Initiatives/Referendums
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Craig A. Steele, City Attorney, Highland and Monrovia

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Local Initiatives and Referenda: Key Considerations for City Attorneys

By Craig Steele, City Attorney
Highland and Monrovia
Richards, Watson & Gershon
csteele@rwglaw.com
213.626.8484

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"[Direct democracy] is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves, to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and veto or negate such measures as it may viciously or negligently enact. All objections finally and ultimately center in a distrust of democracy; in a challenge of the power of the people to govern themselves. The voters are to decide by the adoption, or rejection, of this amendment to the constitution, as to whether self-government is a success or failure; as to whether people believe in themselves. It is the step which brings legislation to the threshold of the individual and clothes him with the power to secure good laws by control over legislators and legislatures." – Ballot Argument in Favor of California Proposition 7, the Initiative and Referendum Amendment, October 10, 1911.¹

I. Introduction

The people of California have retained the power to use the initiative and referendum processes to assert direct control over the political process as their right under the State Constitution for over 100 years. “Direct democracy” measures were part of a sweeping package of constitutional amendments the voters adopted as reforms at a special election in October of 1911. At the same election, the voters also granted women in California the right to vote.² Significantly, the courts recognize Californians’ constitutional initiative and referendum power not as rights granted to the people, but as a type of legislative power reserved by the people for themselves.³

Statewide, these reform efforts were championed by California’s Progressive movement and Governor Hiram Johnson, who had been elected in 1910 as part of a fight to wrest political control away from the Southern Pacific Railroad. California was the 10th state to adopt the initiative and referendum statewide. Although the adoption of Proposition 7 in 1911 reserved the initiative and referendum power in the State Constitution for all California voters, a few California cities had reserved the power of direct democracy to local voters years before. San
Francisco and Vallejo were the first California cities to adopt the initiative and referendum in 1898. Dr. John Randolph Haynes, a founder of the California Direct Legislation League, worked for the inclusion of the initiative and referendum power in 1902, which was ratified by the voters in 1903.⁴

Over the course of 100-plus years, the history of initiatives and referenda statewide has been one of high profile, expensive campaigns for and against a broad variety of subjects, many funded by special interest groups. At the local level, however, initiative and referendum activity has been much more varied. Some city attorneys may never have the opportunity to offer advice regarding a local ballot measure during their entire time in office. Others can tell harrowing “war stories” of hard-pitched battles regarding various ballot measures, including competing measures.

The purpose of this paper is not to provide a step-by-step checklist of the statutory initiative and referendum process. The League of California Cities’ Municipal Law Handbook has an excellent section in that regard⁵ and the relevant sections of the Elections Code are not difficult to follow. Rather, it is my intent to highlight some of the more prevalent legal issues that can arise in the course of a local ballot measure effort, and that usually require the city attorney’s input.

II. Definitions and Legal Authority

A. Definitions

“The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them....”⁶

“The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for the usual current expenses of the State....”⁷

The voters reserved the authority to exercise the power of initiative and referendum at the local level in Article 2, Section 11 of the California Constitution, which provides:
“(a) Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter.

(b) A city or county initiative measure may not include or exclude any part of the city or county from the application or effect of its provisions based upon approval or disapproval of the initiative measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of the city or county or any part thereof.

(c) A city or county initiative measure may not contain alternative or cumulative provisions wherein one or more of those provisions would become law depending upon the casting of a specified percentage of votes for or against the measure.”

As required by Article 2, Section 11, the Legislature has adopted an extensive set of statutory procedures to govern the initiative and referendum processes, found at Elections Code Sections 9200, et seq. Members of the public frequently use the terms “initiative” and “referendum” interchangeably, the assumption often being that any vote of the people on a law may be called a “referendum” on that law. The distinction is more than semantic; each term has separate legal significance. Moreover, the Elections Code provides for two different types of initiative measures.

