

MEMO

Date: July 31, 2023

To: City of Portola

From: Local Emergency Services Study Group (LESSG)
Cary Curtis, Leslie Chrysler

Re: Agenda Item Request
Support of Measures E & F – Beckwourth Peak Fire Protection District

On July 11, 2023 the Plumas County Board of Supervisors approved adding the formation of the Beckwourth Peak Fire Protection District to the November 7, 2023 ballot. The ballot will include two Measures to be voted on by registered voters within the boundary of the proposed new fire district. Measure E asks voters to approve forming the new fire district and Measure F asks voters to approve a new tax to fund the new fire district.

Although there are restrictions on public agency activities with respect to ballot measure advocacy, the California Courts have found it permissible for the governing body of a public agency to take a position on a ballot measure in an open and public meeting where all perspectives may be shared.

The LESSG is requesting the City of Portola place an agenda item on the agenda for its next available meeting to allow for formal action to support formation of the Beckwourth Peak Fire Protection District and approval of the tax, Measures E & F. Below is an example of how the agenda item might read:

Beckwourth Peak Fire Protection District – Consider action to support the formation of the Beckwourth Peak Fire Protection District and approval of a special tax to fund the new fire district, Measures E & F on the November 7, 2023 ballot. Discussion, possible action.

If the City would like to adopt a Resolution supporting the Measures, we would be willing to draft a sample for you. However, the LESSG believes that a Resolution is not required and just a roll call vote of the City Council and minute action is all that is necessary for the Council to take formal action on this issue.

If the City Council votes to support the measures, members of the Council will then be able to publicly state that the agency supports formation of the new fire district and the proposed tax funding.

It is important for public agencies, Council members, staff and volunteers to understand the restrictions and requirements relating to ballot measures. Public resources may **not** be used for ballot measure campaign activities, this includes office equipment, supplies, staff time, vehicles and public funds.

Attached to this memo please find three publications of the Institute of Local Government that address ballot measures as they apply to public agencies and public officials. Feel free to distribute these publications to Council members, staff and volunteers to help them understand the regulations and restrictions that apply to them.



Ballot Measures and Public Agencies

Individual Activities

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. What role may local agencies and their officials play in the initiative and referendum process?

The following series of questions and answers provide general guidelines and analyses of issues regarding the ballot measure activities of individuals. 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 1-3 of this resource available at www.ca-ilg.org/ballot-measure-activities:

- Part 1: General Framework
- Part 2: Before a Measure is Put on the Ballot
- Part 3: Specific Questions

Individual Activities

1. What may individual public officials do to support or oppose ballot measures?

Individual officials and employees can work on the campaign during their personal time, including lunch hours, coffee breaks, vacation days, etc. They can make a campaign contribution to a ballot measure campaign committee using personal funds, and/or pay for and attend a campaign fundraiser during personal time. They can also make campaign appearances during personal time.

2. May I use agency letterhead or my title when communicating my support for a ballot measure?

Restrictions on the use of an agency's seal, logos and letterhead are common.¹ As a general matter, public agency letterhead is a public resource bought and paid for with taxpayer funds. As a result, it should not be used for ballot measure advocacy activities.²

Sometimes campaigns will use a facsimile letterhead that looks like official agency letterhead but is paid for with private funds. If the agency's letterhead is to be used in this manner, the governing body of the agency should approve such use and the letterhead should clearly indicate that it was not paid for with public funds.³ Other Political Reform Act requirements may also apply, for example, placing the name of the committee or candidate on the outside of the envelope.⁴

Using an agency's logo, letterhead or seal with the intent to deceive voters into thinking the communication is from an agency can be a violation of California election law.⁵ California law makes it a misdemeanor to use city seals with the intention of creating an impression that a document is authorized by a public official.⁶

The tradition when using titles ("county supervisor," "mayor," or "council member") is to indicate that the titles are used for identification purposes only. The theory underlying this policy is to be clear that one is not communicating on behalf of the agency.

For more information on this topic, see "Who Gets to Use Agency Seals, Logos, Letterhead and Other Insignia" available at www.ca-ilg.org/AgencySeals_Logos_Letterhead.

3. Can I contribute to the ballot measure campaign from my campaign funds?

Yes. The Fair Political Practices Commission has generally advised that candidates and officeholders may transfer funds from their candidate committees to ballot measure committees.⁷ In general, money raised to support a person's election to office is considered to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding

office.⁸ As such, these funds must be used only for may only be used for political, legislative, or governmental purposes.⁹

Although the Commission hasn't specifically explained why, one theory is because ballot measures are legislative in nature.

