Cities on the Ballot: What, When & How of Speech

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I. Introduction

Use of public resources to support or oppose local ballot measures negates the spirit of one of this country's most fundamental principles – that electoral decisions are reserved to the people. "One of the principal dangers identified by our nation's founders was that 'the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office."[1] Accordingly, the ability of government to engage in political spending is severely limited at both the state and federal levels.

At the same time, the government possesses a wealth of non-political information that is relevant to matters placed before the voters. To deprive voters of this important information is also a disservice. Court holdings, statutes and regulations, therefore, attempt to strike a balance keeping government from explicitly or implicitly advocating for any particular electoral result but permitting and providing appropriate avenues for government to provide information that is relevant to decisions placed before the voters.

The United States Supreme Court has held that when a government entity uses compelled monetary contributions, such as taxes, to fund support or opposition for a political issue, it violates the First Amendment, as political spending is ultimately an expression of protected speech.[2] The California Supreme Court similarly has stated that the "use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leaves to the 'free election' of the people [presents] a serious threat to the integrity of the electoral process."[3] For these reasons, purely political speech by public entities is proscribed. Within this framework, it is never appropriate for cities to expend moneys or use public resources to express an official endorsement of or opposition to a particular candidate for elective office.

The result is more nuanced, however, when it comes to ballot measures and initiatives, the outcome of which can have powerful impacts on the public agencies which exist to serve the electorate. These agencies possess a wealth of information regarding the impact of legislative changes placed before the voters. To entirely muzzle public agencies from providing even non-political information could deprive the voting public of important information that is relevant to the questions they are asked to vote upon. Moreover, while public agencies cannot spend or use public resources to expressly advocate support or opposition to a particular measure, city councils can take an official position on and submit official ballot arguments for or against a particular measure.

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[1] *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 31 (quoting *Stanson v. Mott* (1976) 17 Cal.3d 206.
[2] *Janus v. American Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448.
[3] *Stanson v. Mott* (1976) 17 Cal.3d 206, 218; *citing* Cal. Const., art. II, §2.

In addition to statutes codified by the legislature, the Fair Political Practices Commission ("FPPC") acts as a watch dog to ensure fair political practices are upheld by both private and public actors in the state. In recent elections, the FPPC has begun to take a closer look at how local public agencies are using public funds in relation to ballot measures – particularly bond measures – resulting in investigations, fines and stipulations against public agencies, and at least one legal challenge arguing that the Commission has overstepped its authority.

With the 2020 election right around the corner and legal challenges unlikely to resolve before the election season gets underway in earnest, cities need to know the rules of the road and best practices to make it safely through the election-season minefield.

II. Limitations on Public Agency Political Spending

A. Government and Elections Codes[4]

The Government Code, at section 54964, expressly prohibits local agency officers, employees and consultants from expending or authorizing expenditure of agency funds "to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate"[5] Ballot measures include initiatives, referendums, and recalls.[6] Public agencies, however, may use public funds to educate the public about effects a ballot measure will have on the local agency's activities if both of the following conditions are met: (1) the informational activities are not prohibited by the Constitution or state law; and (2) the information provided constitutes accurate, fair, and impartial relevant facts to aid the voters.[7] Importantly however, "section 54964 does not prohibit expenditure of local agency funds to propose, draft or sponsor a ballot measure, including expenditures to marshal support for placing the measure on the ballot, or to inform the public of need [for the measure]."[8]

The Elections Code makes several express provisions related to a city's expressive activity and spending related to the electoral process.[9]

First, legislative bodies may spend public funds to create a report on a proposed ballot measure that is being submitted for a public vote.[10] The city's report can include any or all of the following: (1) fiscal impact; (2) effect on internal consistency of the county's general or specific plans; (3) effect on use of lands (i.e. available housing); (4) impact on infrastructure funding; (5) impact on community's attraction and retention of business and employment; (6) impact on uses

