



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Ethics Update

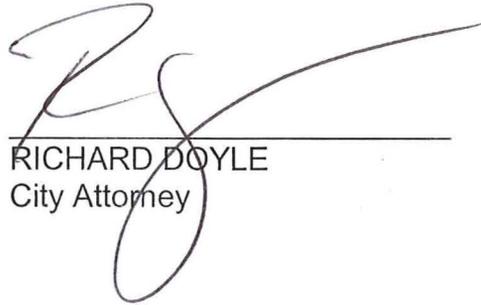
**DATE:** September 15, 2008

## RECOMMENDATION

Accept staff's presentation to the City Council on ethical issues related to campaign activities.

## SUMMARY

In 2007, the City Council approved Reed Reform #26, which recommended holding regular public hearings on ethical issues to learn from mistakes and best practices of others. Our office conducted ethics presentations in April 2007, August 2007, January 2008 and May 2008. This presentation will highlight ethical issues related to campaign activities. This item does not require Council action. The presentation is for the purpose of stimulating Council discussion. A copy of the memo regarding Campaign Activities previously distributed on August 27, 2008 is attached again for your review.



RICHARD DOYLE  
City Attorney

Encl.

cc: Debra Figone  
Lee Price

Please contact Lisa Herrick at 408-535-1963 with any questions.

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Campaign Activities

**DATE:** August 27, 2008

## **BACKGROUND**

On August 5, 2008, the City Council took action to place several measures on the November ballot. This memorandum outlines the legal guidelines for the use of public funds for ballot measures or election campaigns as well as restrictions on political activities of public employees. Attached is a copy of a pamphlet published by the League of California Cities that summarizes many of the points made in this memo.

In February 2006, we distributed a similar memo, updated to incorporate the case of *Vargas v. City of Salinas*, which was the first appellate court case to interpret Government Code Section 54964, a state law prohibiting the use of public funds on political campaigns for both ballot measures and individual candidates. The Court in the *Vargas* case had determined that the previous guidelines in this area, set forth in the Supreme Court case of *Stanson v. Mott*, had to some extent been superseded by the provisions of Government Code Section 54964. The Supreme Court has accepted review of that case, and as such, vacated the holding of the appellate court. This means that until the Supreme Court issues its opinion in the *Vargas* case, the rules regarding the expenditure of public funds under *Stanson v. Mott*, as discussed in this memo, are still in effect.

## **ANALYSIS**

### **I. Use of Public Funds for Ballot Measures or Election Campaigns**

#### **A. General Rule**

Although in general the City has broad discretion to make public expenditures, it is prohibited from spending public funds for partisan communications that advocate the passage or defeat of a ballot measure or the election of a particular candidate. This applies even when the Council has placed a measure on the ballot or the measure directly relates to a City program.

Government Code § 54964 provides that "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." The term "expenditure" is defined as the use of local agency funds for "communications that expressly advocate the approval

or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters.”

B. Permissible Activities

1. Ballot Measures

The City may utilize publicly funded communications to provide impartial information about the subject matter of a ballot measure, but only if the communication provides a **“fair” presentation and is informational rather than promotional**. A fair presentation must make full disclosure of the advantages, disadvantages and consequences so that voters can make an informed choice. Any such communication will be judged in terms of its “tenor, timing and style”. If a communication is argumentative in tone, if it advocates a position or if it is likely to offend those on the opposite side of the issue, it may be prohibited.

Permissible activities with regard to ballot measures include the following communications by the City:

- Participation by City employees and officials in radio and television debates where both sides are heard;
- Responses to questions about the City or a Councilmember’s position by members of the public or the press;
- City officials and City employees campaigning for or against a ballot measure on their own time and away from City premises;
- Preparation of materials that inform citizens of Council approved plans which will be implemented if a ballot measure passes but which also provide the “other side” such as information on the costs and tax consequences to the public.

It should be noted however, that the California Elections Code specifically provides that officials of a local entity, if authorized by the governing body, may author and submit a ballot argument which may advocate for a certain position on the measure.