Note, however, that special disclosure rules apply to candidate-sponsored ballot measure committees.¹⁰

4. May I fundraise for the measure, so private resources can pay for campaign activities? What about approaching those who do business with my agency for financial support for the campaign?

The answer is generally yes, although with two caveats.

In terms of legal restrictions, one needs to be aware that the restrictions against seeking campaign contributions from those involved in license and permit proceedings also applies to solicitations of contributions to ballot measure campaigns.¹¹ For more information about this restriction, see "Campaign Contributions May Cause Conflicts for Appointees and Commissioners," which is available online at <http://www.fppc.ca.gov/index.php?id=103>. Local agencies may have their own, broader restrictions.

Even under circumstances when the law does not constrain an official's political fund-raising activities (other than requiring disclosure of donors), it is important to be extraordinarily judicious in choosing who to ask for campaign contributions. If an individual or company has matters pending with one's agency, they (and others, including the media and one's fellow candidates) are going to perceive a relationship between the decision and whether they contribute to one's campaign. The unkind characterization for this dynamic is "shake-down."

Two important points to remember:

- The legal restrictions on campaign fund-raising are minimum standards.
 - Public officials who indicate their actions on a matter will be influenced by whether they receive a campaign contribution put themselves at risk of being accused of soliciting a bribe or extortion.
- 5. May we ask staff to support the ballot measure, for example, by asking them to endorse the measure, make campaign contributions or volunteer their time?***

It's not a good idea. California law has a strong tradition of separating the electoral process from decisions relating to public employment.

For this reason, state law forbids elected officials and employees from soliciting campaign funds from employees.¹² (The exception is if the solicitation is made to a significant segment of the public that happens to include agency officers or employees.¹³)

State law also forbids conditioning employment related decisions on supporting a candidate or “other corrupt condition or consideration” which includes urging “individual employee’s action.”¹⁴

Note that there are exceptions to these restrictions if the ballot measure would affect the rate of pay, hours of work, retirement, civil service or other working conditions.¹⁵

6. May I ask fellow elected and appointed officials to contribute time, endorsements and/or money to the campaign?

The same state law that prohibits solicitations of campaign contributions from one’s employees’ prohibits solicitations of one’s fellow officials in the same jurisdiction.¹⁶

7. I generally share my views on ballot measures with my friends and constituents; is it okay to send that out using my public agency email address and the public agency email system?

Local officials who have used their agency emails for such purposes have faced criticism. In fact one such use led to a lawsuit that went to the California Court of Appeal. Although a divided court ultimately found that sending an editorial against a ballot measure via email on one’s lunch hour constituted advocacy, it involved only a minimal use of public resources.¹⁷

The better practice is to use a personal email address and send such information from a non-public agency computer system.

8. May I attend a fundraiser for the ballot measure, using public funds to pay for the ticket?

No. This squarely violates the proscription against using public funds for ballot measure advocacy.

9. What about if someone gives me one or more tickets to a fundraiser on a ballot measure?

From time to time a public official will be invited by candidates or ballot measure campaigns to attend political fundraisers. The rule is that a committee or candidate may provide **two tickets** per event to an official without the invited official having to report the value of the ticket on his or her Statement of Economic Interests.¹⁸ If the official receives more than two tickets, the face value of the extra tickets must be reported on his or her Statement of Economic Interests.

10. I have an agency cell phone; what if someone calls me on it to discuss ballot measure campaign activities?

The safest approach is to ask the caller to call you back on a non-agency line.¹⁹

11. May I wear my public agency uniform while expressing my views about a ballot measure?

No, California law specifically prohibits wearing public agency uniforms while participating in political activities.²⁰

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About the Institute for Local Government

The Institute for Local Government is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties. For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust. If you would like to access this resource directly, go to www.ca-ilg.org/ballot-measure-activities.