[4] All statutory references are to California law unless otherwise stated.
[5] Gov. Code, §54964(a).
[6] Gov. Code, §54964(b)(1).
[7] Gov. Code, §54964(c).
[8] *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Assoc. of Governments* (2008) 167 Cal. App. 4th 1229, 1242.
[9] Elec. Code, §9200 *et. seq*.
[10] Elec. Code, §9212.

of vacant lands; (7) impact on traffic, agricultural lands and developed areas; and (8) other matters the legislative body requests.[11]

The Elections Code also provides for the submission and publication of a local legislative body's (i.e., city council's) written ballot arguments for or against a measure, as follows:

> (a) For measures placed on the ballot by petition, the persons filing an initiative petition pursuant to this article may file a written argument in favor of the ordinance, and the legislative body may submit an argument against the ordinance.
>
> (b) For measures placed on the ballot by the legislative body, the legislative body, or a member or members of the legislative body authorized by that body, or an individual voter who is eligible to vote on the measure, or bona fide association of citizens, or a combination of voters and associations, may file a written argument for or against any city measure.
>
> …
>
> (d) The city elections official shall include the following statement on the front cover, or if none, on the heading of the first page, of the printed arguments:
>
> "Arguments in support or opposition of the proposed laws are the opinions of the authors."
>
> …[12]

Given the prohibition on spending public resources to support or oppose a ballot measure, many municipal attorneys advise that city council members should draft any such ballot arguments themselves and not ask or direct city employees to assist them in that drafting.

B. Political Reform Act & FPPC Regulations[13]

Among other purposes, the Political Reform Act of 1974[14] (the "Act") declared that, in light of increasingly large campaign contributions, existing "laws [governing] disclosure of campaign receipts and expenditures have proved to be inadequate."[15] Among other things, the Act regulates the activities of political *committees*,[16] requiring disclosure of *contributions* to and *expenditures* by committees and regulating the activities of committees.

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[11] *Id.*

[12] Elec. Code, §9282.

[13] The regulations of the Fair Political Practices Commission are contained in Title 2 of the California Code of Regulations, §§18110 through 18977. All regulatory references are to the FPPC Regulations unless otherwise stated.

[14] Gov. Code, §81000 et seq.

[15] Gov. Code, §81001(d).

[16] A committee may be a candidate committee or ballot measure committee, an independent expenditure committee in support of a particular candidate or ballot measure, or may be a general purpose committee. (See generally, Gov. Code, §§ 82013, 82016, 82027.5, 82047.5 82048.7, 84101(c).)

Under the Act, a *committee* is defined to be an individual or collection of individuals that raises or spends funds for political purposes above established thresholds. Committees are required to register and thereafter publicly disclose contributions to the committee and expenditures by the committee, among other duties and obligations imposed on committees under the Act. [17] A public entity is not excluded from the definition of a committee.

The Act authorizes the FPPC to implement regulations consistent with the Act and to interpret and enforce Act violations in order to effectuate the Act's purposes and provisions.[18] FPPC interpretations are entitled to great deference if challenged in court, unless the interpretation was clearly erroneous.[19] However, courts do not defer to the FPPC's decision when deciding whether the regulation the FPPC interpreted lies within the scope of its authority under the Act.[20]

(1) Payments by Public Agencies for Campaign Related Communications

An expenditure of public money for communication that expressly advocates election or defeat of a candidate or the qualification, passage or defeat of a measure, or that "taken as a whole and in context, unambiguously urges a particular result in an election" is either a contribution or an independent expenditure triggering registration and disclosure under the Act.[21] An expenditure "include(s) payments for both the direct and indirect costs of the communication. Indirect costs of a communication are costs reasonably related to designing, producing, printing, or formulating the content of the communication including, but not limited to, payments for polling or research; payments for computer usage, software, or programming; and payments for the salary, expenses, or fees of the agency's employees, agents, vendors, and consultants."[22]

