



# "Walking the Line" - Public Agencies', Officials' and Employees' Roles in Local Elections

Best Best & Krieger LLP Webinar

August 15, 2018



Best Best & Krieger



Company/BestBestKrieger



@BBKlaw



**BEST BEST & KRIEGER**   
ATTORNEYS AT LAW

# Ballot Materials in Elections

- Types of Ballot Materials

- For measures:

- Primary Arguments for/against measure
    - Rebuttal arguments
    - Impartial analysis

- For people:

- Candidate Statements



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Primary Ballot Measure Arguments

- No more than 5 signatures allowed per argument. If more than 5 included, only first 5 will be printed
- No more than 300 words
- Check filing deadlines – they can vary by County with consolidated elections



# Who May Write Primary Arguments?

- Voter-Petition Driven Measures
  - Proponents of measure or other interested parties may prepare argument in favor
  - Legislative body may prepare argument against
- City Council Measures:
  - The legislative body, or member(s) of the legislative body authorized by that body.
  - The individual voter, or bona fide association of citizens, or combination of voters and associations, who are the bona fide sponsors or proponents of the measure.



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Authoring Rebuttal Arguments

- Council may choose whether to allow rebuttals
- If allowed, only primary argument authors may draft rebuttals
  - If there was no primary argument for or against a measure, no one may draft the rebuttal argument
  - If rebuttal is not returned within 10 days of filing deadline for primary arguments, no rebuttal argument
- No more than 250 words
- No more than 5 people may sign





# Impartial Analysis

- Prepared by City Attorney\*
- Analysis should show the measure's effect on existing law and the operation of the measure
- Must provide whether measure is voter-driven or proposed by the city council
- Not to exceed 500 words
- If full measure is not printed in ballot, must notify reader where to obtain a copy



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Candidate Statements

- Statements must include the name, age and occupation of candidate
- Brief description of candidate's education and qualifications
- CANNOT reference other candidates, their character, qualifications or activities
- CANNOT include party affiliation, membership or activity in a partisan political org
- Must be submitted with candidate's nomination papers
- CANNOT contain false, slanderous or libelous statements



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Public Examination Period

- All ballot materials are subject to a 10-day public examination period immediately following the deadline for each set of materials
- Any legal challenges to ballot materials **MUST** be filed during this 10-day period
- Only a court can amend ballot materials
  - Must find by “clear and convincing evidence” that material is false, misleading or violates Elections Code





# Challenging Ballot Materials

- During Public Examination Period a voter or the elections official may seek a writ of mandate or injunction to remove language that is false, misleading, or inconsistent with Elections Code
- If filed by voter
  - Elections official named respondent
  - author/candidate named real party in interest
- If filed by elections official
  - County Board of Supervisors named respondent
  - author/candidate named real party in interest



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Ballot Materials Are “Official Matter”

- Elections officials must ensure the following is on front cover or heading of first page:
  - “Arguments in support or opposition of the proposed laws are the opinions of the authors”
- Authors can be held financially liable for ballot materials that are libelous, false, misleading or inconsistent with the Elections Code
  - No immunity from civil liability



# Invalid Ballot Measures

- What if you believe an initiative or referendum is illegal/unconstitutional?



# Role of City Clerk



- City Clerk/Deputy is the “Elections Official (EO)”
  - The “Ref” - Charged with fair and impartial administration of elections
  - Reviews petitions, notices, and other election filings for compliance
  - With rare exception, no discretionary calls – ministerial actions only
  - How much advice can EO give to the public?
    - Can provide basic guidance
    - Cannot provide substantive legal advice
    - No legal authority to “proof” a candidate’s or proponent’s “work” before filing (limited exception for recall petitions)
    - City officials treated the same in their roles as candidates/proponents



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Role of City Attorney

- City Attorney helps the “Ref” in applying the Elections Code
- With City measures, prepares impartial title and summary (pre-petition) and impartial analysis (post-petition)
- How much advice can City Attorney give to the public?
- What about election advice to City Officials?
  - The City Attorney is a “public resource”
  - Is this question being asked in an official capacity on behalf of the City, or as a candidate/proponent?
  - If asked as a candidate/proponent, would City Attorney be giving the same type of answer to any other candidate/proponent if asked?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP



# Use of Public Funds – Advocacy vs Information

- Govt. Code § 54964 (a) & (c)

“An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

...