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 4: Individual Activities*
- *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 The Institute has collected samples of such policies on its website, available at www.ca-ilg.org/post/sample-policies-related-use-agency-insignia.
- ² See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- ³ See, for example, San Diego County Water Authority Administrative Code, § 1.08.10(d) ("The official seal and any emblem, symbol, logo or other distinctive mark of the Authority shall be used solely for Authority purposes and programs, unless otherwise authorized by the Board. Private, commercial or non-commercial use of the official seal, mark, name or identity of the Authority is prohibited."). The code is available online at: www.sdcwa.org/about/who-admincode.phtml.
- ⁴ See Cal. Gov't Code § 84305.
- ⁵ Cal. Elect. Code § 18304.
- ⁶ See Cal. Gov't Code §34501.5, which provides:
 - (a) Any person who uses or allows to be used any reproduction or facsimile of the seal of the city in any campaign literature or mass mailing, as defined in Section 82041.5, with intent to deceive the voters, is guilty of a misdemeanor.
 - (b) For purposes of this section, the use of a reproduction or facsimile of a seal in a manner that creates a misleading, erroneous, or false impression that the document is authorized by a public official is evidence of intent to deceive.

Note that a parallel state-wide provision for county and special district seals does not exist, however many have adopted local provisions.

⁷ California Fair Political Practices Commission Advice Letters No. I-00-068 (May 31, 2000) and I-91-153 (April 01, 1991).

⁸ See Cal. Gov't Code § 89510(b).

⁹ Cal. Gov't Code § 89512 (an expenditure of campaign funds must be reasonably related to a legislative or governmental purpose, unless the expenditure confers a substantial personal benefit, in which case such expenditures must be directly related to a political, legislative or governmental purpose). "Substantial personal benefit" means a campaign expenditure which results in a direct personal benefit with a value of more than \$200. Cal. Gov't Code § 89511(b)(3).

¹⁰ 2 Cal. Code Regs. § 18521.5.

¹¹ Cal. Gov't Code § 84308(b).

¹² See Cal. Gov't Code § 3205 (except for those communications to a significant segment of the public that happens to include fellow public officials and employees).

¹³ See Cal. Gov't Code § 3205(c).

¹⁴ See Cal. Gov't Code § 3204, which reads as follows:

No one who holds, or who is seeking election or appointment to, any office or employment in a state or local agency shall, directly or indirectly, use, promise, threaten or attempt to use, any office, authority, or influence, whether then possessed or merely anticipated, to confer upon or secure for any individual person, or to aid or obstruct any individual person in securing, or to prevent any individual person from securing, any position, nomination, confirmation, promotion, or change in compensation or position, within the state or local agency, upon consideration or condition that the vote or political influence or action of such person or another shall be given or used in behalf of, or withheld from, any candidate, officer, or party, or upon any other corrupt condition or consideration. This prohibition shall apply to urging or discouraging the individual employee's action.

¹⁵ See Cal. Gov't Code § 3209 ("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 conditions 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 their working hours and may prohibit or limit entry into governmental offices for such purposes during working hours.").

¹⁶ See Cal. Gov't Code § 3205 (a) ("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.").

¹⁷ See *DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236 (2010) (Note dissenting opinion disagreeing with majority's minimal-use-of-public-resources conclusion).

¹⁸ 2 Cal. Code Regs. § 18946.4(c).

- ¹⁹ *See* Cal. Gov't Code § 8314(b)(2) (““Campaign activity" does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.”).
- ²⁰ *See* Cal. Gov't Code § 3206 (“No officer or employee of a local agency shall participate in political activities of any kind while in uniform.”).

Ballot Measures and Public Agencies

The California Constitution reserves to the people the right to make some important local policy decisions through the initiative and referendum process.¹ Determining what role local agencies and their officials may play in the initiative and referendum process can be somewhat complicated, but less so if one keeps in mind the basic concept that public funds may not be used to put government's "thumb on the scale" in trying to influence voters one way or the other.

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 paper 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 treading too close to any such lines, but instead giving them fairly wide berth.

It is also important to remember that just because a given course of action may be lawful, does not mean it will satisfy the public's or the agency's ideas of what constitutes an appropriate use of public resources. Proper stewardship of public resources is a key accountability issue for public officials. In determining proper use of public resources, it is important to remember the law creates only minimum legal standards. The public may view what is "right" as a much higher standard than what is "legal." In addition, there almost always are potential political implications of walking too close to the line in terms of the public's overall reaction to a ballot measure and where the public's attention should 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.

¹Cal. Const. Art. II, §§ 8-11

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, **but impartial**, role in contributing to the public's information on important issues affecting the community. The flow of factual, unbiased information back and forth between public agencies and constituents as well as among constituents, is vital to effective decision-making.