A communication unambiguously urges a particular result in an election when it meets either of the following criteria:

- It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots.
- When, considering the *style, tenor, and timing* of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.[23]

Factors used by the FPPC to determine the *style, tenor, and timing* of a communication include, but are not limited to:

[17] Gov. Code, §§82013(b), 84100 – 84225
[18] Gov. Code, §83100 - 83124
[19] *Citizens to Save California v. California Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 747
[20] *Id.*
[21] Gov. Code, §82013, 82015, 82031; FPPC Regs., §18420.1(a)
[22] FPPC Regs., §18420.1(c)
[23] FPPC Regs., §18420.1(b), emphasis added

- Whether the communication is funded from a special appropriation related to the measure as opposed to a general appropriation.
- Whether the communication is consistent with the normal communication pattern for the agency.
- Whether the communication is consistent with the style of other communications issued by the agency.
- Whether the communication uses inflammatory or argumentative language.[24]

The following activities do not to qualify as a contribution or independent expenditure:

- An agency report providing the agency's internal evaluation of a measure made available to a member of the public upon the individual's request.
- The announcement of an agency's position at a public meeting or within the agenda or hearing minutes prepared for the meeting.
- A written argument filed by the agency for publishing in the voter information pamphlet.
- A departmental view presented by an agency employee upon request by a public or private organization, at a meeting of the organization.
- A communication clearly and unambiguously authorized by law.[25]

(2) Mass Mailings

Public agencies may not send more than 200 substantially similar unsolicited tangible communications that feature an elected officer affiliated with the agency (by including the officer's photo or signature, or singling out the officer by the manner his or her name or office is displayed), or that includes a reference to an elected officer affiliated with the agency and is prepared or sent in cooperation with the elected officer in a calendar month at public expense.[26] During the 60 days preceding an election, this prohibition extends to mass mailings sent by or on behalf of a candidate whose name will appear on the ballot at that election ("mass mailings").[27] Because mass mailings are defined to be "tangible items," the restriction does not apply to emails.

Some have argued that, in this regard, the law has not kept up with the increasing use of technology, including email and social media. As previously mentioned, California law is primarily concerned with expenditures, whether monetary or in-kind, and the improper use of government resources for political purposes. Tangible, mailed items have per-item costs to design, print, and send. For an email or social media post, in contrast, there is no per-item "printing" cost or cost to mail, and value of "in-kind" use of a government computer to send or post the message is likely quite low. As with mailings, however, there is a cost to formulate a message, the design, the graphics, etc. – all of which, as previously mentioned, already come

[24] FPPC Regs., §18420.1(d)
[25] FPPC Regs., §18420.1(e)
[26] Gov. Code, §§82041.5, 89002
[27] Gov. Code, §89003

within the scope of laws prohibiting government expenditures for political purposes and the Act's regulation of political committees.

Mass mailings that either: (1) expressly advocate the election or defeat of a clearly identified candidate or measure; or (2) "unambiguously urge a particular result in an election" (as defined in the preceding section) are prohibited.[28]

Under FPPC Regulations, the following items are not considered to be prohibited mass mailings:

- An agency report providing the agency's internal evaluation of a measure sent to a member of the public upon the individual's request.
- A written argument sent to a voter in the voter information pamphlet.
- A communication clearly and unambiguously authorized by law.[29]

FPPC Regulations also provide - without establishing an express standard of review - that "a mailing sent at public expense that features, or includes the name, office, photograph, or other reference to, an elected officer affiliated with the agency which produces or sends the mailing may also be prohibited."[30]

C. Judicial Holdings

An examination of judicial activity in this arena logically starts with *Stanson v. Mott*, a 1976 case in which the California Supreme Court held that public entities may validly expend public funds in connection with ballot measures to create "informational materials," but not "campaign materials."[31] The Court recognized that not all communication can be clearly categorized and ruled that, in ambiguous circumstances, the analysis should focus on the "*style, tenor, and timing*" of the communication to determine whether it is informational or campaign material.[32] FPPC Regulation 18421.1 replicates the Court's "*style, tenor, and timing*" mandate. The pronouncement in *Stanson* that "use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity" remains an issue of contention, and thus the means of communication available to public entities continues to be the subject of litigation to this day.[33]

