



355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101
Telephone 213.626.8484 Facsimile 213.626.0078

**Influencing the Political Process:
Legal Issues Associated with Advocacy
by Government Officials**

**by
Craig Steele
City Attorney
Agoura Hills, Highland and Monrovia**

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Influencing the Political Process: Legal Issues Associated with Advocacy by Local Government Officials

Craig Steele

*Richards, Watson & Gershon**

City Attorney, Agoura Hills, Highland and Monrovia

I. Introduction: Advocacy by Local Government

Local government agencies and officials are often keenly interested in the legislative and administrative actions of other governmental entities as well as the voters. Whether supporting or opposing legislation or trying to influence administrative action, local government advocates can find themselves competing with a myriad of interest groups for the attention of legislators and other decision-makers. California cities and other local agencies have the right and the statutory authority to lobby the State Legislature and Congress, as well as State, federal and local executive and administrative agencies. Because the laws that regulate lobbying by local government agencies are more restrictive than the laws that govern private lobbyists, however, non-governmental lobbyists can avail themselves of more tactics to communicate their messages than can local government advocates.

The intent of this paper is to provide an overview of the basic legal issues associated with legislative and administrative advocacy by local government agencies, their officials and representatives. This paper provides some basic guidance to local officials regarding the limits the law places on those activities. Local government officials who are involved with lobbying Congress or other federal agencies should be aware that different definitions, reporting requirements and restrictions apply, and that federal lobbying rules can vary based on the official or agency being lobbied.

II. The California Law of Legislative and Administrative Advocacy

Local government agencies have specific statutory authority to make their positions on legislative and administrative matters known to legislative and administrative decision-makers. Government Code Section 50023 provides:

“The legislative body of a local agency, directly, or through a representative, may attend the Legislature and Congress, and any committee thereof, and present information to aid the passage of legislation which the legislative body deems beneficial to the local agency or to prevent the passage of legislation which the legislative body deems detrimental to the local agency. The legislative body of a local agency, directly or through a representative, may meet with representatives of executive or administrative agencies of state, federal, or local government to present information requesting action which the legislative body deems beneficial to, or opposing action deemed detrimental to, such

local agency. The cost and expense incident thereto are proper charges against the local agency.”

In addition to lobbying on their own, local government agencies are permitted to enter into associations with other parties to lobby in favor of or against matters of interest to the members of the association.¹ Again, the costs of participating in such associations are permissible local government expenditures as long as the legislative and administrative aims of the association involve items that will directly affect the local government agency, either beneficially or detrimentally.² By resolution, a local agency may withdraw from membership in this type of association at any time.³ Local agencies can contribute to this type of association even if some of the association’s funds may be used for more broad public outreach and marketing purposes.⁴ When ten or more entities pool their funds to hire a lobbyist or undertake lobbying activities, the Political Reform Act (“PRA”) classifies that group as a “lobbying coalition.”⁵ The League of California Cities is a prime example of a “lobbying coalition” and a city’s expenditure for the costs of membership in the League is a proper exercise of the power to associate for lobbying purposes under Government Code Section 50024.⁶

The basic authority granted by the State Legislature to local government to participate in legislative and administrative decision-making is fairly straightforward. Local government officials may contact the State Legislature, Congress, committees and individual legislators to make the case for or against legislation that the legislative body deems to be either beneficial or detrimental to the local agency. Local officials also may ask legislators to take some action that will be beneficial to the local agency. Local officials are permitted to lobby personally, through representatives or as part of an association. The same is true with regard to lobbying administrative and executive decision-makers at the local, state and federal levels. Over the years, however, this fairly broad legislative grant of authority to local government has been narrowed and restricted by the courts, some fairly conservative opinions of the Attorney General, and the PRA’s regulations regarding lobbying.

A. The Political Reform Act

The PRA⁷ is a logical place to start in defining the rules that govern what local officials can and cannot do as they advocate on behalf of their agencies at the State government level. The PRA provides a set of defined terms that are useful in discussing lobbying issues, and establishes the basic system that requires registration and reporting by individuals and entities that make or receive payments for the purpose of influencing decisions of the State Legislature and administrative agencies. Note however, that the PRA **does not regulate** individuals or entities that lobby the federal government, local and regional agencies.⁸

The basic policy of the PRA in regulating the activities of those who lobby any element of state government is set forth in Government Code Section 81002(b):

“The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.”

Under the PRA, “lobbying” that is subject to registration and reporting consists of four basic elements:

- 1) Direct communication, other than administrative testimony, with legislative or state agency officials;
- 2) By an individual who is compensated for that communication;
- 3) For the purpose of influencing legislative or administrative action;
- 4) On behalf of the person or entity that compensates the lobbyist.

The keys to determining whether our clients’ contacts with state officials constitute “lobbying” lie in the definitions of “direct communication” and “influencing legislative or administrative action.” The extensive definition of “direct communication” is set out in Title 2 of the California Code of Regulations, Section 18239(d)(3). Briefly summarized, a person can engage in “direct communication” by appearing as a witness before, talking by phone or in person to, corresponding with, or answering questions and inquiries from any state official covered by the PRA. Those state officials include elected officials, legislative officials, appointed and elected members of state agencies, and staff members with key advisory or decision-making authority. The term “direct communication” does not include “administrative testimony,” which becomes part of the record of a public hearing before a regulatory or administrative agency. “Direct communication” also does not include the provision of purely technical data or analysis to a state agency **at the agency’s request** when the person providing the data is not otherwise lobbying that agency. Additionally and perhaps most important in this context, a person who meets with a covered state official **in the company of his or her registered lobbyist** is not engaged in “direct communication” and is not considered to be lobbying.

