measure which would

affect the rate of pay, hours of work, retirement, civil service, or other working condition of officers or employees of such state or local agency, except that a state or local agency may prohibit or limit such activities by its employees during working hours and may prohibit or limit entry into governmental offices for such purposes during working hours.

Cal. Gov't Code § 3209.

<sup>37</sup> See Cal. Gov't Code § 89512.5.

<sup>38</sup> See 26 U.S.C. § 527(c).

<sup>39</sup> See 26 U.S.C. § 527(e)(2) (definition of "exempt function").

<sup>40</sup> See California Fair Political Practices Commission, Response to League of California Cities' Request for Informal Assistance No. I-92-567, September 11, 1992, at 2-4.

<sup>41</sup> See California Fair Political Practices Commission, Response to League of California Cities' Request for Informal Assistance No. I-89-669, February 7, 1990, at 5-6. See also Cal. Gov't Code § 84302.

<sup>42</sup> 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).

<sup>43</sup> See Cal. Penal Code § 424(a)(7).

<sup>44</sup> See Cal. Gov't Code § 8314.

<sup>45</sup> See generally *Tenwolde v. County of San Diego*, 14 Cal.App.4<sup>th</sup> 1083, 17 Cal.Rptr.2d 789 (4<sup>th</sup> Dist. 1993), *rev. denied* June 10, 1993.

<sup>46</sup> See Cal. Gov't Code § 84203.5.

<sup>47</sup> See Cal. Gov't Code § 83116 (sanctions include cease and desist orders, the filing of required reports, statements, or other documents, and monetary penalties of up to five thousand dollars for each violation).