The most commonly understood definition of an initiative is a legislative measure that is proposed – initiated – by the voters. Under this traditional scenario, initiative proponents draft a measure, give the city notice of their intent to circulate a petition, require the City Attorney to provide a title and summary, collect signatures and, if they collect sufficient valid signatures on the petition, require the city council to either adopt the measure or place it on an upcoming ballot. Alternately, a city council may decide to initiate the process of voter consideration of a measure on its own, without a petition. A city council initiated measure may propose “the repeal, amendment or enactment of any ordinance….” While city council initiated measures sometimes relate to controversial land use or policy issues in the community, or even advisory questions, a number of different types of decisions must be submitted to the voters for approvals. These would include, without limitation, local tax measures and certain kinds of bond measures
and changes to the governing structure of the City, such as district voting proposals, elected mayor proposals or changes to the number of seats on a city council. The two initiative processes may start differently, but both are aimed at soliciting direct voter input on a local legislative proposal. Many of the same statutory processes apply to both initiatives.

On the other hand, the local referendum power is the means by which the voters can choose to adopt or reject legislation that has already been enacted by the city council. While the initiative gives individual electors, or groups of them, the power to actually propose new laws, the referendum process gives voters the chance to take a look at legislation that has already been passed, if they sign a petition in sufficient numbers before the ordinance takes effect. To protect this authority, the Elections Code provides that most adopted local ordinances do not take effect for 30 days following the date that the adoption of the ordinances is attested by the City Clerk. If ten percent or more of the registered voters of the City sign a valid petition protesting adoption of the ordinance, the effective date of the ordinance is suspended and the legislative body must entirely repeal the ordinance or submit it for voter approval. In that sense, the referendum power is best viewed as a kind of veto authority over the legislative power of local government.

**B. The Initiative and Referendum Powers Apply Only to Legislative Acts.**

The power of initiative and referenda may only be applied to legislative acts, and the voters’ legislative authority is generally viewed to be “co-extensive” with the legislative power of the local governing body. But the initiative and referendum power is limited to actual legislative acts, and does not extend to administrative acts. A legislative act sets policy to be followed in future cases; an administrative or executive act simply applies existing policy decisions to a current set of facts. Although the California Constitution and the Elections Code refer to local legislative acts under the heading of “ordinances,” it is well-settled that a legislative act may be enacted by initiative, or subject to rejection by a referendum, regardless of whether it is actually labeled as an ordinance or a resolution. The character of the act determines the applicability of the initiative and referendum process, because the electorate’s power is generally the same as that of the legislative body. Given the significance of the initiative and referendum power, if doubts can be reasonably resolved in favor of the people’s reserved power, those doubts will be resolved in favor of preserving it.
The legislative/administrative distinction closely mirrors the legislative/quasi-judicial concept in land use law. The voters may adopt, amend or repeal a zoning ordinance by initiative or referendum as legislative acts. However, the granting of a conditional use permit or a variance under a zoning ordinance is not within the voters’ power. Generally, after a policy decision has been made, subsequent decisions made to execute that policy will not be considered legislative and not be subject to initiative or referendum. So, for example, when the County of Los Angeles and the State of California adopted the policy decision to build court buildings in Los Angeles County, the subsequent decisions about where to locate those buildings were held to have been administrative in nature. Similarly, a city council’s decision to enter into a contract with another party to implement state and federal legal requirements was deemed to be administrative in nature and not subject to referendum.

While the people’s ability to exercise the initiative or referendum powers over local legislative acts is quite broad, it is not so broad as to extend beyond the legislative authority of a city council. So, for example, the California Attorney General has opined that a local initiative may not adopt policy positions on issues that are outside the authority of a local legislative body. So a proposed measure that called for an end to the Vietnam War and withdrawal of U.S. troops was not a valid exercise of the local initiative power, even though it purported to state the policy position of the voters of the local entity.

