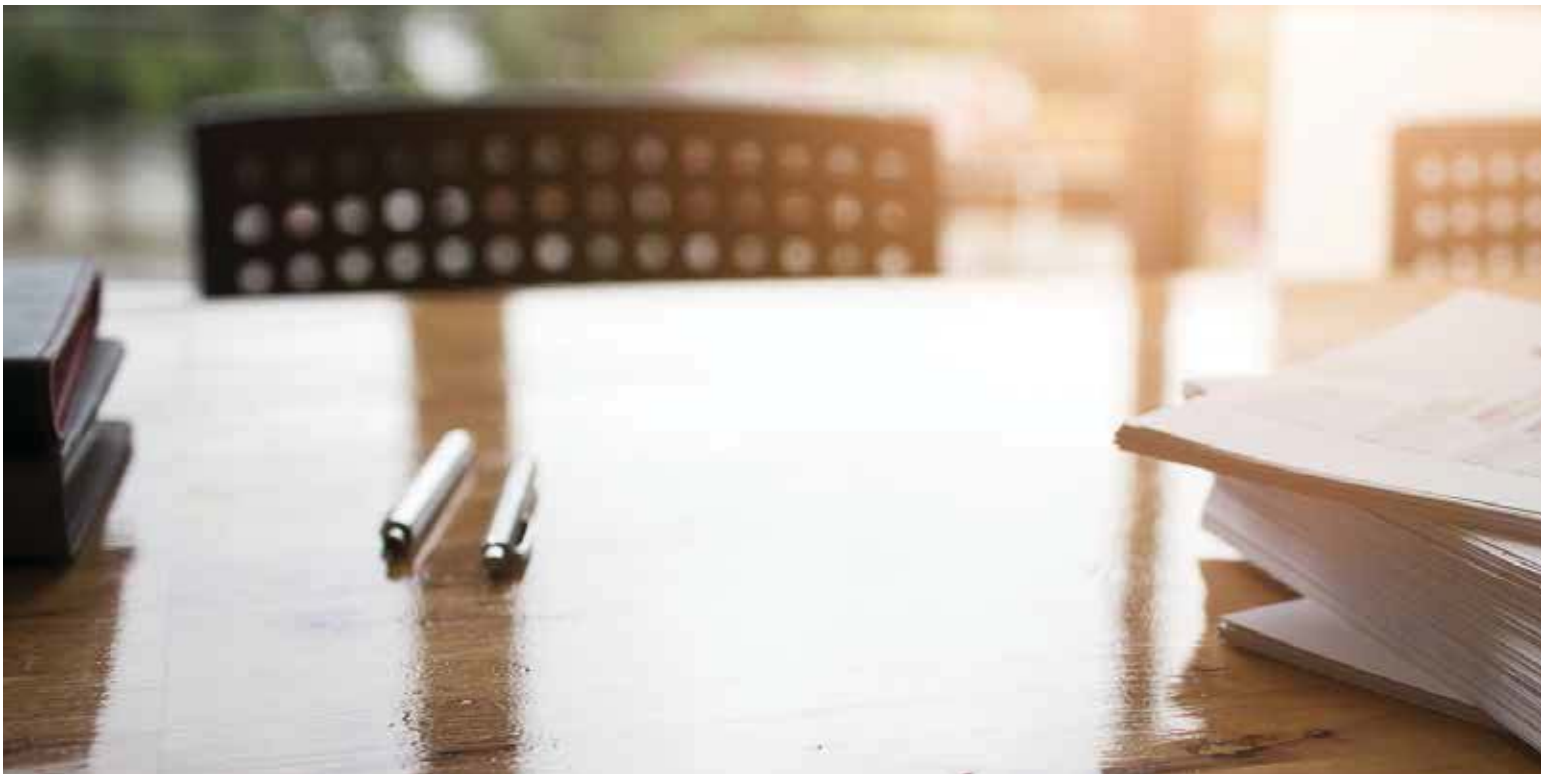

Local Public Agency Advocacy: The Line Between Information and Campaigning

By Craig Steele, Shareholder, Richards, Watson & Gershon

Local government agencies and officials are often keenly interested in legislative and administrative actions by other government entities; and perhaps more so in the actions of the voters. Whether supporting or opposing legislation or administrative action, or informing the voters about the importance of a ballot measure, local government officials can find themselves competing with multiple interest groups for the attention of legislators, decision-makers and voters. The laws that regulate advocacy by local government agencies are more restrictive than laws that govern private advocates.

Courts view the use of public resources to generate impressions of support on one political side or the other as a "distortion" of the political process[1]. It's one thing to state the position of an agency directly, such as through the agency's lobbyist or legislative testimony, adopting a resolution of board support for a ballot measure, or distributing factual information to constituents. But using public funds to campaign for or against a ballot measure, or to seek "grass roots" support for a bill, crosses a legal line that can have significant consequences for the agencies and public officials involved.

Admittedly, that line is not always clear. Some agencies have nestled up against it in recent years, especially in expanding the use of "informational" communications to voters about revenue-related ballot measures. Courts tend to define the line in terms of what has been called a "dichotomy" between public agencies' informational activity (permitted) and campaign activity (not)[2]. The line starts with a pretty straightforward pair of statutes. Government Code Section 54964 prohibits officers, employees or consultants of local agencies from spending or authorizing the expenditure of public funds to support or oppose a ballot measure or

candidate. That statute does not prohibit an "accurate, fair and impartial" presentation of relevant facts about a ballot measure to voters. Government Code Section 8314 makes it illegal for local officials and staff to use public resources for campaign or personal purposes. These laws impose personal criminal and civil liability on those who violate them.