In 1993, California's Second Appellate District concluded in *Choice-in-Education League v. Los Angeles Unified School Dist.*, that television ***can*** be a permissible way for public agencies to communicate information as long as the intention was to inform and educate viewers.[34] This

[28] FPPC Regs. §18901.1(a)(2)
[29] Gov. Code, §89002(b)
[30] FPPC Regs. §18901.1(f).
[31] *Stanson v. Mott* (1976) 17 Cal.3d 206, 218.
[32] *Id.* at p. 233.
[33] *Id.* at p. 221; see generally *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415; *California State Association of Counties et al v. Fair Political Practices Commission*, Los Angeles Superior Court Case No. BS174653 (filed August 3, 2018).
[34] *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 430

suggests that *Stanson* should not be read to mean that television or radio are categorically impermissible means of communication and may be used so long as the other factors are met.

A 2008 decision, *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments,* addresses the timing of communications as a factor in determining whether it constitute campaign activity. In *Santa Barbara*, the Second District Court of Appeal held that a local transportation authority did not violate Government Code Section 54964 when, prior to placing a tax measure on the ballot, the agency retained a private consultant to help survey voter support for an extension of a sales tax, craft favorable ballot measure language, and determine the best strategy to maximize voter support.[35] The transportation authority's actions did not violate the prohibition against public spending to support or reject a ballot measure because the action did not constitute communications about a "'clearly identified ballot measure' that [had] been 'certified' to appear on an election ballot" and because measure drafting and sponsorship was not "partisan campaigning."[36]

In 2009 the California Supreme Court again addressed public agency communication in relation to the electoral process in *Vargas v. City of Salinas.*[37] *Vargas* involved a voter-sponsored initiative to repeal a utility user tax. As permitted under Elections Code section 9212 for voter-sponsored measures, the City prepared a report that informed its decision not to adopt the initiative ordinance but instead to place it before the voters. Thereafter, the City continued to study the effects of the proposed initiative and city departments prepared analyses discussing the reduction or elimination of specific services or programs in the event of the measure's passage. In the course of its normal budgeting process, the City Manager made specific budget cut recommendations to the City Council. Upon adoption of target cuts by the City Council, documents were prepared in English and Spanish and made available to the public at City locations and disseminated via a regularly published city newsletter in advance of the election. Petitioners argued that the City's speech beyond that described in section 9212 constituted an improper use of City resources for a political purpose. The Court disagreed and upheld the City's activities.

In upholding the City's activities, the *Vargas* Court reaffirmed that "the campaign activity/informational material dichotomy set forth in *Stanson*… remains the appropriate standard for distinguishing the type of activities that presumptively may not be paid for by public funds, from those activities that presumptively may be financed from public funds.[38]

Vargas held that a public agency may:

- Communicate its viewpoint on a ballot measure within the educational/informational materials without providing information about opposing views.

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[35] *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal. App.4th 1229, 1242; see also Op.Atty.Gen. 04-211 (April 7, 2005).
[36] *Id.*, at p. 1242
[37] *Vargas v. City of Salinas* (2009) 46 Cal.4th 1
[38] *Id.* at p. 34.

- Analytically evaluate and express its opinion regarding the ballot measure's merits.
- Form an opinion and express that opinion in a balanced, non-inflammatory way to citizens who inquire.
- Create documents reflecting its opinion available to those who seek out the documents.