C. Limitations on the Initiative and Referendum Power.

Although the courts generally look to preserve broad rights to use the initiative and referendum powers, over the years a substantial body of law has developed to define a number of specific types of limitations on the use of those powers. Briefly summarized, some of the most frequently relevant limitations are:

1. Limitations on Initiative Power

a. Like any law, an initiative measure must comply with both the California and federal constitutions. So, for example, a proposed initiative that discriminated against homosexuals and people with AIDS was held to be facially invalid and not a valid subject for an initiative because it violated the Equal Protection Clause and anti-discrimination provisions of
the California Constitution. The city properly refused to place it on the ballot. Similarly, a proposed county initiative that purported to distinguish between unincorporated county residents and city residents for the purpose of voting on airport-related land uses was invalidated, among other reasons, because the voting classifications it established were unconstitutional. Initiative measures that clearly violate either the California or federal constitutions, or both, are the most frequent subject of pre-election litigation.

b. An initiative measure may not name an individual to hold office, or name or identify any private corporation to perform a function or have any power or duty. A local initiative measure that named a particular corporation as an “Applicant” and assigned the corporation various duties, powers and functions in relation to the permitting of a solid waste facility was held to violate this provision of the California Constitution. The court also held Article 2, Section 12 of the California Constitution applies to local initiative measures, notwithstanding a lack of specific text to that effect. However, in another case the court held an initiative measure that sought voter approval of a development agreement naming a specific developer as a party was not the kind of measure subject to the prohibition in Article 2, Section 12.

c. An initiative measure must actually execute a legislative act; it may not direct the legislative body to take a subsequent legislative act. In an initiative measure that adopted certain policy statements relating to growth control, the voters directed the city council to amend the city’s general plan to conform to the concepts the voters adopted in the measure. In a post-election challenge, the court invalidated the initiative, holding that the direction to take a later legislative act is not a valid use of the initiative power.

d. An initiative measure may not take a legislative action in an area that has been preempted by the State or federal government. Examples of preempted fields where initiative legislation has been disallowed includes solid waste management, airport land use, and public employee retirement. Prior to the dissolution of redevelopment agencies, courts also held that California’s redevelopment laws preempted local initiatives related to redevelopment.
e. In the rare cases of authority that is specifically delegated by statute to the city council, rather than just to the city as an entity, courts will presume the Legislature intended to prohibit local voters from exercising the initiative and referendum powers over such actions. So, the California Supreme Court held that a statute that specifically gave city councils and boards of supervisors the authority to adopt certain kinds of development fees precluded the voters from adopting or repealing the same fees by initiative or referendum.\(^\text{35}\)

f. Similarly, an initiative measure that is held to impair an “essential government function” will be found to be invalid. This limitation generally protects the most basic management and executive functions of a local government agency from impairment by the voters. Examples include measures that would impair basic fiscal management duties, such as requiring voter approval of any “revenue raising device” including fees for service and normal service charges.\(^\text{36}\) This limitation has also been held to prohibit an initiative that would have interfered with a city’s statutory authority to issue pipeline franchises.\(^\text{37}\)

g. Land use initiatives or referenda must be consistent with the local general plan. It is well-settled that initiative measures may take legislative actions relating to land use matters such as adopting or amending general and specific plans and zoning ordinances. Occasionally, an initiative measure will adopt a land use provision that conflicts with an existing general plan. Similarly, a referendum could repeal or amend a land use ordinance in a way that leaves inconsistency with a general plan. This occurs most often when land use project opponents subject one decision in a series of land use actions to a referendum, leaving the other decisions intact. If the opponents choose the wrong decision to make subject to referendum, the referendum may be invalid because it results in an inconsistency with the general plan.\(^\text{38}\)

h. The Elections Code prohibits more than one election on the same subject matter at a special election within a 12 month period.