The terms “legislative action” and “administrative action” under the PRA are fairly self-explanatory. The former includes all of the various procedural steps carried out in the legislative process in drafting, considering and deciding on statutes, bills, resolutions and nominations, including the Governor’s decision whether to sign a legislative enactment.⁹ The latter includes rule making, rate setting and various quasi-legislative proceedings carried-out by administrative agencies.¹⁰ The California Fair Political Practices Commission (“FPPC”) defines “influencing legislative or administrative action” as “promoting, supporting, influencing, modifying, opposing or delaying” either type of action by any means.¹¹

When an individual provides the four elements of lobbying services set forth above **and** receives \$2,000 or more in economic consideration in a calendar month for such services, other than reimbursement for reasonable travel expenses, that individual is a “lobbyist” under the PRA.¹² That individual is generally referred to as a “contract lobbyist.” On the other hand, a local government employee whose principal duties are to communicate directly or through agents with legislative or agency officials for the purpose of influencing legislative or administrative action also is a “lobbyist.”¹³ That employee must spend one-third or more of his or her compensated time in direct communication to be considered a “lobbyist” under the PRA. Such an employee is generally referred to as an “in-house lobbyist.”¹⁴ Elected public officials acting in their official

capacities are not “lobbyists” and are not subject to the PRA’s registration and reporting requirements.¹⁵ With a few other exceptions not relevant to this topic, “lobbyists” must register with the Secretary of State and file quarterly reports on their lobbying activities.

Under the PRA, local public agencies can incur registration and reporting requirements as either a “lobbyist employer” or as a member of a “lobbying coalition” or both. In this context, a local public agency that employs and compensates one or more lobbyists, or contracts with a lobbying firm, for the purpose of influencing legislative or administrative action, is a “lobbyist employer.”¹⁶ As stated above, the League of California Cities is a “lobbying coalition,” and payments of dues to the League that are used to employ lobbyists are reportable under the PRA. Other similar associations may be “lobbying coalitions” as well. A public agency can be both a “lobbyist employer” and a member of a “lobbying coalition” under the PRA’s definitions.

“Lobbyist employers” must register and report their expenditures for lobbying activities quarterly.¹⁷ Members of “lobbying coalitions” that do not otherwise employ or contract with lobbyists are required to report payments to the coalition for lobbying services **only** when they have spent \$5,000 or more cumulatively in a calendar quarter for the purpose of influencing legislative or administrative action.¹⁸ “Lobbying coalitions” are required to file the same reports as “lobbyist employers” with additional information regarding the identity and contributions of their members.¹⁹

The information the FPPC requires to be maintained and reported could be the subject of an entire paper and session at this conference. Generally, lobbyists, lobbying firms and lobbying coalitions assist their clients with reporting obligations, and the FPPC conducts numerous seminars on lobbying reporting requirements. Any agreement between a local public agency and a lobbyist or lobbying firm should include a specific requirement that, at a minimum, the lobbyist will assist the client with registration and reporting requirements and record keeping. Generally summarized, state and local government agencies that are required to file reports as “lobbyist employers” or members of “lobbying coalitions” must report:

- 1) The name, business address and telephone number of the filer;
- 2) The total amount of payments to each lobbyist and lobbying firm;
- 3) A description of the specific lobbying interests of the filer;
- 4) Each “activity expense” paid by the filer, which are payments that benefit any state official or a member of his or her immediate family, such as gifts, salary, honoraria, consulting fees, etc.;
- 5) Political contributions made to an elected state officer or candidate (of course, public agencies cannot make political contributions to officers or candidates);
- 6) All payments of \$250 or more in the reporting period for lobbying expenses, and goods and services used by a lobbyist in connection with the lobbying activities; and

- 7) Dues or similar payments made to any organization (such as the League) that makes expenditures equal to 10% of its total budget, or \$15,000 or more during any calendar quarter, to influence legislative or administrative action (which the League reports it does).²⁰

B. Regulation of Lobbying Tactics

In addition to defining what lobbying is and which lobbying activities must be reported, the PRA and other statutes establish limits on the tactics persons may and may not employ to influence legislative or administrative action. While not an exhaustive list, several items are of particular interest to advocates on behalf of public agencies.

Public agency advocates may not:

- 1) Contribute to or raise public funds for any candidate for elective office. Candidates also are prohibited from accepting such funds;²¹
- 2) Make gifts to any one state official aggregating more than \$10 in any calendar month;²²
- 3) Do anything for the purpose of placing a State official under personal obligation to the lobbyist or the lobbyist's employer;
- 4) Deceive or attempt to deceive a State official with regard to any material fact pertinent to legislative or administrative action or create any fictitious appearance of public favor or disfavor of any proposed legislative or administrative action;
- 5) Represent falsely, either directly or indirectly, that the lobbyist can control the official action of any State officer; or
- 6) Enter into any agreement to compensate a lobbyist that makes payment to the lobbyist contingent upon the defeat, enactment or outcome of any proposed legislative or administrative action.²³
- 7) Spend public funds in support of or opposition to ballot measure campaigns.²⁴

C. Limits on Influencing “Direct Democracy” and “Grass Roots” Lobbying

While the PRA and other laws provide a generally applicable statutory framework for legislative and administrative advocacy, the courts and the Attorney General's office have looked more specifically at the role of public agencies in the process of shaping and making law through the initiative and referendum process and at the “grass roots” level.