Both statutes and case law define the legal parameters of what public agencies may and may not do to communicate their views on ballot measures with public resources. "Public resources" include not only money, but things paid for with public money, including staff time, agency facilities, materials and equipment and agency communications channels.²

All state and local officials, including appointees, are prohibited from using public funds for campaign purposes, such as supporting or opposing a ballot measure. However, courts, most notably in the case of *Stanson v. Mott*, have clarified there is a difference between a public agency's lawful impartial informational activity and unlawful partisan advocacy for or against a ballot measure. While public agencies may provide accurate, factual and impartial information to the public about a ballot measure, they may **not** expressly advocate for a "Yes" or "No" vote on the measure, or disseminate information in a manner, style, tenor or tone that urges a particular vote.

Local public agency governing bodies **may** take a position at public meetings in favor of or against a particular measure that would affect the agency or its constituents.³ And public agencies may spend money to encourage constituents to register to vote, and to get out to vote.⁴

- It is worth noting that there are additional campaign-related restrictions and transparency requirements that have been adopted by the Fair Political Practices Commission pursuant to the state's Political Reform Act, such as a restriction on using public resources to mail advocacy to voters⁵ and transparency requirements intended to ensure that the public has a right to know who is spending what to influence their votes.⁶ The best way for an agency to avoid running afoul of the FPPC regulations is to refrain from any communication that could reasonably be construed as advocacy. Since public agencies cannot spend public funds for illegal advocacy purposes there should be no reason for public agencies to be reporting campaign expenditures.

² 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).

³ See 2 Cal. Code Regs. § 18420.1 (defining campaign-related expenditures as either reportable independent expenditures or contributions).

⁴ See 2 Cal. Code Regs. § 18901.1 (prohibiting campaign mailings sent at public expense).

⁵ *League of Women Voters v. Countywide Criminal Justice Coordination Comm.*, (1988), 203 Cal.App.3d 529, 555.

⁶ *Schroeder v. City Council of Irvine*, (2002) 97 Cal.App.4th 174, 187.

Agencies should also be aware that there are restrictions on sending mass mailings at public expense that mention or feature an elected official, even if they are non-campaign related. For example, mass mailings at public expense are strictly limited from elected officials who are also candidates for 60 days preceding an election.⁷

In light of the complexity in this area, it is essential to be in close contact with agency counsel regarding agency activities relating to ballot measures.

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?

Public information is one thing; advocacy is another. The reason courts have given for restricting public agency activities with respect to ballot measures is that the use of taxpayer dollars in an election campaign could distort the debate⁸ and undermine the fairness of the election.⁹ More specifically, courts have worried about public agency communications overwhelming voters¹⁰ and drowning out the views of others.¹¹ 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.¹²

That being said, courts have also recognized that public agencies have a role to play in making sure the public has the factual, impartial 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."¹³

The court also noted that, if public agencies cannot address issues of public concern and controversy, they cannot govern.¹⁴

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

California courts have, in essence, created three categories of activities:

- Those that are usually **impermissible** campaign activities;
- Those that are usually **permissible** informational activities; and

⁷ Cal. Gov't Code § 89003.

⁸ See *Vargas*, 46 Cal. 4th at 31-32.

⁹ *Vargas*, 46 Cal. 4th at 36-37.

¹⁰ 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).

¹¹ *Vargas*, 46 Cal. 4th at 46 (concurring opinion).

¹² *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Sch. Dist.*, 46 Cal.4th 822, 845 (2009).

¹³ *Miller v. Comm'n on the Status of Women*, 151 Cal. App. 3d 693, 701 (1984).

¹⁴ *Id.*

- Those that may **require further analysis** under the “style, tenor and timing” test.¹⁵

Impermissible activities include using public funds for communications that expressly advocate a particular result in an election, or to purchase campaign materials such as bumper stickers, posters, advertising “floats,” television and radio spots and billboards.¹⁶ Another improper activity is using public resources to disseminate advocacy materials prepared by others.¹⁷ The production and mailing of “promotional campaign brochures” is also not allowed, even when those documents contain some useful factual information for the public.¹⁸

Permissible activities include:

- The governing body of the agency taking a position on a ballot measure in an open and public meeting where all perspectives may be shared;¹⁹
- Preparing impartial staff reports and other analyses to assist decision-makers in determining the impact of the measure and what position to take;²⁰
- 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 including, if applicable, the governing body’s position on the measure.²¹
- Accepting invitations to present the agency’s views before organizations interested in the ballot measure’s effects including, if applicable, the governing body’s position on the measure.²²

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.²³ 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.²⁴ 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.²⁵

4. 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.