2. **Common Procedural Issues in the Initiative Process.**

The local initiative process generally takes a relatively long period of time, with multiple interactions between the city clerk and the initiative proponents. In many cases, especially where professional petition circulators and an experienced city clerk are involved, there are relatively
few opportunities for the city attorney to “touch” the initiative process. Still, the city attorney has some statutory responsibilities, and there are some common procedural issues that arise that may require the city attorney’s involvement.

a. **Title and Summary.** After the initiative proponents have published or posted the statutorily required notice of intent to circulate an initiative petition, they will also file a request for the city attorney to prepare a title and summary of the initiative petition within 15 days. The city attorney’s duty to provide a title and summary is ministerial, and must be complied with even if the city attorney thinks the proposed measure is invalid. This document should simply summarize, in 500 words or less, what the measure says. There is no statutory authority or requirement for the city attorney to do any analysis of the measure at this stage. Since any elector can seek a writ of mandate to compel the city attorney to amend the title or summary if either is false, misleading or in excess of the Elections Code requirements, there is no reason to provoke any dispute with the proponents at the earliest stage of the process by criticizing the measure, being argumentative, or refusing to prepare a title and summary.

b. **Defects in Form or Substance of the Petition.** The city clerk has a mandatory duty to reject initiative petitions that do not include the required elements of a valid petition. Those elements are the contents of the notice of intent, a valid declaration of the circulator (including the dates of circulation), evidence that the initiative petition includes the full text of the measure being proposed, and the full name, signature and address, as registered to vote, of each signer, personally entered by the signer. City clerks generally will be reluctant to reject petitions on any of these grounds without legal advice, and rightly so.

c. **Misconduct in Circulating the Petition.** It is a misdemeanor for any circulator of a petition to make false statements about, or misrepresent, the purpose and effect of a petition. It is exceedingly difficult to document this type of violation in a way that can lead to prosecution, since reports to the elections official are often second hand or do not identify the circulator in question.
allegedly false statements do not impact the elections official’s duty to process the petition, there is some narrow authority to suggest that absolutely false statements by initiative proponents in the petition itself and in the signature gathering process may invalidate an initiative measure even after it has been passed by the voters.\textsuperscript{44} It must be noted that this case is an incredibly fact-specific case in which the initiative measure itself contained material misrepresentations as to the effect of the measure and initiative proponents made blatantly false statements. At trial the proponents did not even attempt to defend the truth of the statements. In invalidating the measure, the court noted that its ruling should be viewed narrowly in the context of the bad facts of the case.

d. **Timing.** In most cases, all initiative signatures and all sections of the petition must be secured together and filed at one time by the initiative proponents or a person authorized in writing by the proponents.\textsuperscript{45} Late filings should not be accepted.

e. **Withdrawal of Signatures.** Any voter who has signed a petition may withdraw his or her signature by filing a written request with the elections official before the petition is filed.\textsuperscript{46} Once the petition is filed with the elections official, signatures may not be withdrawn.

f. **Withdrawal of Measures.** The Elections Code permits initiative and referendum proponents to engage in negotiations regarding the issues raised in a petition, and proponents may withdraw the proposed measure at any time before filing the signed petition for verification by the elections official. A withdrawal request must be in writing and signed by all of the original proponents of the measure.\textsuperscript{47}

g. **Examination of Signatures.** Once a petition is filed, the elections official makes an initial count of the signatures to determine, *prima facie*, whether a sufficient number of signatures has been filed. If there appear to be sufficient raw signatures, the elections official then has 30 days from the date of filing, excluding Saturdays, Sundays, and holidays, to verify the signatures on the
The Elections Code and the Secretary of State’s regulations set forth guidelines and standards for determining whether signatures should be counted as valid or not. The verification period is the time during which the city attorney should be researching the legal validity of the proposed measure, if necessary, in order to be prepared to advise the city council regarding its options if the measure has a sufficient number of valid signatures. In certain extreme cases, the measure may be so obviously invalid that the city declines to even accept it for filing.