1. Background: Early Case Law and Attorney General Opinions

In the limited number of cases on the issue, the courts have very strictly limited the ability of public agencies to communicate directly with **the voters** for the purpose of influencing legislative action at the ballot box or “direct democracy.” These limits have been applied both to efforts by public agencies to convince voters to support or oppose ballot measures as well as the more traditional idea of “grass roots lobbying.” This current restrictive view of public agencies’ authority to approach the public directly in either context arises out of the California Supreme Court’s decision in *Stanson v. Mott*.²⁵ In that case, the court was presented with the question whether the California Director of Beaches and Parks was authorized to spend public funds to urge the voters to support bond measures that would have enhanced state and local recreational facilities. The court found that such expenditures were not authorized by statute, and that public expenditures on one side or another of a partisan political campaign were improper.

In that regard, the court held:

“Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. 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. A principal danger feared by our country’s founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office. . . [citations omitted] . . . the selective use of public funds in election campaigns raises the specter of just such an improper distortion of the democratic electoral process.”²⁶

The *Stanson* court further held that there is no distinction to be drawn between candidate elections and ballot measure elections in this respect. On a more relevant note for this topic, the court specifically recognized important distinctions between permitted legislative lobbying and impermissible election campaigning. The court held that public agency lobbying, within the limits authorized by statute, in no way undermines or distorts the legislative process. On the other hand, the court held, the use of public funds to influence an election campaign does present a “serious threat to the integrity of the electoral process.”²⁷ The court relied heavily on its earlier decision in *Mines v. Del Valle*,²⁸ in which the court held that public expenditures on one side of a ballot measure campaign were “manifestly unjust and unfair.” Significantly, however, the court noted that public agencies have the authority and the obligation to present objective, non-partisan information to the voters – “a fair presentation of the facts” – about prospective ballot measures.²⁹

Stanson reaffirmed the authority of government agencies to advocate their legislative positions through direct communication with individual government officials. The court also held that public funds may not be spent to convince the voters to vote for or against particular ballot measures.

While it is difficult to argue with the California Supreme Court's opinion that public funds cannot be spent to influence the results of elections, an appellate court and the Attorney General's office have taken a more extended view of *Stanson* to hold that government agencies may not engage in "grass roots" lobbying. In a "grass roots" lobbying effort, the lobbying party communicates with members of the public through various means and urges them to contact legislators with messages for or against specific legislative proposals. In *Miller v. Miller*,³⁰ the court disapproved of "grass roots" efforts by the California Commission on the Status of Women using public funds to promote the ratification of the Equal Rights Amendment in other states. The court found that the Commission's public information campaign, rallies, and other activities in support of proposed legislative actions was more analogous to election campaigning than legislative lobbying, because the Commission's efforts were focused on communicating with the voters rather than the legislatures directly.

The *Miller* court concluded that the "real issue" to be determined under *Stanson* was not the objective of the informational activity, but the audience to which the communication was directed. In invalidating the Commission's expenditures, the court held:

"It is one thing for a public agency to present its point of view to the Legislature. It is quite another for it to use the public treasury to finance an appeal to the voters to lobby their Legislature in support of the agency's point of view. The latter undermines or distorts the legislative process just as clearly as the use of the public treasury to mount an election campaign distorts the integrity of the electoral process."³¹

The *Miller* court's decision regarding grass roots lobbying has not been subsequently challenged, leaving no opportunity to question the logic of the "audience vs. objective" theory the court advanced. The Attorney General's office has relied heavily on *Miller* to reaffirm its opinion that public funds may not be spent on "grass roots" lobbying efforts unless specifically authorized by statute.³² In addition, *Miller* left some important questions unanswered. For example, Government Code Section 50023 permits local government agencies to lobby directly or through "representatives." Although many people assume the term "representative" refers only to "lobbyist," there appears to be no authority for such a limitation. If a local government decides it wants to be "represented" before the State Legislature by the volunteer presidents of local homeowners associations or business people, for example, the law does not appear to prevent that representation. But local government officials would have to undertake some effort to recruit those representatives, and it is unclear whether that recruitment would constitute "grass roots" lobbying under *Miller*.

Since *Stanson and Miller*, it has been accepted that while local governments can lobby the State Legislature, communications directed to the voters regarding legislative issues must be limited to impartial information. In later cases, the *Stanson* court's opinion regarding the ability of public agencies to provide impartial information on legislative issues at public expense has been examined in somewhat greater detail. In *League of Women Voters v. Countywide Criminal Justice Coordination Committee*,³³ the court held that while the government has legitimate rights in informing, educating and persuading the public, it simply may not use public funds as an advantage over the free speech rights of the public.³⁴ The case also stands for the proposition that a government agency may spend public funds to draft and find a sponsor for an initiative

measure that furthers the interests of that agency. The court found that drafting a measure is more akin to lobbying than partisan campaign activity. In *California Common Cause v. Duffy*,³⁵ the court held that a local sheriff's use of public facilities and personnel to distribute postcards critical of then-Chief Justice Rose Bird was "political" and not "informational" as permitted by *Stanson* because the cards presented only one side of Justice Bird's fitness to be retained in office. For some time, and based on these cases, local government officials have struggled to determine whether communication materials distributed to the public were "impartial enough" to pass muster under *Stanson*.