The statutes mirror the California Supreme Court's holding in a leading case setting forth the rules against partisan government involvement in elections. In *Stanson v. Mott*[3], the Court found the expenditure of public funds to support State bond measures was improper, and held:

> *"[A]t least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign ..."*[45]

Apart from official ballot arguments and other materials authorized by the Elections Code, there is no legislative authorization for local public agencies to spend public money to promote or defeat a ballot measure or a candidate. However, the *Stanson* court recognized that public funds may be spent for "informational purposes," to provide the public with a fair and impartial presentation of relevant information.

Problems sometimes arise in attempting to distinguish improper "campaigning" from proper "informational" activities. As agencies have expanded outreach efforts, courts and lawyers have tried with mixed success to define which type of communication is which. Some impermissible campaign communications are obvious: words like "vote for" or "vote against" are "express advocacy" that don't belong in public agency communications[6]. Bumper stickers and buttons are campaign items. Otherwise, without express advocacy, when a communication or activity about a ballot measure is not clearly campaign or informational activity, the following factors make it more likely to be deemed appropriate informational activity:

1. The communication is part of a regular pattern of communication between the public agency and constituents, such as a periodic newsletter, and not a unique communication immediately before an election. Graphics, color and design are similar to other publications.

2. The communication conveys the views of the agency in a moderate tone, without overly emotional warnings about what may happen if the measure does not pass.

3. The content of the communication is based on verifiable and publicly available facts, such as agency studies or staff reports.

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Conference Highlight

Don't miss this session in Indian Wells, California!

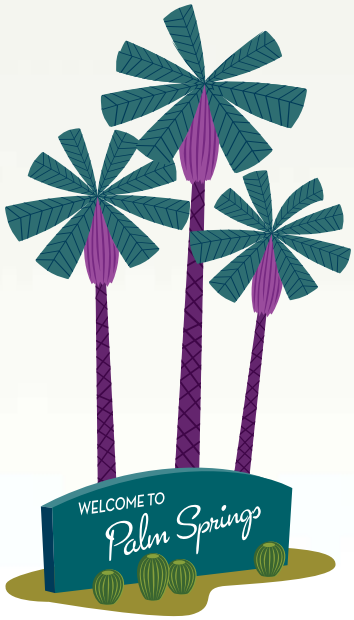
Breakout Session

Public Agency Advocacy: The Rules Regarding Lobbying and Ballot Measures

Richards Watson & Gershon

Increasingly, public agencies need to influence legislative policy decisions to effectively carry out their missions. Lobbying and educating voters about critical issues are important tasks, but the laws and regulations that govern public agency activity in those areas are complex. This session will provide an overview of the most important areas of the law and help public agency employees know when to ask for legal advice.

Tuesday, September 25
11:00 a.m. – 12:15 p.m.



4. The communication explains a voting process, election deadlines or encourages non-partisan activity such as registering to vote[7].

5. The communication does not assume that the measure will pass or fail; and uses words like "if measure A passes" rather than "when measure A passes."

6. If the content is fact-based, true and moderate in tone, the failure to include opposing arguments is not necessarily improper[8].

Given those factors, it seems that if a communication looks and sounds like a typical, consistent, moderate and factual communication from a public entity and contains no express advocacy, it is likely permissible, even if it relates to a ballot measure. If it looks or sounds more like a campaign activity, either through express advocacy or atypical timing, style or type, the communication is likely not permissible.

This informational/campaign distinction is relevant to lobbying efforts as well. Local officials have the authority to directly lobby the Legislature, Congress, agencies and individual decision-makers to advocate for or against decisions that the local legislative body deems to be either beneficial or detrimental to the local agency[9]. However, the law does not allow public agencies to use public funds for "grass roots lobbying." In a "grass roots" lobbying effort, the lobbying party communicates with the public through various means and urges them to contact legislators with messages for or against legislative proposals. Private groups frequently do this; public agencies may not. Spending public funds on a "grass roots" lobbying campaign is banned under the same theory that prohibits the use of public funds to influence voters in an election[10]. Courts, and the California Attorney General, have found that "grass roots lobbying" by public agencies is illegal because public funds cannot be used to create a distorted appearance of public support or opposition[11].

Advocacy on behalf of your local agency is important and legal, as long as those activities stay on the informational side of the line. Agencies may tell their own stories, directly to the appropriate audience, in a moderate, factual and consistent way.

1. *Stanson vs. Mott(1976) 17 Cal.3d 206, 217.*
2. *Vargas v. City of Salinas (2009) 46 Cal.4th 1, 30,34 (citing Stanson v. Mott (1976) 17 Cal.3d 206, 222-23).*
3. *Stanson v. Mott (1976) 17 Cal.3d 206.*
4. *Id. at 209-10.*
5. *Id. at 221.*
6. *Vargas, supra; 46 Cal.4th 1 at 8.*
7. *Schroeder v. City Council of Irvine (2002) 97 Cal.App.4th 174, 187-89 (upholding significant city expenditures for voter registration and information directly connected to an election).*
8. *See generally, Vargas, supra (as to tone, timing and tenor);Schroeder, supra, (as to non-partisan and voter registration communications); Peninsula Guardians, Inc. v. Peninsula Health Care Dist. (2011) 200 Cal.App.4th 1108 (as to tone, content and design issues).*
9. *For most special districts, see Cal. Govt. Code § 53060.5 or the enabling authority.*
10. *Miller v. Miller (1978) 87 Cal.App. 3d 762, 768 (citing Cal. Govt Code § 50023; Stanson v. Mott (1976) 17 Cal.3d 206, 218).*
11. *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").*