h. **Effect of a Valid Petition.** If the petition contains the valid signatures of 10% of the registered voters in the jurisdiction (or in a city of less than 1,000 voters the lesser of 25% or 100 signatures), the city council has three options: 1) adopt the measure as presented at the regular meeting at which the city clerk certifies the validity of the petition or within 10 days thereafter; 2) order the measure submitted to the voters at the next regular municipal election not less than 88 days in the future, or 3) order a report to be prepared within 30 days regarding the impacts of the measure on the city, and then take either of the previous two actions. If the ordinance contains the valid signatures of at least 15% of the registered voters and includes a request that the city council call a special election on the matter and if the city council chooses to submit the measure to the voters it must do so at a special election on a date at least 88 but not more than 103 days following the call of the election.

i. **Effect of the Vote.** If the city council puts the measure on the ballot and a majority of the voters approve it, it is a valid and binding ordinance of the city as of the date the election result is declared by the city council. Successful initiative measures go into effect ten days after the declaration of the vote, unless the measure provides otherwise. If an initiative measure is either adopted by the city council without a vote of the people, or approved by the voters, that ordinance cannot be repealed or amended except by a vote of the people, unless the original ordinance provides otherwise. City attorneys who draft measures to be submitted to the voters are well-advised to include language in the measure that allows the city council to amend the adopted ordinance under certain
circumstances. This allows the city to make minor or practical changes to an ordinance from time to time without going back the voters for approval repeatedly.

j. **Conflicting Measures.** If two or more conflicting measures pass at the same election, the measure that receives the highest number of affirmative votes controls. Generally, measures are considered to conflict if one or both expressly state that the measure conflicts with another, or if the measures comprehensively regulate the same subject. If asked to draft a city council-sponsored competing measure to be placed on a ballot with an initiative, the author should strongly consider including language about the effect and priority of competing measures.

3. **Limitations on the Use of the Referendum.**

The statutory and judicial limitations on the power of referendum are far more limited. As noted above, a city referendum can be brought only regarding a legislative decision made by the city council. Otherwise, referenda cannot be brought against the following types of legislative actions, each of which takes effect immediately on adoption:

a. Ordinances that call or relate to a local election;

b. Urgency ordinances such as those adopted under Government Code Sections 36934, 36937 and 65858;

c. Ordinances relating to street improvement proceedings;

d. Other ordinances governed by particular provisions of state law that make the referendum process inapplicable; and,

e. Ordinances providing for tax levies or for governmental appropriations. However, this exception to the referendum power has largely been eliminated by the adoption of Proposition 218, which specifically amended the California Constitution to provide that the voters may use the power of initiative and referendum to repeal tax measures.

The factors that can prevent a referendum from going forward to the ballot, or invalidate a referendum after the election, are much more process-oriented than substantive.\textsuperscript{54} Referendum proponents’ failure to completely or substantially comply with all the procedural steps in the referendum process will likely be fatal to the referendum. This is especially important given the compressed time frame within which a referendum petition can be circulated. In the short referendum period, proponents often are unable to “fix” procedural defects. Those steps are:

a. **Time.** The requisite number of registered voters’ signatures on a referendum petition must be secured and filed with the elections official during regular business hours within 30 days following the date the ordinance was adopted and attested by the City Clerk. Petition signatures filed later that date are void.\textsuperscript{55}

b. **Signature Threshold.** A referendum petition must contain the valid signatures of at least 10\% of the registered voters in the jurisdiction or, if there are fewer than 1000 voters, the lesser of 25\% or 100 voters.\textsuperscript{56}

c. **Identify the Ordinance Number or Title.** Each page of the referendum petition must include the identifying number or title of the ordinance subject to referendum.\textsuperscript{57} This, along with the full text requirement explained below, is a key requirement. There must be no question about the scope of the proposed referendum.