Under *Vargas*, whether a public agency's communication on matters presented to the electorate are informational are to be analyzed under the following factors:

- Whether the communication conveys past and present facts.
- Whether the communication is argumentative, includes "inflammatory rhetoric," or urges voters to take particular actions.
- Whether the communication is consistent with the agency's normal communicative practices.[39]

III. Enforcement and Recent Litigation

Since approximately 2016, the FPPC's interest in public agency spending related to campaigns appears to be on the increase. This increased scrutiny has drawn at least one legal challenge[40] and resulted in a failed attempt to expand the FPPC's jurisdiction[41] to include enforcement authority over the improper use of public funds for campaign purposes. Even without this expansion, the FPPC retains enforcement authority over the failure of a public entity to register and file disclosures if its activities qualify it as a committee under the Act.

A. *In the Matter of San Francisco Bay Area Rapid Transit District ("BART")*; FPPC Case No. 16/19959

In June 2016, the Bay Area Rapid Transit District ("BART") Board of Directors placed Measure RR, authorizing issuance of $3.6 billion in general obligation bonds, on the November 2016 ballot. The measure emanated from the "Better BART Initiative" ("Initiative") supported by the agency since at least 2014. During the time between placement on the ballot and the election, BART funded creation and distribution of campaign related communications including YouTube Videos and text messages, that:

- used the Initiative's longstanding tagline, "it's time to rebuild".
- featured riders complaining that BART had "gotten worse," that "safety has diminished," and was "obviously showing its age;" describing their need for and reliance on BART; and calling on the agency to "spend more dollars to get [BART] into a more modern condition" among other comments.

[39] *Id.* at p. 40.

[40] *California State Association of Counties ("CSAC") et al v. Fair Political Practices Commission*, Los Angeles Superior Court, Case No. BS174653.

[41] Assembly Bill 1306, introduced during the 2019/20 legislative session but suspended in April 2019, would have amended the Political Reform Act to authorize the Commission to bring administrative and civil actions against public agencies and public officials for spending public resources on campaigns.

The FPPC concluded that the communications were *inflammatory and argumentative* and that by borrowing the voices and the sympathy of its customers, BART *campaigned* for Measure RR."

Although BART had a social media presence prior to placement of Measure RR on the ballot, the FPPC concluded that it ramped up that presence with new features and programs including uploading the videos it paid to produce. In so doing, the FPPC concluded that BART's social media activities in this regard were in *furtherance of its campaign to support* Measure RR.

Relying on FPPC Regulations and the holding in *Stanson* and *Vargas*, the FPPC concluded that BART had not file required expenditure disclosures and failed to include paid-for-by statements on its electronic media advertisements. Potentially subject to a fine of $33,374.98, BART paid a fine of $7,500 pursuant to a stipulation.

It appears that this is the only matter to come to a decision to date under these FPPC Regulations.

B. *California State Association of Counties ("CSAC") and California School Boards Association ("CSBA") v. Fair Political Practices Commission*, Los Angeles Superior Court, Case No. BS174653.

On August 3, 2018, CSAC and the CSBA ("Plaintiffs") filed a writ alleging that Regulations 18420.1 and 18901.1 are invalid as a matter of law, that the Commission has exceeded its jurisdiction in adopting these regulations, and that the regulations are unenforceable. In particular, Plaintiffs assert that:

- Regulation 18901.1 broadly prohibits local government's use of electronic media (television and radio) and is therefore an invalid expansion of the holdings in *Stanson* and *Vargas*;
- The FPPC exceeded its authority in enacting Regulations 18420.1 and 18901.1 because they are drawn not from the Act but from the California Supreme Court's decision in *Vargas*;
- Any per se prohibition of televisions, radio and electronic advertising is invalid and unconstitutional because it creates a vague standard regarding the content of government speech and infringes on public entities' protected speech rights;
- FPPC Officers and employees who enforce these Regulations are acting contrary to the authority provided by the Act.

Plaintiffs seek: invalidation of Regulations 18420.1 and 18901.1; a declaration that any blanket prohibition on public agencies' use of televisions, radio and electronic media is invalid and unconstitutional; and that FPPC Regulations may not be implemented to impose such a blanket prohibition.