¹⁵ Vargas, 46 Cal. 4th at 7, citing Stanson, 17 Cal. 3d at 222 & n. 8.

¹⁶ Vargas, 46 Cal. 4th at 24, 32, 42.

¹⁷ Vargas, 46 Cal. 4th at 24, 35.

¹⁸ Vargas, 46 Cal. 4th at 39 n. 20.

¹⁹ 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).

²⁰ Vargas, 46 Cal. 4th at 36-37.

²¹ Vargas, 46 Cal. 4th at 24-25, 33.

²² Vargas, 46 Cal. 4th at 25, 36, citing Stanson, 17 Cal. 3d at 221.

²³ Vargas, 46 Cal. 4th at 7, 30, 40.

²⁴ Vargas, 46 Cal. 4th at 34, 40 (compare with the tone of the newsletter described in footnote 20).

²⁵ Vargas, 46 Cal. 4th at 40.

Improper use of public resources is a crime.²⁶ Criminal penalties include a two- to four-year state prison term and permanent disqualification from public office.²⁷

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.²⁸ Other consequences may include having to reimburse the agency for the value of the resources used.²⁹ Those charged with improper use of public resources may have to pay not only their own attorney's fees, but also those of any individual who is challenging the use of resources.³⁰

In addition, conflicting perspectives on whether there might be a "*de minimus*" defense makes relying on such a defense risky.³¹ 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.³² Failure to comply with these requirements subjects an agency to additional penalties.³³

There is a political consequence as well. If the public and news media are talking about whether a public agency violated the law in spending public funds to campaign for or against a measure, they're not talking about the merits of the measure. Keeping the focus on the ethics of the public agency instead of the merits of the measure often results in a result that is not helpful to the public agency.

5. 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 and the significant consequences for violating them.

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. Agency counsel should review all communications about ballot measures or other elections in advance.

²⁶ 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).

²⁷ Cal. Penal Code § 424.

²⁸ Cal. Gov't Code § 8314(c)(1).

²⁹ *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).

³⁰ See generally *Tenwolde v. County of San Diego*, 14 Cal. App. 4th 1083 (4th Dist. 1993), *rev. denied*.

³¹ 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).

³² 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).

³³ See, for example, Cal. Gov't Code §§ 83116, 91001(b), 91000(a), 91001.5, 91002, 91004, 91005, 91012.

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.

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?

Under both the California Elections Code and case law, local agencies may use public resources to draft a measure for the ballot.³⁴ 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 influence the vote.³⁵

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 legal authority to spend public funds on ballot measure activities. The other is whether the use of that legal authority oversteps what the courts may perceive as constitutional restrictions on what may be done with public resources.³⁶

When drafting and placing a measure on the ballot, the California Elections Code provides the legal authority for cities and counties.³⁷ The remaining question is whether certain kinds of activities are appropriate as part of that effort?

³⁴ *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).

³⁵ *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).

³⁶ 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

³⁷ 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).

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 transportation³⁸ and the agency was following the prescribed steps for putting a measure before the voters (which included such activities as preparing a transportation plan).³⁹ 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.⁴⁰

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*.⁴¹

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.⁴² 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.”⁴³

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 in favor of the measure.⁴⁴ Generally summarized, it appears that public agencies may spend public funds to research potential provisions of a ballot measure, draft the measure itself, take the procedural steps necessary to get it on the ballot, have the governing body take a position on the measure, and inform voters about the provisions of the measure in a factual, impartial way.

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 that public agencies may spend money for polling and research as long as those resources are not being

³⁸ 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).

³⁹ 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).

⁴⁰ See *Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1240.

⁴¹ See *Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1241.

⁴² *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.”)

⁴³ *League of Women Voters*, 203 Cal. App. 3d at 554.

⁴⁴ *Vargas*, 46 Cal. 4th at 36.

used to promote 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.⁴⁵ The Attorney General based his analysis on a court of appeal case that allowed pre-qualification activities,⁴⁶ noting that the audience for such activities is not the electorate.⁴⁷

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.⁴⁸ 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.⁴⁹ Furthermore, the poll results and the polling consultant's report on the research will undoubtedly be considered to be public records.