d. **Full Text.** Each section of the petition that is circulated must include the full text of the ordinance that is subject to referendum.\textsuperscript{58} A number of cases have invalidated referendum petitions due to the proponents’ failure to circulate the full text – even voluminous texts – of the ordinance subject to the referendum. This is true even where the subject of the referendum is an entire general plan.\textsuperscript{59} Courts also have held that the “full text” requirement includes the proponents’ obligation and circulations would have been required to carry around the entire document to circulate exhibits and diagrams that are a part of the ordinance subject to referendum.\textsuperscript{60} The purpose of this requirement is to ensure that voters are not confused about the target of a referendum petition.\textsuperscript{61} The courts interpret the “full text” requirement quite literally,
even holding that a city clerk has a ministerial duty to reject a petition that has been circulated without the full text of the document at issue.\textsuperscript{62}

When the proponents file a referendum petition, the city clerk’s duties with regard to signature counts and verification are the same as described in Section 2 (g), above. If the referendum proponents file a legally compliant petition with sufficient valid signatures within the time allotted, the effective date of the ordinance is suspended and the city council must either entirely repeal the challenged ordinance or submit it to the voters at the next regular election or a special election at least 88 days following the order of the election.\textsuperscript{63} To become effective, the ordinance must be approved by a majority of the voters. If the ordinance is not approved, or if the City Council repeals it, the same ordinance cannot be adopted for a year thereafter.\textsuperscript{64}

5. City Participation in Ballot Measure Campaigns.

With the adoption of Proposition 218, many public agencies have been required to submit ballot measures to their voters for approval of important revenue measures. Because local agencies have more frequently become the proponents of ballot measures, there often are not formal campaign committees formed to raise funds and campaign on behalf of measures. As agencies have become more involved in revenue-related ballot issues, some agencies have started to expand their informational activities relating to other types of initiatives and referenda. This has led to an increased need for city attorneys to define the line between permissible and impermissible activities for public officials and public agencies. Even with the increase in activities, the law is quite well-settled that a public agency and its officers and employees may not expend public funds for the purpose of influencing the voters to vote in any particular way.

The Government Code provides, in relevant part:

“Our 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.”\textsuperscript{65}

In addition, it is a misdemeanor:
“...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 which are not authorized by law.

The foregoing statutes codify the holding of the California Supreme Court in the leading case setting forth the basic rules against partisan government involvement in ballot measures. In Stanson v. Mott, the court addressed the question of whether the State Director of Beaches and Parks was authorized to expend public funds in support of certain state bond measures for the enhancement of state and local recreational facilities. The court concluded that the Director of Beaches and Parks lacked such authority and set forth the basic rule that:

"...at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign..."

The court held that "a fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions." The court also held that this basic rule applied equally to candidate election campaigns as well as ballot measures. Apart from official ballot arguments and other materials authorized by the Elections Code, there is no legislative authorization to expend public monies to promote or defeat a ballot measure. However, the Stanson court recognized that public funds may be expended for "informational purposes" to provide the public with a fair presentation of relevant information.

Stanson recognized that problems may arise in attempting to distinguish improper "campaign" expenditures from proper "informational" activities:

"With respect to some activities, the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio "spots" unquestionably constitutes improper campaign activity (citation omitted), as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure (citation omitted). On the other hand, it is generally accepted that a
public agency pursues a proper "informational" role when it simply gives a "fair presentation of the facts" in response to a citizen's request for information (citation omitted) or, when requested by a public or private organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization (citation omitted)."71

The Stanson case and others that followed drew a relatively clear line between improper campaign expenditures and lawful informational activities by a public agency. Those cases hold generally that city expenditures in connection with ballot measure elections, even those expenditures that go so far as to urge voters to vote at a particular election – without advocating a particular result – are not unlawful as long as the communications do not expressly advocate, or taken as a whole unambiguously urge, the passage or defeat of a clearly identified measure.72

But in 2009, the California Supreme Court took a look at the distinction between improper campaign activities and appropriate information activities, in the context of more aggressive public agency public information tactics in connection with a local ballot measure. In Vargas v. City of Salinas,73 the court examined a challenge to the City’s public information campaign that extensively and purposefully reached out to voters to inform them of the potential impacts to city services if a ballot measure was not approved. The outreach included a city newsletter, website content, extensive and repeated public analyses of the impacts of the measure by staff and other communications.