2. Evolved Standard: From "Express Advocacy" to "Informational versus Campaign Activity"

In *Schroeder v. City Council of Irvine*, a taxpayer challenged the Irvine City Council's authorization of expenditures of public funds to register voters in the city and inform them of the importance of a countywide ballot measure.³⁶ Although the City 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*. The court held that the City's expenditures would have been unlawful under *Stanson* only if the communications **expressly advocated, or taken as a whole unambiguously urged**, the passage or defeat of the measure. The court also upheld the City's expenditures on non-partisan voter registration to determine the validity of governmental communications related to ballot measures.

However, the California Supreme Court recently decided that "express advocacy" is an insufficient standard. In *Vargas v. City of Salinas*,³⁷ proponents of a local ballot initiative to repeal the City's utility user's tax ("Measure O") sued the City alleging improper government expenditures in opposition to the measure. The court held that even if a communication does not expressly advocate for either side of an issue, a *Stanson* analysis must nonetheless be conducted to determine whether the activity was for informational or campaigning purposes based on its style, tenor, and timing.³⁸ Although the court did not specifically refer to the *Schroeder* analysis in its opinion, and did not overrule *Schroeder* the court clearly stated that the "express advocacy" standard does not meaningfully address potential constitutional problems arising from the use of public funds for campaign activities that were identified in *Stanson*. Thus, local governments must look to *Vargas* for the proper standard to evaluate whether an expenditure is permissible and disregard the less detailed standard of *Schroeder*. The legal standard for permissible government expenditures is no more nuanced and detailed than the "express advocacy" standard followed by the *Schroeder* court.

A variety of factors led to the *Vargas* court's ultimate conclusion that the City's communications were informational, including the fact that the publications avoided argumentative or inflammatory rhetoric and did not urge citizens to vote in a particular manner. The expenditures in question were made pursuant to general appropriations in *Salinas*' regular annual budget pertaining to the maintenance of the City's website, the publication of the City's regular quarterly newsletter, and the ordinary provision of information to the public regarding the City's operations. The court found that in posting on the City's website the minutes of City Council meetings relating to the council's action along with reports prepared by various municipal

departments and presented by officials at City Council meetings, the City engaged in informational rather than campaign activity.³⁹ Similarly, the court found the City did not engage in campaign activity in producing a one-page document listing the program reductions that the City Council voted to implement should Measure O be approved, or in making copies of the document available to the public at the city clerk's office and public libraries.⁴⁰ The court reasoned that, viewed from the perspective of an objective observer, the document constituted an informational statement that merely advised the public of specific plans that the City Council voted to implement should Measure O be approved.

Finally, the court found that the city engaged in permissible informational activity by mailing to City residents the fall 2002 "City Round-Up" newsletter containing articles describing proposed reductions in city services. Although under some circumstances the mailing of material relating to a ballot measure to a large number of voters shortly before an upcoming election would constitute campaign activity, a number of factors led to the court's conclusion that the mailing of the newsletter constituted informational rather than campaign activity: it was a regular edition of the newsletter that was mailed to all City residents as a general practice, the style and tenor of the publication was entirely consistent with an ordinary municipal newsletter and readily distinguishable from traditional campaign material, and the article provided residents with important information about the tax in an objective and nonpartisan manner.⁴¹

The Supreme Court's opinion illustrates the insufficiency of the "express advocacy" standard by suggesting that if the City of Salinas had posted billboards throughout the City prior to the election stating, "IF MEASURE O IS APPROVED, SIX RECREATION CENTERS, THE MUNICIPAL POOL, AND TWO LIBRARIES WILL CLOSE," it would defy common sense to suggest that the City had not engaged in campaign activity in that example, even though such advertisements would not have violated the less restrictive "express advocacy standard."⁴²

Stanson and *Vargas* show that local agencies must exercise significant restraint when communicating to voters about local measures. A new FPPC Regulation provides a list of safe harbors for communications that a local agency is permitted to make.⁴³ These communications include: an agency report providing the agency's internal evaluations 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; and a communication required by law.

D. Administrative Agency Rules and Regulations

Local and regional agencies in California have adopted various agency-specific lobbying laws of which advocates should be aware. Hundreds of administrative agencies operate in California, and an explanation of each of their individual rules is beyond the scope of this paper. It is thus important that advocates inform themselves of any "local rules" on lobbying **before** engaging in a lobbying effort. For illustrative purposes, this paper provides examples of rules in place at the California Coastal Commission.

One example of an agency-specific lobbying rule at the California Coastal Commission is the special rule on *ex parte* communications. The California Administrative Procedure Act broadly prohibits *ex parte* contacts between parties and decision-makers during administrative adjudication proceedings.⁴⁴ The California Coastal Commission, which plans and regulates land and water use in the coastal zone in partnership with coastal cities and counties, provides its own unique guidelines that ban *ex parte* communications between interested persons and Commissioners. The California Coastal Act (“Coastal Act”) defines *ex parte* communications as any oral or written communication between a member of the Commission and an interested person about a matter within the Commission’s jurisdiction which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.⁴⁵ Interested persons include applicants, other participants in the proceeding, any person with a financial interest in the matter, any agent or employee of any of the above, or anyone else receiving consideration for representing them, and representatives acting on behalf of a civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision.⁴⁶

The Coastal Act provides a list of communications **excluded** from the definition of *ex parte* communications:

- 1) A person’s communications with his or her own staff or attorney;
- 2) Discussions about procedural issues;
- 3) Communications about matters before another state or local agency on which a Coastal Commissioner also serves, whether on the record during an official proceeding of such agencies or between the Coastal Commissioner who serves on the other agency and other agency officials or employees of that agency; and
- 4) Nonvoting Commissioners’ discussions with a staff member of any state agency, where both are acting in their official capacities; or regarding a matter pending before the Commission where the nonvoting Commissioner does not communicate with any other Commissioner about the matter in any way, on or off the record.⁴⁷

Thus, the Coastal Act does not prohibit all communications between local governments and Commissioners. If a Commissioner also serves on another agency board that is hearing a matter concerning the City, city representatives could freely discuss that non-Coastal matter with the Commissioner under certain circumstances. A city would not have to report communications with its own attorneys, or contact with Commissioners regarding procedural issues. In this regard, city officials have certain rights to communicate over private parties.

The Coastal Commission’s rules regarding *ex parte* communications are examples of one agency’s unique lobbying rules. Many counties, regional agencies and other levels of government have their own unique rules with which advocates should familiarize themselves.

E. Federal Legislative and Administrative Advocacy

1. The Lobbying Disclosure Act

Local government entities frequently advocate their interests to the federal government.⁴⁸ Similar to the PRA, the Lobbying Disclosure Act (“LDA”) provides rules that govern what advocates can do when they advocate to the federal government. Significantly, communications made by a public official acting in his or her official capacity are not considered lobbying contacts within the LDA.⁴⁹ The LDA defines “public official” as any elected official, appointed official, or employee of a federal, state, or local unit of government.⁵⁰ This definition also includes elected and appointed officials and employees of an organization of State or local elected or appointed officials other than officials on an entity described above, or a national or state political party or organizational unit thereof.⁵¹ However, it explicitly excludes from the definition of public officials colleges and universities, government-sponsored enterprises, public utilities that provide gas, electricity, water or communications, guarantee agencies, and agencies of any state functioning as a student loan secondary market.⁵² Thus, when a local government official, such as a city councilmember or staff member, acting in his or her official capacity makes contact with a covered legislative or executive branch official, this communication is not subject to the requirements of the LDA. Contract lobbyists employed by local government agencies, however, are subject to the reporting and registration requirements of the LDA.

The LDA requires lobbyists and lobbying firms to register with the Secretary of the Senate and the Clerk of the House, and to file reports with the Secretary and the Clerk concerning their activities, including estimates of money expended for lobbying activities during the reporting period. The LDA defines “lobbyist” as an individual employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20% of the time engaged in the services provided by such individual to that client over a three month period. The LDA defines “lobbying activities” as lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

The LDA defines “lobbying contacts” as any oral or written communication to a covered executive or legislative branch official made on behalf of a client with regard to:

- 1) The formulation, modification, or adoption of federal legislation;
- 2) The formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy, or position of the United States government;
- 3) The administration or execution of a federal program or policy; or
- 4) The nomination or confirmation of a person for a position subject to confirmation by the Senate.

Penalties for lobbyists who fail to comply with registration and reporting requirements include fines and imprisonment. The LDA has similar registration and disclosure requirements as under state law, requiring disclosure of the lobbyist's identity, the identities of the lobbyist's clients, and the subject matter of the lobbying.

2. Gift and Travel Restrictions

Registered lobbyists and organizations that employ registered lobbyists may not make a gift or provide travel to a covered legislative branch official if the lobbyist or organization has knowledge that the official may not accept the gift or travel under the House and Senate gift rules.⁵³

The list of exceptions to these rules, however, includes a provision allowing gifts from local governments. U.S. House Rule 23, clause 5(a)(3)(O) explains that anything paid for by federal, state or local government is acceptable under the gift rules. This broad provision extends to tangible items, meals, services, and travel, so long as a government agency or entity paid for the gift.⁵⁴ The example provided in the House Ethics Manual ("the Manual") explains that a Member of Congress may accept tickets from a state university for an upcoming game in the Member's district. However, if a private university offered sporting event tickets, the Member could only accept them under the general provision on acceptable gifts, i.e., if their value is less than \$50, and the private university does not retain or employ lobbyists.⁵⁵ The "paid-for" language of this provision is especially important. Members of Congress and staff may not accept a gift from a government agency when a third party donates the gift to the agency, and the agency merely acts as a conduit.⁵⁶ Members and staff may not accept a meal or other gift paid for by an outside consultant or lobbyist for a government agency, even though the government would ultimately reimburse the cost of the gift.⁵⁷

An entity such as an airport authority, port authority, joint powers authority, or public utility is a government agency for purposes of this gift provision only if it is treated as a government agency for other purposes under the law. The Manual provides two examples of entities that the Committee considers government agencies: (1) the Washington Area Transit Authority, established by an interstate compact entered into by the State of Maryland, the Commonwealth of Virginia, and the District of Columbia and approved by Congress, with funding derived from the federal government and state governments; and (2) the Tennessee Valley Authority. Conversely, federal law provides that Amtrak is not a department, agency or instrumentality of the United States government,⁵⁸ and thus Amtrak is not a government agency for purposes of this gift rule provision. The Manual also indicates that the Committee considers regional Federal Home Loan Banks private entities, rather than government agencies, under the House gift rule. The Manual instructs interested parties to consult the House Ethics Committee for guidance on the status of a particular entity.⁵⁹