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 record⁵⁰ subject to disclosure upon request to anyone under California's Public Records Act.⁵¹

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;*

⁴⁵ 88 Ops. Cal. Att'y Gen. 46 (2005).

⁴⁶ *League of Women Voters*, 203 Cal. App. 3d at 552-54.

⁴⁷ 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.")

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

⁴⁹ 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).

⁵⁰ 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.")

⁵¹ 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.")

- 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.⁵²

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*.⁵³ 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.⁵⁴

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.⁵⁵ 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.⁵⁶ 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

⁵² *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).

⁵³ See *Santa Barbara County Coal. Against Auto. Subsidies*, 167 Cal. App. 4th at 1241.

⁵⁴ 88 Ops. Cal. Att’y Gen. at 52.

⁵⁵ 88 Ops. Cal. Att’y Gen. at 52.

⁵⁶ 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).

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.⁵⁷

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.”⁵⁸ 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.⁵⁹

About the Institute for Local Government

The Institute for Local Government is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities, the California State Association of Counties and the California Special Districts Association.

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⁵⁷ 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).

⁵⁸ 73 Ops. Cal. Att'y Gen. 255 (1990).

⁵⁹ 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).

Ballot Measure Activities & Public Resources



As important as ballot measures are to policymaking, public agencies and officials face important restrictions and requirements related to ballot measure activities.

The basic rule is that public resources may not be used for ballot measure *campaign* activities. Public resources may be used, however, for *informational* activities. The key difference between campaign activities and informational activities is that campaign activities support or oppose a ballot measure, while informational activities provide accurate context and facts about a ballot measure to voters.

This document summarizes some of the key applications of these principles. The law, however, is not always clear and the stakes are high. Missteps in this area are punishable as both criminal and civil offenses. Always check with agency counsel for guidance on how these rules apply in any specific situation.

Public Agency Resources May Be Used To

- ✓ Place a measure on the ballot.
- ✓ Prepare and distribute an objective and fact-based analysis on the effect a ballot measure may have on the agency and those the agency serves.
- ✓ Express the agency's views about the effect of the measure on the agency and its programs, provided the agency is exceedingly careful not to advocate for or against the measure's passage.
- ✓ Adopt a position on the measure, as long as that position is taken at an open meeting where all voices have the opportunity to be heard.
- ✓ Respond to inquiries about the ballot measure in an objective and fact-based manner.
- ✓ Agency communications about ballot measures should not contain inflammatory language or argumentative rhetoric.
- ✓ Public employees and elected officials may, on their own time and with their own resources, engage in the following activities:
 - Work on ballot measure campaigns or attend campaign-related events on personal time (for example, evenings, weekends and lunch hours).
 - Make campaign contributions to ballot measures, using one's own money or campaign funds (while observing campaign reporting rules).
 - Send and receive campaign related emails using one's personal (non-agency) computer and email address.

Ballot Measure Activities & Public Resources

Public Officials Should Not

- × Engage in campaign activities while on agency time or with agency resources.
- × Use agency resources (including office equipment, supplies, staff time, vehicles or public funds) to engage in advocacy-related activities, including producing campaign-type materials or performing campaign tasks.
- × Use public funds to pay for campaign-related expenses (for example, television or radio advertising, bumper stickers, or signs) or make campaign contributions.
- × Use agency computers or email addresses for campaign communication activities.

Best Practices

- ✓ Inform agency employees and public officials about these legal restrictions, particularly once a ballot measure affecting the agency has qualified for the ballot.
- ✓ Include language on informational materials that clarifies that they are for informational purposes only. For example, “these statements shall not be construed in support of or against XX ballot measure.”

WHEN DO THESE RESTRICTIONS KICK IN?

The rules against the use of public resources for campaign activities are triggered once a measure has qualified for the ballot. There may be more latitude before a measure has qualified, but consult with agency counsel regarding the permissibility of specific activities.

DISCLOSURE REQUIREMENTS

Ballot measure activities that cross the line into advocacy are also subject to disclosure (transparency) requirements under California’s Political Reform Act (Government Code sections 81000 *et seq.*).

The Institute for Local Government (ILG) is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities, California State Association of Counties and the California Special Districts Association. Our mission is to promote good government at the local level with practical, impartial and easy-to-use resources for California communities. For more resources related to ballot measures and campaigns, visit www.ca-ilg.org/campaigns.

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