2. Candidates

As stated above, Government Code Section 54964 prohibits the use of public funds “to support or oppose...the election or defeat of a candidate”. The law does not specify any permissible activities with regard to the use of public funds on campaigns for political office, as it does with ballot measures. As such, City expenditures, including the free use of City facilities for political events, should be carefully scrutinized to be sure that the expenditure cannot be construed in any way to be partisan.

For example, a candidate's forum, where all of the candidates running for a local seat are invited, would probably be a permissible event if all of the City funded communications were completely objective and access to the event were open to all. Since assuring unbiased communication and open access necessarily means controlling political speech, the only way to assure that an event does not run afoul of the prohibition on public funding and the First Amendment is for the City to hold the event itself.

On the other hand, if another organization rents a City facility on the same terms and conditions as any member of the public, and no City funds are spent on noticing or staffing the event, then the City cannot control the content of the event and the event can be overtly partisan.

Furthermore, in any City meeting subject to the Brown Act the public must be allowed to speak on any item under the "Open Forum" or "Public Comment" section of the agenda. The City cannot prevent these public comments even if they constitute express advocacy of a particular candidate.

#### C. Prohibited Activities

The use of public funds for communications that advocate support or opposition to a ballot measure or election contest is prohibited. As stated above, communication that advocates a position, is argumentative in tone, or is likely to offend those on the opposite side of the issue may be considered express advocacy.

Other prohibited activities include:

- Having an employee do campaign work on City time. For example, employees should not advocate or urge a position on a ballot measure or a candidate to a citizen during work time;
- Using public funds for printing or distributing a publication or pamphlet that expressly advocates a position on a ballot measure or candidate;
- Using City publications as a means of disseminating information in a manner that expressly advocates a position on a ballot measure or candidate;
- Making written materials available on City premises, including libraries and community centers, in a manner that expressly advocates a position on a ballot measure or candidate;

- Use of City staff to write campaign speeches for ballot measures or candidates;
- Using City telephones, computers, copiers or fax machines for communications that expressly advocate a position on a ballot measure or candidate;
- Use of City mail routing to distribute materials that expressly advocate a position on a ballot measure or candidate even though the materials are prepared outside of the City;
- Preparing or sending out press releases in a manner that expressly advocates a position on a ballot measure or candidate;
- Use of City stationary in a manner that expressly advocates a position on a ballot measure or candidate.

D. Penalties

City officials can be held personally liable for authorizing the improper expenditure of public funds for campaign purposes. City officials are held to a "standard of due care" which means that an official who fails to exercise "reasonable diligence" in authorizing the expenditure of public funds is subject to liability. Reasonable diligence will be evaluated by taking such factors as the following into account:

- Whether the impropriety was obvious or not;
- Whether the official had notice of the improper nature of the expenditure;
- Whether the official relied on legal advice.

The unauthorized expenditure of public funds can also result in criminal sanctions under Penal Code § 424. A conviction under this section is a felony and results in disqualification from holding public office in the future. A member of the Board of Supervisors of Orange County was convicted under this section for authorizing county payments of salary to his office staff for work performed on his campaign for Lieutenant Governor. People v. Battin, 77 Cal.App.3d 635 (1978).

II. Prohibition on Political Activities of City Commissioners

Additional restrictions on political activity apply to City Commissioners. City Council Policy prohibits City Boards, Commissions and Committees from endorsing any candidate and taking any independent position on any ballot measure. An individual

Commissioner may not use their Commission title in making personal political endorsements. Additionally, Boards, Commissions and Committees cannot be involved in gathering or disseminating information on candidates or campaigns (e.g. surveys, public debates, mailings, etc.) (City Council Policy 0-36)

A Commission may however, recommend that the City Council take a certain position on a ballot measure relating to topics within the Commission's purview.