The gift rules do not restrict the ability of Members of Congress and staff to accept travel offered by a government entity.⁶⁰ Such travel is **not** subject to the requirements for pre-travel Committee approval following private sponsor certification, the post-travel disclosure requirement, or the various specific restrictions that apply to officially-connected travel paid by a private source, nor does one need to disclose this type of travel in their annual Financial

Disclosure Statement.⁶¹ Again, the Manual uses the example of a public versus a private university, noting that the rule permits the acceptance of travel paid for by a **state** university without the described requirements, but travel paid for by a **private** university would be subject to Committee pre-approval.⁶²

3. The American Recovery and Reinvestment Act

President Obama recently set forth strict lobbying rules regarding all American Recovery and Reinvestment Act (“Recovery Act”) projects and applications. The Recovery Act is a \$787 billion economic stimulus package intended to stimulate the U.S. economy, with provisions for federal tax relief, expansion of social welfare provisions and domestic spending in education, health care, and infrastructure. The White House initially issued the “Memorandum on Ensuring Responsible Spending of Recovery Act Funds,” which required disclosure on the Internet of all oral communications between federally registered lobbyists and government officials concerning Recovery Act policy, barred registered lobbyists from having oral communications with government officials about specific Recovery Act projects and required those communications be in writing, and also required posting of those written communications on the Internet.⁶³ Following a review of this policy by the Office of Management and Budget, President Obama decided to further restrict lobbying for Recovery Act funds, and extended the restriction on oral communications to **all persons, not just federally registered lobbyists**.⁶⁴ Currently, the Office of Management and Budget is consulting with agencies and outside experts about these principles and is in the process of publishing detailed guidance. Thus, if any local government desires to access Recovery Act funds, it must be aware of these restrictions.⁶⁵

III. The Issue of Lawyers as Lobbyists

Some courts have distinguished lobbying from the practice of law, and exempted lawyers from registering as lobbyists in certain situations. Court decisions in this area of the law have focused primarily on two issues: whether lobbying statutes enacted by various states are void with regard to lawyers because they encroach upon the state Supreme Court’s inherent authority to regulate the legal profession, and the extent to which the attorney-client privilege applies to information imparted to the lawyer by his client when the lawyer acts as a lobbyist.⁶⁶ Some lawyers refuse to register as lobbyists under this theory.

In *Baron v. City of Los Angeles*,⁶⁷ the California Supreme Court held that to the extent that a local lobbying ordinance purported to govern lawyers’ activities which constitute the “practice of law” within the State Bar Act, the ordinance invaded a field of recognition preempted by state law.⁶⁸ The court deemed the ordinance valid as applied to attorneys except when attorneys act on behalf of others in the performance of a duty or service which only an attorney licensed to practice law in California could lawfully perform. In establishing whether an act constitutes the “practice of law” or lobbying, the court determined that the decisive element is the character of the act as opposed to where the act is performed.

The *Baron* court explained that an attorney representing a client at a city board or commission adjudicatory or quasi-adjudicatory hearing on a matter involving factual and legal questions need not register under the ordinance, while an attorney authorized by a client to appear at hearings

considering local legislation in order to argue for or against the adoption of that legislation would be within the legitimate thrust of the ordinance. The court noted that although debatable situations could develop regarding whether a person must register under the ordinance, the standards set out by *Baron* require no more of lawyers who must decide whether to register under the ordinance than of laymen who must decide whether their conduct may subject them to prosecution for the unauthorized practice of law.⁶⁹

The distinction between lobbying and practicing law affects whether a communication is privileged. To determine whether something is subject to attorney-client privilege, courts generally conduct a fact-specific inquiry to decide whether it constitutes legal advice or lobbying.⁷⁰ Lobbying activity is not privileged.⁷¹ For example, work-product immunity does not protect summaries of legislative meetings, progress reports, and general updates on lobbying activities because they do not constitute legal advice.⁷²

IV. Getting Local Government's Message Out

Obviously, private and non-profit entities have certain advantages over public agencies in lobbying state, local and federal governmental agencies. Public agency advocates must find ways to communicate with government decision-makers who work within the PRA's lobbying framework that do not run afoul of *Vargas, Stanson* and *Miller*. The time-honored and traditional lobbying techniques of testifying before legislative committees, monitoring bills, presenting written evidence and input, and maintaining personal contacts between local officials and state officials, reported pursuant to the PRA, still provide the best opportunity to influence legislative and administrative action.

In addition to complying with the basic registration and reporting requirements outlined above, public agencies are prohibited from making political contributions to enhance their stature in the lobbying process. Similarly, public agencies may not spend public funds to support or oppose ballot measures. Those well-founded rules, and the lack of any corresponding limit on the activities of interest groups, employee organizations and other private advocates, may create a certain disadvantage in the legislative process. Because the consequences for violations of those rules are severe, however, and the public policy is sound, compliance is in the public agency's best interest. As the law regarding lobbying evolves, however, there may be some more creative ways for public agencies to participate in the legislative process, including:

A. Facilitate "grass roots" lobbying activities without using City resources through a non-public advocacy group.

As noted above, there are fewer legal restrictions on the advocacy activities of private individuals and entities. If local advocacy groups are formed or exist in communities without the use of public funds, there is no legal reason to preclude the private organization from coordinating its "grass roots" activities with the legislative positions of a public entity.

Public officials will be more familiar with this concept in the context of committees formed to support or oppose local ballot measures. Those privately funded groups can spend money to

urge voters to support or oppose measures or committees. The same concept could work in a lobbying effort.