In a fact pattern that looked, to some extent, like a more intentional effort to influence the voters, the Vargas court added a contextual element to the determination of whether a public agency’s communications related to a ballot measure are permissible. In a close case, the court held, the “style, tenor and timing” of communications may signal improper advocacy, even if the communications lack an express “vote yes” or “vote no” message.74 The court contrasted the City’s factual and relatively dispassionate communications to a hypothetical where a city put up large billboards that predicted some horror would occur if an identified measure passed. It is not easy to put the holding of the Vargas court into a convenient talking point of legal advice. In advising public agencies about communications relating to a ballot measure, it is perhaps most helpful to ask whether the proposed communication “looks, sounds, or feels” like a campaign
communication, even if it does not advocate a particular result in an election. The more a communication looks, sounds or feels like an unusual activity for the public activity – bumper stickers, glossy mailers and slogans come to mind - the more likely it will be subject to successful challenge. But if the public agency communicates as it normally does, through newsletters, a website, and the like, in measured tone that more closely resembles staff analysis, those communications are more likely permitted under the applicable case law.

The Schroeder v. City of Irvine case, decided before Vargas, is an interesting illustration of some communications measures that have been approved by courts. The Irvine City Council had authorized substantial expenditures of public funds to register voters in the City and inform them of the importance to the City of a countywide ballot measure. Although the City Council had taken a public position in favor of the proposed ballot measure, the materials it distributed did not advocate any particular vote on the measure and rarely mentioned the measure at all. A taxpayer challenged the expenditures as illegal “partisan campaigning” under Stanson. Because the City of Irvine’s publicly-funded communications only urged the reader to vote, and not how to vote, the Schroeder court held Irvine’s communications were appropriate. Further, although the petitioner argued that the unambiguous implication of the City’s communications was for a yes vote, the court held that when reasonable minds can differ as to the message being conveyed, there has been no “express advocacy” in violation of Stanson. The court also held that cities are not prohibited from spending public funds to encourage voter registration if the city council determines there is a public purpose in doing so.

Thus, the above-cited cases and statutes leave some room for a public agency and its officers and employees to provide impartial information to the voters about a ballot measure. There also is authority for a city official to express the city’s official position on the measure upon request. It is also clear that, in addition to impartial informational activities, cities may spend public funds to draft a ballot measure, and can likely use public funds to conduct polling to determine what elements should be in the measure. In a 2008 case involving a regional public entity, the court made a distinction between the process of drafting a ballot measure and associated activities – what the court called “governing” – and actually campaigning in favor of or against the ballot measure itself.
Once the measure is before the voters, however, additional caution is certainly warranted. This presents a delicate situation for the city attorney, likely faced with city councilmembers and staff members who want to be more aggressive about the need to “inform” the public about the vital need to pass the measure, as well as public relations consultants who seem to specialize in telling city officials how some other city attorney allowed another city to “push the envelope” without any problem. However, if the style, content, timing or tone of information provided at public expense either expressly advocates or unambiguously urges a particular result in an election, those expenditures of public funds would be illegal. The stakes for an illegal expenditure of public funds for partisan political purposes are high. A violation of Government Code Section 8314 by an individual is a misdemeanor. Under *Stanson*, public officials who authorize such unlawful expenditures may be held personally liable for repayment of the funds improperly spent, although that remedy appears to be rare.

6. Tips on Advising the City Clerk Regarding Initiatives and Referenda.

Regular elections are stressful enough for most city clerks. The uncertainty of an initiative or a referendum can create higher stakes than normal and increase the need for solid advice from the city attorney. Working as a team, it is important for the city attorney and city clerk to maintain impartiality and not view the initiative or referendum process as an adversarial situation. The city clerk, as elections official, has a duty to protect the impartiality and integrity of the election process, and to not get involved in partisan situations or take sides.