This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

- (1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.
- (2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.”



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Use of Public Funds – Advocacy vs Information

- *Stanson v. Mott (1978) / Vargas v. Salinas (2009)*

While Govt. Code § 54964 prohibits govt-funded “express advocacy”, the courts have blurred the line between government-funded “advocacy” versus “information”

*Stanson* – Case by case analysis - Look to the “style, tenor and timing” of the material to determine if it’s “advocacy” or “information”

*Vargas* – Reaffirmed *Stanson* rule and made clear that ***both GC 54964 and Stanson rules apply***

**Takeaway** – Govt-funded material that doesn’t “expressly advocate” can still be “advocacy” based upon its “style, tenor and timing”



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Use of Public Funds – Advocacy vs Information

- Govt. Code § 8314

“It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.”

- “Public resources” = any agency-owned property or asset, including land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and agency-compensated time.”
- “Use” = use of public resources substantial enough to result in a gain or advantage to the user or a loss to the agency for which a monetary value may be estimated.”
  - Incidental and minimal use not a violation
- Providing fair and impartial information about effects of a measure is OK



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Use of Public Funds – Advocacy vs Information

## Penalties for Impermissible Activities

- *Stanson/Vargas* - Public official is personally liable if they fail to “exercise due care” in authorizing the expenditure
  - “Due care” means that the public official must use reasonable diligence in authorizing the expenditure of public funds.
  - Plaintiff may receive atty's fees. The attys fee award can be assessed directly against the public official
- Govt. Code 8314
  - Civil action - penalty up to \$1,000/day of violation and 3x value of unlawful use
  - Prosecution under Pen. Code § 424 (felony misappropriation of public funds)



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Use of Public Funds In Elections

## Permissible Activities

- Activities related to the preparation of an initiative
- Identifying programs/services to be cut if measure passes and posting reports and minutes on website if this is City's standard practice
- Including informational, non-partisan articles in regularly-published newsletter
- City may author ballot argument for or against measure
- **Prior to measure being placed on ballot** - State on record City's position regarding the measure at a regularly scheduled public meeting, where alternative viewpoints may be discussed
- Factually inform the public, media and others that city supports the measure, but must do so in informational manner and not in a way that urges others to vote yes or no on the measure
- A departmental view presented by city employee upon request by a public or private organization, at a meeting of the organization
- city officials, employees, and staff may, on their "own time and dime", advocate a position on the ballot measure if it is made clear that they are acting in a personal capacity and not at the city's expense
- voter registration programs



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP



# Use of Public Funds In Elections

## Impermissible Activities

- Purchase items such as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' promoting the measure
- Disseminate campaign literature prepared by private proponents of the measure
- Produce and distribute materials that advocate a yes or no vote on the measure
- Contribute to campaigns supporting or opposing the measure
- Expend funds for printing, office supplies or staff time to generate promotional materials on behalf of the measure
- Use city staff or employees to campaign for approval of measure during working hours



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Use of Private Funds and Time In Elections

- Generally, no limits – First Amendment speech
- Officials may freely advocate on their own “time and dime”
  - Official must be mindful of “private” versus “public” time (see below)
- Private funds may include personal money/resources or valid privately-contributed and spent campaign funds
  - Committees can be specifically formed for support candidates or measures, or both
  - Follow FPCC rules to establish committees and to report campaign funds contributed and spent