Public officials and staff, on their own time, would be free to participate in privately funded “grass roots” lobbying efforts. In a purely informational capacity, staff members also could provide information to such groups about the public agency’s official legislative priorities and positions.

B. In an impartial informational capacity, inform the public about the public agency’s legislative priorities and positions.

Stanson and other cases acknowledge that public agencies have the authority and responsibility to provide information to the public about legislative issues. The *Vargas* court held that a public agency may expend public funds to provide information about an upcoming election so long as the style, tenor, and timing of the communication does not indicate that it is a part of a campaign. Although those cases arise in the context of laws the voters are considering, the theory seems to apply to legislation pending in the State Legislature as well.

It appears that public agencies may expend public funds to inform the public about the public agency’s legislative priorities and positions in a factual, impartial way consistent with *Vargas* and the FPPC’s safe harbors. That impartial information could be presented in public meetings and in publications such as city newsletters. Public agencies should be cognizant of the need to scrupulously avoid communications that could be viewed as having the style, tenor, and timing of campaigning, such as a billboard posted the week of an election detailing the programs the city would have to cut if a certain ballot measure passed.

Having received accurate factual and impartial information about pending legislation, members of the public might well decide to take independent action consistent with the agency’s legislative position. It is critical to remember that even impartial public communications must comply with the lobbying disclosure rules and other laws applicable to public agencies, such as mass mailing rules.

C. Make staff and elected officials available to respond to requests for information about the public agency’s legislative priorities.

Stanson and FPPC safe harbor § 18420.1(c)(4) make it clear that public agencies have the authority to respond to requests for information regarding political issues. *Stanson* also states that the public agency can make staff available to analyze legislative proposals and to explain the agency’s position on such issues.

If individuals or groups request information on legislative issues, public agencies could provide detailed information and analysis in writing or in presentations to the persons requesting the information. Community groups could request regular briefings of this type. Again, if community members and groups are provided accurate information regarding the public agency’s legislative issues, they might well decide to take private action on those issues.

D. Recruit community members as volunteer “representatives” to lobby legislative and administrative decision-makers.

Government Code Section 50023 authorizes local agencies to lobby decision-makers in person or through “representatives.” Nothing in the statute requires that such “representatives” be compensated professional lobbyists. Public agencies could recruit and designate community leaders to lobby as “representatives” of the public agency. This type of volunteer participation by members of the community could create additional buy-in with the agency’s positions and more activity at the “grass roots” level without the expenditure of public funds.

Volunteer “representatives” would not trigger lobbyist registration and reporting requirements, since the representatives would not be compensated. Government Code Section 50023 provides specifically that local agencies may pay the incidental expenses of lobbying efforts through “representatives.”

E. Participate more actively in “lobbying coalition” activities.

Government Code Section 50024 and the PRA permit public agencies to join lobbying coalitions and spend money through those coalitions for lobbying purposes. Pursuant to opinions of the Attorney General’s office cited in this paper, lobbying coalitions appear to have more flexibility to spend funds for marketing and “grass-roots” efforts, especially where the lobbying coalitions combine public and private funds.

Again, participants in lobbying coalitions should carefully comply with the registration and reporting requirements of the PRA.

V. Conclusion

Public agencies have the authority to expend public funds to influence legislative or administrative action but cannot expend public funds to influence “direct democracy” through the initiative or referendum processes, or to generate “grass roots” opinions regarding legislation. Although the laws governing public agency lobbyists are restrictive, public agencies have the ability to follow the law and still effectively advocate for their interests in Sacramento and Washington D.C.

¹ Cal. Govt. Code § 50024.

² *Id.*

³ Cal. Govt. Code § 50025.

⁴ *See*, 14 Ops.Cal.Atty.Gen. 176 (approving of City contributions to a chamber of commerce for marketing and lobbying efforts); 25 Ops.Cal.Atty.Gen. 305 (approving of County contributions to a non-profit group disseminating information to the public and government officials).

⁵ 2 Cal. Code Regs. § 18616.4(a).

⁶ *Lehane v. City and County of San Francisco*, (1972) 30 Cal.App.3d 1051.

⁷ Cal. Govt. Code §§ 81000 – 91015. The PRA’s lobbying provisions are contained in §§ 86100 – 86300.

⁸ Congress and Federal agencies have their own registration and reporting requirements for lobbyists. *See generally*, 2 U.S.C. § 1601–1614 and 31 U.S.C. § 1352. Similarly many local and regional agencies in California have adopted various agency-specific lobbying laws of which advocates before those agencies should be aware.

⁹ Cal. Govt. Code § 82037.

¹⁰ Cal. Govt. Code § 82002.

¹¹ Cal. Govt. Code § 82032.

¹² Cal. Govt. Code § 82039.

¹³ *Id.*

¹⁴ 2 Cal. Code Regs. § 18239(c).

¹⁵ Cal. Govt. Code § 86300(a).

¹⁶ Cal. Govt. Code § 82039.5.

¹⁷ Cal. Govt. Code §§ 86100, 86113 – 86118.

¹⁸ 2 Cal. Code of Regs. § 18616.4(d).

¹⁹ 2 Cal. Code of Regs. § 18616.4(b).

²⁰ Cal. Govt. Code §§ 86115 – 86116.5.

²¹ Cal. Govt. Code § 85300 (prohibiting spending or accepting public monies for the purpose of seeking elective office); Penal Code § 424 (prohibiting the use of public funds for purposes not authorized by law).