The city attorney can help city clerks by identifying issues and tasks early in the process; perhaps even by creating a timeline or checklist for a less experienced clerk to use as the process moves along. During the periods when petitions are being circulated and signatures are being verified, the city attorney can use that time to review the provisions of the measure and research any legal issues that may be presented. Once signatures have been verified there is a relatively short time window within which to advise your client regarding legal issues. It may also help to inform the city council and staff regarding the steps in the process and the projected timeline.

Finally, it is important that the city clerk recognize the ongoing confidentiality of the process. Initiative, referendum and recall petitions, as well as any memoranda prepared by the clerk in
examining the petitions, are not public records. The identities of voters who sign petitions should be protected so as to not a chill voter’s right to participate in the process. Signed petitions may only be shown to the city clerk and deputies, the proponent (if the petition is found to be insufficient) and specified law enforcement officials, including the city attorney, upon approval of the appropriate superior court. Some city attorneys take the position that they have the independent authority to view petitions as part of the process of advising the city clerk. I see no support in the statute for that proposition. Instead, if there is some need for the city attorney to see a petition or petitions and court approval is not available, I have recommended that the city clerk deputize the city attorney for the limited purpose of receiving and processing the petitions. Once an election result has been certified, the city clerk must retain petitions in a secure fashion for eight months following the certification.

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2. Id.
4. The Initiative and Referendum Institute, University of Southern California, http://www.iandrinstitute.org/California.htm
8. See, Elections Code § 9201.
12 Elections Code § 9237.

13 Id.

14 See, DeVita v. Napa County, (1995) 9 Cal. 4th 763 (County General Plan may be amended by initiative, future changes subject to voter approval).

15 Simpson v. Hite (1950) 36 Cal.2d 125.

16 See, Valentine v. Town of Ross (1974) 39 Cal.App.3d 954 (approval of plans for a flood control project was administrative, not legislative, and not subject to referendum since the decision to go forward with the project had previously been made).


21 See Topanga Ass’n. v. County of Los Angeles (974) 11 Cal.3d 506.


32 Hawk, supra.


Committee of Seven Thousand (COST) v. Superior Ct. (1988) 45 Cal.3d 491.

See, City of Atascadero v. Daly, (1982) 135 Cal.App.3d 466 (proposed initiative requiring voter approval of any city action to collect revenue invalid).

Newsom v. Bd. of Supervisors (1928) 205 Cal. 262.

See, deBotarri v. Norco City Council (1985) 171 Cal.App.3d 1204 (successful referendum petition would have left zoning inconsistent with adopted general plan).

Elections Code Section 9218.

Elections Code § 9203. See also, Schmitz v. Younger (1979) 21 Cal.3d 90 (duty to prepare title and summary is ministerial; validity of an initiative measure is a matter for a court to decide).

The city attorney’s responsibility to prepare an impartial analysis of the proposed measure, if it qualifies for the ballot, is the subject of a separate paper.

Elections Code §§ 100, et seq., and 9207, et seq. See, Myers v. Patterson (1987) 196 Cal.App.3d 130 (elections official has a ministerial duty to reject an initiative petition that does not include the text of the notice of intent).

Elections Code § 18600.


Elections Code §§ 9208, 9210.

Elections Code § 9602.

Elections Code § 9604.

Elections Code §§ 9114, 9240.

Elections Code § 9215.

Elections Code § 9214.

Elections Code § 9217.

Elections Code § 9221.

Elections Code § 9235.

Signature verification procedures and election requirements that apply to initiative measures also govern the referendum process. Elections Code §§ 9240, 9243.

Elections Code §§ 9235, 9242.

Elections Code § 9237.

Elections Code § 9238.

Id.


Elections Code § 9241.

Id.

Government Code § 54954,

Government Code § 8314.


Id. at 209.

Id. at 217.

Id. at 221.

Id. at 222.


Vargas, supra, at 40.

Stanson, supra.


Government Code § 6253.5.

Id.

Elections Code § 17200.