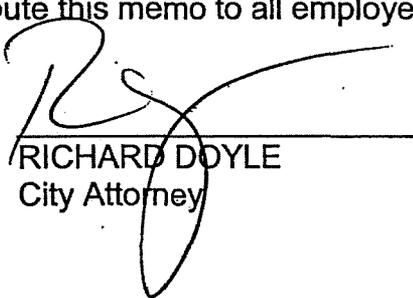
### III. Prohibition on Political Activities of Public Employees

The following state law prohibitions apply specifically to activities of City and Agency employees:

- A public employee may not participate in political activities while in uniform. Government Code § 3206.
- An employee of a public agency may not, directly or indirectly, solicit a political contribution from an officer or employee of that agency with knowledge that the person is employed with the agency unless the solicitation is also made to a significant segment of the public which may include employees of the agency. Violation of this prohibition is a misdemeanor. Government Code § 3205.

### CONCLUSION

Neither the City nor Agency may expend any funds in support or opposition to any ballot measure or for any campaign for public office. Because the penalties are severe, it is important to exercise extreme care in providing information or engaging in activities which may be construed as expressly advocating on behalf of a ballot measure or candidate. Please feel free to call this Office with any questions you may have about these requirements and to distribute this memo to all employees.



RICHARD DOYLE  
City Attorney

cc: Debra Figone  
Harry Mavrogenes  
Senior Staff

Enclosure

A RULE OF THUMB:

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*A city official should  
always first consult  
with the city's attorney  
concerning the propriety  
of any given course  
of conduct.*

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Need more information? To learn more about the League's ballot measure, and rules for city officials, please visit the League's website at [www.cacities.org](http://www.cacities.org).



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[www.cacities.org](http://www.cacities.org)

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WORKING ON A  
BALLOT MEASURE CAMPAIGN:  
SOME RULES FOR  
CITY OFFICIALS

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*The League thanks Steven Lucas of the law firm Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, for his contributions to this publication.*

# DO'S AND DON'TS

## FOR CITY OFFICIALS AND CITY EMPLOYEES

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### THE DON'TS: City officials and city employees may NOT:

- DON'T** • Distribute campaign literature through the city's internal mail system.
- DON'T** • Place campaign literature on employee bulletin boards, on the city's web page, or elsewhere on city government premises.
- DON'T** • Make public appearances speaking in favor of the ballot measure during compensated work hours.
- DON'T** • Make telephone calls about the campaign during compensated work hours.
- DON'T** • Walk precincts, draft campaign ads, or perform other campaign tasks during compensated work hours, or assign subordinates to do same.
- DON'T** • Add a link from the city website to a campaign website.
- DON'T** • Send or receive campaign-related emails on city computers.
- DON'T** • Urge other city employees to vote for the measure during compensated work hours.
- DON'T** • Use city copy machines, telephones, fax machines, computers, stationery, etc. for campaign purposes.

### THE DO'S: City officials and city employees MAY:

- Work on the campaign during their personal time, including lunch hours, coffee breaks, vacations, etc.
- Make a campaign contribution to a ballot measure campaign committee using personal funds, and/or attend a campaign fundraiser during personal time.
- Make public appearances during personal time advocating the ballot measure.
- Have the city council adopt a resolution that officially endorses the ballot measure and confirms the prohibition on using government funds for political purposes at a public meeting.

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**“City officials interested in working for the League ballot measure, including participating in CITIPAC fundraising, should start by contacting their League Regional Representative.”**

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*There are two simple, but very important rules city officials and employees should follow if they want to get involved in campaign activities in support of the League's ballot measure to strengthen constitutional protections for local revenues.*

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### DON'T USE PUBLIC FUNDS

All contributions to the ballot measure of your time and resources must be made with non-public funds. This means no public facilities or equipment (phones, computers, email accounts, vehicles, copy machines or any other equipment) may be used to plan or promote ballot measure activities, including fundraising. No public funds may be used in support of your campaign activities.

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### CAMPAIGN ON YOUR OWN TIME

**Keep good records.** Track your time and your use of private equipment used in ballot measure activities, so you are able to document that no public funds were used.

City officials interested in working for the League ballot measure, including participating in CITIPAC fundraising, should start by contacting their League Regional Representative.