²² Cal. Govt. Code § 86203.

²³ Cal. Govt. Code § 86205.

²⁴ Cal. Govt. Code § 54964

²⁵ *Stanson v. Mott*, (1976) 17 Cal.3d 206.

²⁶ *Stanson, supra*, at 217.

²⁷ *Stanson, supra*, at 218.

²⁸ *Mines v. Del Valle*, (1927) 201 Cal. 273, overruled on other grounds by *Stanson v. Mott*, (1976) 17 Cal.3d 206.

²⁹ *Stanson, supra*, at 220-21.

³⁰ *Miller v. Miller*, (1978) 87 Cal.App.3d 762.

³¹ *Miller, supra*, at 768-69.

³² *See*, 42 Ops.Cal.Atty.Gen. 25 (1963) (The mailing of information and recommendations regarding pending welfare legislation to voters at County expense was not permitted by statute); 66 Ops.Cal.Atty.Gen. 186 (1983) (County funds may be spent under Cal. Govt. Code Section 50023 only to “attend” the legislature and “present information”); 73 Ops.Atty.Gen. 255 (1990) (Public funds may be spent to draft an initiative and provide impartial information).

³³ *League of Women Voters v. Countywide Criminal Justice Coordination Committee*, (1988) 203 Cal.App.3d 529.

³⁴ *Id. Accord, Choice-In-Education League v. Los Angeles Unified School District*, (1993) 17 Cal.App.4th 415, 429.

³⁵ *California Common Cause v. Duffy*, (1987) 200 Cal.App.3d 730, 746-47.

³⁶ *Schroeder v. City Council of Irvine*, (2002) 97 Cal.App.4th 174.

³⁷ *Vargas v. City of Salinas*, (2009) 46 Cal.4th 1.

³⁸ *Id.*

³⁹ *Id.* at 37.

⁴⁰ *Id.* (stating, “not only [did] the document not advocate or recommend how the electorate should vote on the ballot measure, but its style and tenor [was] not at all comparable to traditional campaign material”). The fact that the city only made the document available at the city clerk’s office and in public libraries to people who sought it out reinforced the document’s informational nature. *Id.*

⁴¹ *Id.* at 38-39 (noting that none of the materials in question constituted the kind of typical campaign materials or activities identified in *Stanson*, such as bumper stickers, posters, advertising floats, or TV and radio spots, although these items do not exhaust the category of potential campaign materials or activities).

⁴² *Id.* at 32.

⁴³ 2 Cal. Code Regs. § 18420.1

⁴⁴ *Dep’t of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 5.

⁴⁵ Cal. Pub. Res. Code § 30322(a).

⁴⁶ Cal. Pub. Res. Code § 30323.

⁴⁷ Cal. Pub. Res. Code § 30322(b).

⁴⁸ Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 Cornell J. L. & Pub. Pol’y. 1, 8 (2006).

- ⁴⁹ 2 U.S.C. § 1602(8)(B)(i).
- ⁵⁰ 2 U.S.C. § 1602(15)(A).
- ⁵¹ 2 U.S.C. § 1602(15)(B)-(F).
- ⁵² 2 U.S.C. § 1602(15)(A)(i)-(v).
- ⁵³ 2 U.S.C. § 1613(a).
- ⁵⁴ House Ethics Manual, 110th Congress, 2d Session, *Gifts*, 55 (2008).
- ⁵⁵ *Id.* at 56.
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*
- ⁵⁸ 49 U.S.C. § 24301(a)(3).
- ⁵⁹ House Ethics Manual, 110th Congress, 2d Session, *Gifts*, 56 (2008).
- ⁶⁰ House Ethics Manual, 110th Congress, 2d Session, *Travel*, 108 (2008).
- ⁶¹ *Id.*
- ⁶² *Id.*, FN 21.
- ⁶³ March 20, 2009 White House Memorandum: Ensuring Responsible Spending of Recovery Act Funds, available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/.
- ⁶⁴ May 29, 2009 White House Blog, Update on Recovery Act Lobbying Rules: New Limits on Special Interest Influence, available at <http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence/>.
- ⁶⁵ *See generally*, <http://www.recovery.gov>.
- ⁶⁶ Peter H. Geraghty, *Lawyer as Lobbyist*, July 2008; available at <http://www.abanet.org/media/youraba/200807/article11.html>.
- ⁶⁷ (1970) 2 Cal.3d 535.
- ⁶⁸ *Id.* at 542-43.
- ⁶⁹ *Id.* at 679.
- ⁷⁰ *U.S. v. Grand Jury Subpoenas*, (S.D.N.Y. 2001) 179 F.Supp.2d 2701; *see also Black v. Southwestern Water Conservation Dist.*, (2003) 74 P.3d 462 (determining that memoranda from a water conservation district constituted legal advice regarding negotiations and lobbying efforts for a water district project and were not communications made to a public official for the purpose of influencing legislation, and therefore were protected by the attorney-client privilege).
- ⁷¹ *See, e.g.* Edna Selan Epstein, *The Attorney-Client Privilege & the Work Product Doctrine* 239 (2001) (stating, “[w]hen a lawyer acts as a lobbyist, matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts.”).
- ⁷² *P. & B. Marina v. Logrande*, (E.D.N.Y. 1991) 136 F.R.D. 50, 59, *aff’d mem.*, (2d Cir. 1992) 983 F.2d 1047.