# Campaigning by Public Officers/Employees

- Public officers and employees may not engage in political activities during “work hours”
  - “Work hours” = standard/OT hours part of a required work shift
  - Not “work hours” = permitted lunch break, vacation, admin. leave day, or public holiday *when not working*
  - While on “work hours”, no. . .
    - Distributing pamphlets, signs, handouts or other campaign materials;
    - Attending campaign meetings, rallies or other functions;
    - Making campaign telephone calls, e-mails, etc. (even from private devices);
    - Performing any other campaign-related tasks (i.e., copies, stuffing envelopes, etc.);
    - Wearing campaign buttons, hats, shirts or other clothing, or posting signs



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Campaigning by Public Officers/Employees

- An officer/employee may solicit or receive political contributions to promote the passage or defeat of a ballot measure that affects the rate of pay, work hours, retirement, civil service or other working conditions of public employees, except that the local agency may prohibit solicitation during work hours and on City property



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Appearance in Uniform and/or Vehicles/Equipment

- Govt. Code § 3206 – “No officer or employee of a local agency shall participate in political activities of any kind while in uniform.”
  - What is “in uniform”?
    - Is the clothing/equipment required for the job?
    - Does the City pay for the clothing/equipment?
    - Is the clothing/equipment associated with a specific position?
  - This rule applies even when uniformed officer/employee is off-duty
- No authorizing officer, employee or candidate to appear in, on, next to, or otherwise appear to operate agency vehicles or equipment for political activities



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP



# Making Promises to and Soliciting Contributions from other Officers/Employees

- Govt. Code 3204 - A public officer or employee may not promise to provide any person with a gift, money, promotion, job, or other form of compensation in return for a contribution or vote
- Govt. Code 3205 - a public officer/employee shall not, directly or indirectly, solicit political contributions from another officer/employee
  - Applies to all solicitations, even outside of City property
  - Exception - Officer/employee solicits contributions from “a significant segment of the public which may include officers or employees of that local agency.” (no specific targeting of officer/employee)
  - Violation is a criminal misdemeanor



# Statements About Candidates or Measures During Public Meetings

- Public Officials may:
  - Generally urge citizens to be informed and to vote;
  - Provide impartial non-advocacy information to the public about a measure
- Public Officials may not:
  - Make advocacy statements about a specific measure;
    - A very brief comment (15-20 seconds) would likely be viewed as *de minimus*. But extended comments or statements would be prohibited govt.-funded advocacy
  - Make advocacy statements about a specific candidate



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# Question

Mayor Jones is running for another term this November. He rents out the City's Community Center for a campaign fundraiser and rally. The Community Center is available for rent to the general public at a standard rate. Mayor Jones pays the standard rate and otherwise agrees to follow the City's standard conditions in using the Community Center

May he use the Community Center for this purpose?



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP

# Campaigning on Public Property

- Government Code Section 3207(b)
  - Any city may establish rules and regulations to prohibit or otherwise restrict political activities on the premises of the local agency
  - Government Code Section 3207 allows a city to establish further rules and regulations to prohibit or restrict officers/employees engaging in political activity during work hours
  - If the law or city's policy do not restrict activity, officer/employee enjoys full political rights
- Political Signs
  - *Reed v. Gilbert*
- Right to campaign in traditional public fora (parks, sidewalks)



[www.BBKlaw.com](http://www.BBKlaw.com)

© 2018 BEST BEST & KRIEGER LLP

# New Mass Mailing Rule

- Three of the otherwise permissible mass mailings cannot be sent within 60 days of an election by, or on behalf of, a candidate:
  - Letterhead with the incumbent candidate's name
  - Announcement of a meeting directly related to the incumbent's duties held/attended by incumbent
  - Announcement of City event where City provides facility/funds and includes more than 1 mention of incumbent's name



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP



# Thank you for attending!

## **Sigrid Asmundson**

500 Capitol Mall, Suite 1700  
Sacramento, CA 95814  
(916) 551-2853  
sigrid.asmundson@bbklaw.com



## **William James (Jim) Priest**

2855 E. Guasti Rd., Suite 400  
Ontario, CA 91761  
(909) 483-6648  
william.priest@bbklaw.com



[www.BBKlaw.com](http://www.BBKlaw.com)

©2018 BEST BEST & KRIEGER LLP