In March 2019, the trial court granted, with leave to amend, FPPC's motion for judgment on the pleadings as to Regulation 18901.1 on standing and ripeness grounds. In late June, 2019, petitioners filed their second amended complaint. At present no hearing date is scheduled. This

case is unlikely to be resolved on the merits before the October 2019 League of California Cities Annual Conference when this paper is to be presented.

IV. Best Practices

Although the FPPC's specific enforcement authority under Regulations 18901.1 and 18420.1 has been challenged, the underlying judicial holdings remain valid. It is well settled that public agencies are limited in the tone, tenor, and timing of communications supported by public funding as it related to campaign matters. The only question as a result of litigation against the FPPC is which state level public agency will come after a city when it crosses the line.

The following best practices are designed to assist cities in avoiding scrutiny by the FPPC and to first avoid and then withstand legal action by opponents of the city's perceived position alleging the city acted improperly in making expenditures and communicating regarding campaign matters.

A. Acceptable City Actions

- Establish robust communication methods in non-election years. Public agencies should only disseminate information to constituents during elections through already established means of communication. Establishing wider communication methods in anticipation of use for election communications will help the agencies be proactive and reach a broader audience.

- Use public resources to evaluate and provide *informational materials* regarding a ballot measure, but do not engage in *advocacy*. Purely informational materials present a fair and balanced presentation of relevant facts.

- Evaluate and publicly express the City's position as to the merits of a proposed ballot measure, including providing information at the meetings of public or private organizations inquiring about a measure, provided they are not *mounting a campaign* for or against the measure.

- Take formal action to authorize some or all of the city council to prepare and submit official ballot arguments for or against a ballot measure, such as an initiative, pursuant to the procedures established by the Elections Code.[42]

- Prepare *objective, fact-based reports* on the effects of a ballot measure.

- Distribute informational materials through communication channels *regularly used for city communications*, such as the City's website, regularly scheduled newsletters, etc., including such processes as: a City's regular budget or planning process.

[42] Election Code, §9282. As noted above, the cautious approach is to advise that city council members should draft any such ballot arguments themselves and not ask or direct city employees to assist them in that drafting.

- Respond to inquiries, provided the response is limited to (1) indicating that the City has either endorsed or opposed the measure; and (2) providing fair and impartial information regarding the measure.

B. Acceptable Activities by Officials

- On their own personal time and using their own personal resources, advocate in favor of or in opposition to a particular ballot measure.

C. Prohibited City Activities

- Use public funds or resources to campaign for or against a measure.[43]

- Expressly advocate for or against a ballot measure, i.e., urging voters to "vote against" or "defeat" or "reject" a measure.

- Use inflammatory or argumentative language or rhetoric in city communications, including language that unambiguously conveys support (or opposition), for example: testimonials and tag lines that extoll the benefits and virtues that will occur if a measure is passed/tragedies that will befall a community if a measure fails[44].

- Use mediums of communication they do not use for regular agency communications, i.e., bumper stickers, posters, advertising, floats, billboards and television or radio ads.

- Other than at a duly noticed public meeting, a quorum or more of members of the City Council may not meet to discuss or otherwise congregate to discuss ballot measures that are within the subject matter jurisdiction of the City Council.[45]

- Hire consultants to develop a strategy for building support for a measure or engage in activities that form the basis for a campaign to obtain approval of a measure before anything is placed on the ballot.[46]

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[43] Public resources are property owned by the public agency including buildings, facilities, funds, telephone, supplies, computers, vehicles, email and social media accounts, etc. For example, a public agency with a social media presence may have garnered a large number of "followers" or may have developed email distribution lists comprised of people who signed up in order to receive official public information. These types of resources should not be shared by the public agency with a committee that is advocating the favored position of the agency. Whether these lists are public records and thus open to anyone on the basis of a Public Records Act request, is beyond the scope of this paper.

[44] See FPPC Stipulation in Case No.: 16/19959 (examples include: "Rebuild BART," "parts of BART continue to deteriorate," "we need to spend more dollars to get [BART] into a more modern condition," and "if there is no BART, can you imagine how many people aren't going to get to work?"

[45] See generally the Ralph M. Brown Act (Gov. Code §54950 et. seq.).

[46] *See, e.g.*, Opinion No. 13-304, 99 Ops.Cal.Atty.Gen. 18, (2016) (citing Opinion No. 04-11, 88 Ops.Cal.Atty.Gen. 46, (2005)): "However, we also concluded that a district may not use public funds to hire a consultant to develop a strategy for building support for the measure. Impermissible activities could include, for example, assisting…in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure, if the purpose or effect of such actions were to develop a campaign to promote the bond measure.

- Use of public resources for advocacy can be subject to criminal and/or civil penalties for individuals involved. Incidental and minimal use of public resources may not be subject to penalties.[47]

D. Gray Areas

Though the above permissible and impermissible actions are fairly clear based on relevant case law and statutory authority, other communications by cities or city officials may or may not be appropriate depending on the *style, tenor and timing* of the publication or communication.

For example, if a city council member on his or her own (not in response to a question or comment by the public or to a presentation or report on the merits of the ballot measure) makes a comment from the dais regarding the merits of a ballot measure, the style, tenor and timing of that comment would need to be evaluated to determine if the communication was a proper informational activity or a prohibited campaign activity. *If, for example, the style, tenor, and timing of a communication demonstrates that the primary purpose of the communication is to assist in the campaign for or against an issue, it could be considered a form of prohibited campaigning.*[48] To avoid such a result, it is advisable to limit communications, such as statements by council members, to responses to comments or questions by the public and to discussions relating to reports or evaluations regarding the merits of ballot measures.

Another possible gray area is the *de minimis* use of public resources like computers, phones, time, and social media presence. As described above, the analysis is very fact specific. It potentially involves the user of public resources' intent, the instigator of the communication, and the ability to put a value on the incidental use of the agency's resources among other considerations. It is, for example, commonplace for public employees to direct inquiring members of the public to the proponents and opponents of measures. The rationale here is usually to enable members of the public to do their own research and it is generally accepted that any incidental use of public equipment is *de minimis*. Consider instead a public agency that only directs callers to the campaign in favor of a measure it likes or to the campaign opposed to a measure it does not like. In that case, it is easy to see that the analysis might not be the same.

Surveying the relevant judicial decisions, we reasoned that 'a community college district board may not spend district funds on activities that form the basis for an eventual campaign to obtain approval of a bond measure.'"

[47] Under Gov. 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." This determination is highly fact specific. For example, in *DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, a county supervisor's act of directing her chief of staff to e-mail a newspaper editorial advocating defeat of an initiative measure to a list of 1,500 people was an "incidental and minimal" use of public resources, where chief of staff created the text of the e-mail in about 10 minutes during her lunch period and distributed the e-mail once, with the push of a button and because there was neither a gain to supervisor nor a loss to the county for which a monetary value may be estimated, where the expenditure was minimal..

[48] See *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 26-27 (discussing *Keller v. State Bar* (1989) 47 Cal.3d 1152).

V. Conclusion

Cities have an important and proper role in the electoral process. They are the conduit by which measures and initiatives are places on the ballot. Cities are also repositories of important information that is relevant to a great many matters that the public will vote on. To deprive the public of that information would be a disservice. At the same time, as far back as the founding fathers, it was recognized that government should not use public funds to support or oppose measures or candidates. That conversation is reserved to the voters. Accordingly, cities must use great care to ensure that election-related expenditures and communications impartial information that, when taken as a whole, neither explicitly nor impliedly suggests a particular result. Cities should also use the same communication vehicles for election-related communications that it ordinarily uses to communicate civic information to the public.